Correctional Medical Services, Inc. *and* Civil Service Employees Association, Local 1000, AFSCME. Case 3–CA–23855

December 9, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES[1]

On May 31, 2007, the National Labor Relations Board issued a Decision and Order in this proceeding. The Board found therein that Civil Service Employees Association, Local 1000, AFSCME (the Union) conducted picketing at the Respondent's health care facility on September 12, 2002, without complying with the notice requirements of Section 8(g). Based on that noncompliance, the Board concluded that employees who participated in the picketing were not protected by the Act, and that the Respondent therefore did not violate Section 8(a)(1) or (3) of the Act by allegedly threatening, interrogating, and discharging several employees because of their participation in the picketing.[2]

Subsequently, the Union petitioned the United States Court of Appeals for the Second Circuit for review of the Board's Order dismissing the complaint. On June 19, 2009, the Second Circuit granted the petition for review, vacated the Board's Decision and Order, and remanded this case to the Board "for further proceedings consistent with [the court's] opinion."[3] On December 2, 2009, the Board notified the parties that it had decided to accept the court's remand, and stated that all parties were permitted to submit statements of position concerning the issues raised by the remand. The General Counsel and the Union each filed a statement of position.

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

Having accepted the remand, we accept the court's opinion as the law of the case. Consistent with that opinion, and for the reasons discussed below, we find that the Respondent violated Section 8(a)(1) by threatening to discipline employees Richard Jolly, Richard Kowalski, Darcy LaGoy, Chesley Schager, and Stephanie Spear; by interrogating Kowalski, LaGoy, and Spear; and by discharging all five of these employees because they engaged in protected picketing on September 12, 2002.[4]

Facts[5]

The Respondent operates a medical clinic at the Albany County Correctional Facility in Albany, New York. On August 15, the Union requested that the Respondent recognize it as the collective-bargaining representative of all clinic employees except the resident physician, the supervisors, and the office clericals. The Respondent rejected the request.

On September 12, the Union picketed peacefully in support of its demand for recognition. The Union gave no notice to the Respondent or the Federal Mediation and Conciliation Service before the picketing began.[6] About 20 individuals, including the 5 clinic employees named above, participated in this activity, which lasted for about 40 minutes. The five employees were off-duty during the picketing.

On September 13, the Respondent sent a letter to each of these employees. In relevant part, the letter stated:

> On Thursday, September 12, 2002, Civil Service Employees Association and Capital District Area Labor Federation conducted a picket at the Correctional Medical Services Health Care Unit site at Albany County Correctional Facility. You participated in that picketing. The Union did not provide any advance notice of the picket.
>
> The National Labor Relations Act ("Act") requires a union to provide 10 days' written notice of its intent to picket a health care site. Employees who participate in illegal picketing lose their protection under the Act. Correctional Medical Services is filing a charge with the National Labor Relations Board ("NLRB") concerning the Union's illegal

[1] Member Pearce, who is recused, is a member of the panel but did not participate in this decision on the merits. Member Becker is also recused, and did not participate in the consideration of this case.

In *New Process Steel v. NLRB*, ___ U.S. ___, 130 S.Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2644.

[2] 349 NLRB 1198 (*CMS I*). Then-Chairman Battista and then-Member Schaumber formed the Board majority. Then-Member Liebman, dissenting, would have found that the Respondent violated the Act.

[3] *Civil Service Employees Assn., Local 1000, AFSCME v. NLRB*, 569 F.3d 88, 95 (2d Cir. 2009).

[4] All subsequent dates are in 2002, unless otherwise noted.

[5] The parties submitted a factual stipulation, which the Board relied on in *CMS I*, 349 NLRB at 1198–1199. The following statement of facts draws from the factual summary in *CMS I* and also directly from the parties' stipulation.

[6] Sec. 8(g) requires a labor organization to give at least 10 days' advance written notice to any health care institution and to the FMCS before engaging in any strike, picketing, or other concerted refusal to work at the institution.

> picket. When the NLRB has completed its investigation of that charge, we will advise you as to what, if any, action will be taken concerning your participation in the picketing. CMS does not condone your conduct.
>
> Pending the NLRB's investigation of this matter, you are to continue working your normally scheduled hours. CMS assures you that it will take no actions other than as legally authorized by the NLRB. CMS respects each employee's right to engage in conduct protected by the Act, but will not tolerate conduct in violation of the Act.

A few days later, the Respondent filed an unfair labor practice charge against the Union. On September 26, the General Counsel issued a complaint in Case 3–CG–41 alleging that the Union, by its conduct on September 12, violated Section 8(g) of the Act.[7]

In the meantime, on September 25, the Respondent's outside counsel for labor and employment matters, an admitted agent of the Respondent, individually questioned employees Kowalski, LaGoy, and Spear about the picketing. The attorney asked them to confirm their participation, to identify who had solicited them to picket, and to name other employees who had participated.

On September 30, the Respondent terminated the five employees for engaging in an "illegal picket."[8] The Union filed an unfair labor practice charge, and the General Counsel issued a complaint alleging that the Respondent had violated Section 8(a)(1) by threatening employees on September 13 and interrogating employees on September 25, and Section 8(a)(1) and (3) by discharging the five employees.

