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Newark Electric Corp., Newark Electric 2.0, Inc., and Colacino Industries, Inc., and International Brotherhood of Electrical Workers, Local 840.
Case 03–CA–088127

July 31, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On March 26, 2015, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 362 NLRB No. 44. Thereafter, the Respondents filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

Acting General Counsel Lafe E. Solomon issued the consolidated complaint in this case on May 30, 2013. On March 21, 2017, the United States Supreme Court issued its decision in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 580 U.S. ___, 137 S. Ct. 929 (2017), holding that, under the Federal Vacancies Reform Act of 1998, Solomon’s authority to take action as Acting General Counsel ceased on January 5, 2011, after the President nominated him to be General Counsel. Thereafter, the court of appeals vacated the Board’s Decision and Order and remanded this case for further proceedings consistent with the Supreme Court’s decision.

The Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. SW General*, supra, we have considered whether the complaint is valid and whether the complaint allegations are properly before the Board for decision. On August 14, 2017, then-General Counsel Richard F. Griffin Jr. issued a Notice of Ratification in this case that states, in relevant part,

The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.

On March 21, 2017, the United States Supreme Court held that Acting General Counsel Solomon’s authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *NLRB v. SW General, Inc.*, 580 U.S. ___, 137 S. Ct. 929 (March 21, 2017).

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act. Congress provided the option of ratification by expressly exempting, pursuant to FVRA Section 3348(e)(1), “the General Counsel of the National Labor Relations Board” from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA.

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of then-General Counsel Griffin to ratify the complaint and to continue prosecution in this matter, we find that the complaint allegations are properly before the Board for decision.

We have considered de novo the judge’s decision¹ and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge’s rulings, findings² and conclusions and adopt his recommended Order to the extent and for the reasons stated in the Decision and Order reported at 362 NLRB No. 44 (2015), which is incorporated herein by reference. The Order, as further modified herein, is set forth in full below.³

¹ Administrative Law Judge Kenneth W. Chu was appointed at a time when the Board was without a quorum. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). On July 18, 2014, in an abundance of caution and with a full complement of five Members, the Board ratified nunc pro tunc and expressly authorized the selection of Judge Chu to serve as an administrative law judge with this agency.

² The General Counsel and the Respondents filed statements of position on remand. The Order remanding the case to the Board states that the Respondents “may raise their laches argument on remand....” In their position statement, the Respondents assert that the allegations arising from the charges filed in Case 03–CA–088127 over 5 years ago should be dismissed based on the doctrine of laches. We reject the Respondents’ defense of laches, which does not bar action by the Board, as a federal government agency, to vindicate public rights. See *Entergy Mississippi, Inc.*, 361 NLRB 892, 893 fn. 5 (2014), *enfd.* in relevant part 810 F.3d 287 (5th Cir. 2015); *F. M. Transport, Inc.*, 302 NLRB 241 (1991).

³ In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge’s recommended tax compensation and Social Security reporting remedy. In addition, in accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), *enfd.* in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall amend the remedy to require the Respondent to compensate Anthony Blondell for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as pre-

ORDER

The National Labor Relations Board orders that the Respondents, Newark Electric Corporation, Newark Electric 2.0, Inc., and Colacino Industries, Inc., Newark, New York, a single employer and alter egos, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to honor the February 24, 2011 Letter of Assent C and the collective-bargaining agreement that is in effect from June 1, 2012, through May 31, 2015, between the IBEW, Local 840 and the Finger Lakes Chapter, NECA, which establishes the terms and conditions of employment of the Respondents' employees in the following appropriate bargaining unit during the term of the contract and any automatic extensions thereof:

All employees performing work, as set forth in Article II of the January 1, 2011 to May 31, 2012 agreement between the Union and the Finger Lakes, New York Chapter of NECA, and the June 1, 2012 to May 31, 2015 successor agreement between the Union and the Finger Lakes, New York Chapter of NECA, within the geographic area set forth in Article II of the same agreements.