The Board's Decision in *CMS I*

The Board majority found, as threshold matters, that the discharged employees had engaged in "picketing" under the auspices of the Union, and that the Union therefore violated Section 8(g) because it had failed to provide the required advance notice. The Board then invoked the "basic principle" that an employee who participates in unlawful activity is engaged in conduct unprotected by Section 7 and can be lawfully discharged for doing so. Accordingly, in the Board's view, the Respondent's discharge of the five picketers did not violate the Act.

As for the complaint's 8(a)(1) allegations, the Board concluded that because the picketing that was the subject of the threats and interrogations was unprotected, "it was not unlawful for the Respondent to respond in that manner." Thus, the Board dismissed the complaint in its entirety.

The Second Circuit's Opinion

On review, the court determined that the "plain meaning of the statute"[9] established a congressional intent to draw "a clear distinction" between employees who "participate in *picketing* conducted by [a] labor organization in violation of [Section 8(g)'s] notice requirements" and employees who engage in an 8(g)-unlawful strike because "the statute specifies sanctions" only for the latter.[10] Based on this distinction, and recognizing that Section 7 generally protects employee picketing, the court concluded that employees who picket peacefully absent 8(g) notice have not "acted contrary to law in their individual capacity or forfeited the protections of [S]ection 7."[11] Having rejected the Board's essential finding—that the employees' September 12 picketing was unprotected—the court remanded the case to the Board without further addressing the complaint's allegations.

Discussion

Because we have accepted the court's remand as the law of the case, its opinion is binding on us.[12] Accordingly, we will re-evaluate the complaint allegations on the premise that the employees' September 12 picketing was protected by Section 7.

A. The Discharges

The discharge of an employee violates Section 8(a)(1) of the Act if the employee was engaged in activity which is "concerted" within the meaning of Section 7, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected, concerted activity.[13]

It is undisputed that the employees' picketing on September 12 was concerted activity, and that the Respondent was aware of its concerted nature. Further, as explained above, it is the law of this case that the picketing was protected by the Act. Finally, the Respondent acknowledged that it discharged the employees for partici-

[7] At some point after September 30, the Union entered into an informal settlement agreement resolving Case 3–CG–41.

[8] About 1 month later, the Respondent reinstated all five, without backpay.

[9] 569 F.3d at 92.

[10] Id. at 93.

[11] Id. at 94.

[12] Chairman Liebman adheres to her dissenting view in *CMS I*. Member Hayes did not participate in the decision in *CMS I* and expresses no opinion concerning the views expressed there inasmuch as the court's opinion now controls.

[13] *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

pating in the picketing. Therefore, the employees' protected, concerted activity motivated the discharges, and no further analysis is required.[14] We conclude that the Respondent's discharge of the five employees for engaging in protected picketing on September 12 violated Section 8(a)(1).[15]

B. The September 13 Letters and the September 25 Inquiry

In its answer to the complaint, the Respondent admitted the General Counsel's allegations that in its September 13 letters it threatened to discipline employees because of their picketing, and that on September 25 it interrogated employees concerning the picketing. The Respondent averred that its conduct in both instances was lawful because the picketing was not protected by the Act. It is now the law of the case, however, that the picketing was protected. We thus turn to whether the Respondent's threats and interrogations unlawfully interfered with the employees' protected activity.

1. *Threats.* "The basic test for an 8(a)(1) violation is whether the employer engaged in conduct, regardless of intent, which reasonably tends to interfere with the free exercise of employee rights under the Act."[16] The Board will evaluate the totality of circumstances to distinguish between employer statements that are unlawful threats and those that are privileged under Section 8(c).[17]

The September 13 letters stated that the Union's picketing on September 12 was illegal, and that employees who engage in illegal picketing "lose their protection under the Act." The letters warned the five employees that when the Regional Office finished its investigation of the Respondent's unfair labor practice charge against the Union, the Respondent would determine what action to take regarding the employees' participation in the picketing. Finally, although expressing respect for employee rights, the letters declared that the Respondent "will not tolerate conduct in violation of the Act."

The overriding message here was that the Respondent had already decided that the picketing was illegal, and that the employees had engaged in unprotected conduct. The inference that a reasonable employee would draw is that discipline or discharge would follow in fairly short order. We conclude that the Respondent threatened the employees with unspecified discipline for engaging in protected picketing, and accordingly violated Section 8(a)(1).[18]

2. *Interrogations.* On September 25, the Respondent's labor attorney individually questioned employees Kowalski, LaGoy, and Spear about the picketing. He sought information concerning their participation, who solicited them to picket, and the identity of other employees who participated.

The Board evaluates all of the relevant circumstances in determining whether an interrogation is coercive of Section 7 rights.[19] The factual background of the inquiry, the nature of the information sought, and the identity of the questioner are significant factors, among others, in the analysis.[20] Here, the questioning occurred against the backdrop of the Respondent's letters threatening unspecified discipline because of the employees' picketing, which they had received less than 2 weeks earlier. The individual inquiries concerned sensitive matters related to their protected activity, and that of their fellow employees. And the person posing the questions was the Respondent's lawyer for labor and employment matters. In those circumstances, we find that the Respondent's questioning of the employees was coercive.[21]

In its brief in *CMS I*, the Respondent contended that its attorney was lawfully inquiring about a matter of perceived employee misconduct: the September 12 picketing. The Respondent is correct that an employer has the right to engage in a "legitimate investigation of unprotected conduct."[22] However, it cannot successfully rely on this privilege if the conduct at issue turns out to be protected.[23] This is so because the test for coercion under Section 8(a)(1) "does not turn on the employer's motive."[24] In other words, if the investigated conduct proves to be protected, the employer's good-faith belief

[14] See, e.g., *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 864 (2000), enfd. 262 F.3d 184 (2d Cir. 2001).

[15] We find it unnecessary to consider the complaint allegation that the discharges also violated Sec. 8(a)(3). Our remedy below for the 8(a)(1) violation is not materially different from an appropriate remedy under Sec. 8(a)(3).

[16] *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1223 (2004) (citing *American Freightways Co.*, 124 NLRB 146, 147 (1959)).

[17] See, e.g., *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

[18] In its brief to the Board in *CMS I*, the Respondent argued that the letters were necessary to establish that it did not condone conduct it perceived to be illegal. Although the Respondent was within its rights to foreclose any question of condonation, this goal certainly could have been accomplished without expressing a threat of retaliation.

[19] See, e.g., *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[20] Id.; see, e.g., *Stoody Co.*, 320 NLRB 18 (1995).

[21] See, e.g., *Sunrise Senior Living, Inc.*, 344 NLRB 1246, 1254–1255 (2005), enfd. mem. 183 Fed.Appx. 326 (4th Cir. 2006) (finding unlawful interrogations where questioners included high-ranking officials, circumstances suggested possible discipline, and questions sought information concerning their own and coworkers' protected activity).

[22] *Ogihara America Corp.*, 347 NLRB 110, 114 (2006).

[23] See, e.g., *General Electric Co.*, 253 NLRB 1189, 1190 fn. 4 (1981).

[24] *American Freightways*, above, 124 NLRB at 147.

to the contrary is no defense. As stated, the September 12 picketing was protected conduct.

Accordingly, on evaluation of the relevant circumstances above, we find that the inquiries by the Respondent's attorney were coercive interrogations in violation of Section 8(a)(1).[25]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and its medical clinic in Albany, New York, is a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by discharging employees Richard Jolly, Richard Kowalski, Darcy LaGoy, Chesley Schager, and Stephanie Spear for engaging in peaceful picketing protected by the Act.

4. The Respondent violated Section 8(a)(1) by threatening to discipline the employees named above because of their protected picketing.

5. The Respondent violated Section 8(a)(1) by interrogating employees Kowalski, LaGoy, and Spear about their own and other employees' protected picketing.

6. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging employees Jolly, Kowalski, LaGoy, Schager, and Spear because they engaged in peaceful, protected picketing, we shall order the Respondent to make them whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to remove from its files any and all references to the unlawful discharges of Jolly, Kowalski, LaGoy, Schager, and Spear, and to notify them in writing that this has been done and that the discharges will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Correctional Medical Services, Inc., Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for engaging in peaceful picketing or other protected, concerted activities.

(b) Threatening to discipline employees for engaging in protected, concerted activities.

(c) Interrogating employees about their own and other employees' protected, concerted activities.

(d) 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) Make whole employees Richard Jolly, Richard Kowalski, Darcy LaGoy, Chesley Schager, and Stephanie Spear for any loss of earnings and other benefits suffered as a result of the unlawful action against them, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and, within 3 days thereafter, notify employees Jolly, Kowalski, LaGoy, Schager, and Spear in writing that this has been done and that the discharges will not be used against them in any way.

(c) 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 due under the terms of this Order.

(d) Within 14 days after service by Region 3, post at its Albany, New York facility copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 3,

[25] The stipulated facts do not suggest that on September 25 the Respondent's attorney was preparing a defense to an unfair labor practice charge or for strike activity at the medical clinic. But even assuming he was, there is no evidence that the appropriate safeguards for his inquiries were established. See, e.g., *Preterm, Inc.*, 240 NLRB 654, 656 (1979); *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

[26] 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."

after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[27] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 13, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 9, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[27] In *J. Picini Flooring*, 356 NLRB No. 9 (2010), the Board recently decided that its remedial notices are to be distributed electronically in appropriate circumstances. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of notices, but agrees to do so in this case, for institutional reasons.

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 discharge you for engaging in peaceful picketing or other protected, concerted activities.

WE WILL NOT threaten to discipline you for engaging in protected, concerted activities.

WE WILL NOT interrogate you about your own or other employees' protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the Act.

WE WILL make whole employees Richard Jolly, Richard Kowalski, Darcy LaGoy, Chesley Schager, and Stephanie Spear for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of employees Jolly, Kowalski, LaGoy, Schager, and Spear, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

CORRECTIONAL MEDICAL SERVICES, INC.