(b) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative, within the meaning of Section 8(f), of the Respondents' employees in the appropriate unit during the term of their collective-bargaining agreement and any automatic extensions thereof.

(c) Repudiating and failing and refusing to apply to unit employees their collective-bargaining agreement since July 20, 2012, and to make payments to the fringe benefit funds under the collective-bargaining agreement and any automatic extensions thereof.

(d) Discharging or otherwise discriminating against employees because they form, join, or assist the IBEW, Local 840, or any other labor organization, or engage in protected concerted activities, to discourage employees from engaging in these activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement with the Union, and any automatic renewal or extension of it.

(b) Make whole unit employees for any loss of earnings and other benefits resulting from the Respondents' failure to honor the terms of the agreement, in the manner set forth in the remedy section of the judge's decision as amended in the decision reported at 362 NLRB No. 44.

(c) Remit the fringe benefit funds payments that have become due and reimburse unit employees for any losses or expenses arising from the Respondents' failure to make the required payments, in the manner set forth in the amended remedy section of the decision reported at 362 NLRB No. 44.

(d) On request, bargain collectively in good faith with the Union as the exclusive representative of the employees in the appropriate bargaining unit during the term of the collective-bargaining agreement and any automatic extensions thereof.

(e) Within 14 days from the date of this Order, offer Anthony Blondell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Anthony Blondell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in the decision reported at 362 NLRB No. 44 and as further amended in this decision.

(g) Compensate each affected employee, including Anthony Blondell, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(h) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharge of Anthony Blondell, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and other adjustments of monetary benefits due under the terms of this Order.

scribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall modify the Order to reflect these remedial changes and we shall substitute a new notice to conform to the Order as modified.

(j) Within 14 days after service by the Region, post at the Respondents' Newark, New York facilities copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 20, 2012.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. July 31, 2018

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to honor the February 24, 2011 Letter of Assent C and the collective-bargaining agreement with the Union that is in effect from June 1, 2012, through May 31, 2015, which establishes the terms and conditions of your employment in the following appropriate bargaining unit during the term of the contract and any automatic extensions thereof:

All employees performing work, as set forth in Article II of the January 1, 2011 to May 31, 2012 agreement between the Union and the Finger Lakes, New York Chapter of NECA, and the June 1, 2012 to May 31, 2015 successor agreement between the Union and the Finger Lakes, New York Chapter of NECA, within the geographic area set forth in Article II of the same agreements.

WE WILL NOT fail and refuse to recognize and bargain in good faith with the Union as your collective-bargaining representative during the term of the collective-bargaining agreement and any automatic extensions thereof.

WE WILL NOT repudiate and fail and refuse to apply to unit employees your collective-bargaining agreement since July 20, 2012, and to make payments to the fringe benefit funds under that agreement and any automatic extensions thereof.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the IBEW, Local 840, or any other labor organization, or engaging in protected concerted activities, to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL give full force and effect to the collective-bargaining agreement effective from June 1, 2012, through May 31, 2015, and any automatic extensions thereof.

WE WILL make you whole for any losses you may have suffered as a result of our refusal to honor the terms of the collective-bargaining agreement.

WE WILL remit the fringe benefit funds payments that have become due and reimburse you for any losses or expenses arising from our failure to make the required payments.

WE WILL, on request, bargain in good faith with the Union as your exclusive collective-bargaining representative during the term of the collective-bargaining agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Blondell full reinstatement to his former job or, if that job is no longer available, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Blondell whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate each affected employee, including Anthony Blondell, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 3, within

21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Anthony Blondell, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NEWARK ELECTRIC CORP., NEWARK ELECTRIC
2.0, INC., AND COLACINO INDUSTRIES, INC.

The Board's decision can be found at www.nlrb.gov/case/03-CA-088127 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half St. S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

