**Novelis Corporation *and* United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service, Workers, International Union, AFL–CIO.**

**Novelis Corporation *and* United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers, International Union, AFL–CIO.** Cases 03–CA–121293, 03–CA–121579, 03–CA–122766, 03–CA–123346, 03–CA–123526, 03–CA–126738, 03–CA–127024, and 03–RC–120447

December 7, 2018

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

This case is on remand from the United States Court of Appeals for the Second Circuit. On August 26, 2016, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act. The Respondent's violations, which were committed during a union organizing campaign, included (1) restoring Sunday premium pay and unscheduled overtime pay; (2) threatening employees that, if they selected the Union, (a) the Respondent would lose business, (b) employees would lose jobs, (c) wages would be reduced, and (d) more onerous working conditions would be imposed; (3) selectively and disparately enforcing the Respondent's posting and distribution rules; (4) prohibiting employees from wearing union insignia on their uniforms while permitting employees to wear antiunion and other insignia; (5) removing union literature from a mixed use area; (6) interrogating employees; (7) threatening employees by telling them that they did not have to work for the Respondent if they were unhappy with their terms and conditions of employment; (8) impliedly threatening an employee with layoff if employees selected the Union; (9) soliciting employees' complaints and grievances and promising employees improved terms and conditions of employment if they did not select the Union; (10) misrepresenting that the Union was seeking to have the Respondent rescind employees' pay and/or benefits and blaming the Union by telling employees that they would have to pay back wages retroactively as a result of unfair labor practice charges filed by the Union; (11) demoting an employee because of his protected concerted and union activities in posting comments on Facebook; (12) maintaining and giving effect to an overly broad social media policy; and (13) maintaining an overly broad email use policy. Because of the severity of the unfair labor practices, the Board found that a bargaining order was appropriate under the test set forth in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). In Case 03–RC–120447, the Board set aside the results of an election held on February 20 and 21, 2014, and dismissed the election petition.

Subsequently, the Respondent petitioned the United States Court of Appeals for the Second Circuit for review of the Board's Order, and the Board filed a cross-application for enforcement. On February 9, 2018, the Board petitioned the court to sever and remand the two workplace rule violations involving the Respondent's email use rule and social media rule for further consideration in light of the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017). On March 15, 2018, the court issued its decision, in which it granted in part and denied in part enforcement of the Board's Order and remanded the case "for further proceedings consistent with [its] opinion." *Novelis Corp. v. NLRB*, 885 F.3d 100, 111 (2nd Cir. 2018). Although the court enforced the Board's Order with respect to all violations save the two workplace rule violations that the Board had asked the court to sever and remand, the court denied enforcement of the Board's bargaining order. The court held that the Board had failed to consider the impact of changed circumstances subsequent to the Respondent's violations when determining whether a fair election was possible, specifically noting that the Board had failed to account for the mitigating effects of the Respondent's remedial actions, employee turnover, management turnover, and the passage of time since the unfair labor practices were committed. Id. at 109–111. As a result, the court concluded that "it is inappropriate to impose union membership without a reasoned finding, absent here, that a new, fair election more than three years after the violations is not reasonably possible." Id. at 111.

On June 22, 2018, the Board advised the parties that it had decided to accept the court's remand and invited the parties to file statements of position. The General Counsel, Charging Party, and Respondent filed statements.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

[1] 364 NLRB No. 101 (2016).

[2] Member Emanuel is recused and took no part in the consideration of this case.

The Board has reviewed the entire record, including the parties' statements of position, in light of the court's decision, which we accept as the law of the case. Because that decision makes it perfectly clear that a *Gissel* bargaining order is unenforceable here, we reject the contention of the General Counsel and the Union that the court's decision affords us an opportunity to reconsider the appropriateness of a *Gissel* order. Accordingly, we delete the *Gissel* bargaining order previously issued.[3] However, even though a *Gissel* remedy is no longer being imposed, we agree with the General Counsel that special remedies are necessary in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices and to ensure that a fair election can be held if the Union files a new petition. It is well settled that the Board has broad discretion to impose remedies that fit the circumstances of each case it confronts, and it has ordered special remedies to address the lingering effects of an employer's unfair labor practices. *Comcast Cablevision of Philadelphia*, 328 NLRB 487, 487–488 (1999). The Board has reasoned that such remedies help to ensure a fair election where the union previously held majority support. Id. at 488.

Here, we find the following special remedies are essential to ensuring that employees may freely exercise their Section 7 rights. First, we shall order the Respondent to supply the Union, on its request made within 1 year of this Supplemental Decision and Order, the names, addresses, telephone numbers and e-mail addresses of its current unit employees. The Board has found that requiring an employer to furnish the union with the names and addresses of its current bargaining-unit employees "will enable the [u]nion to contact all employees outside the [workplace] and to present its message in an atmosphere relatively free of restraint and coercion." *Blockbuster Pavilion*, 331 NLRB 1274, 1275 (2000) (internal quotations omitted).[4]

Second, we shall order the Respondent to grant the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are customarily posted, when the Union makes such a request within 2 years from the date of this Supplemental Decision and Order. The Board has held that the bulletin board access remedy reassures employees that "they can learn about the benefits of union representation, and can enlist the aid of union representatives, if they desire to do so, without fear of being subjected to severe unfair labor practices." Id. at 1276 (internal quotations omitted).

Because the Union has not requested the reinstatement of the petition, we will not direct a second election at this time. We believe that by granting the special remedies set forth above, we will enable the Union to gain access to and communicate with current unit employees should it choose to do so. Having done so, the Union may then reassess its standing with the unit and file a new petition, if it so desires.[5]

[3] It is not necessary to reaffirm our prior Order in other respects because, as noted above, the court of appeals enforced it in all respects except for the bargaining order provision and the two rules violations. See *Fluor Daniel, Inc.*, 350 NLRB 702, 702 fn. 5 (2007); *Bryan Adair Construction Co.*, 341 NLRB 247, 247 fn. 4 (2004).

Chairman Ring and Member Kaplan recognize that, under current precedent, the Board does not consider changed circumstances in determining the propriety of a *Gissel* bargaining order. However, they would consider revisiting Board precedent in this regard in a future appropriate proceeding.

[4] This remedy is in addition to the Union's right to have access to a list of voters and their contact information under *Excelsior Underwear*, 156 NLRB 1236 (1966), in the event of a representation election.

[5] To be clear, the only reason we are not reinstating the petition and directing a second election is that the Union has not asked us to do so, and there may be good reasons for its silence in this regard. Five years have passed since December 2013, when the Union attained a card majority. By August 2016, when the Board issued its decision, there had been significant turnover in the unit, as the court found. Nearly two-and-a-half years have passed since then. Under these circumstances, reinstating the petition and directing a second election will not advance the purposes of the Act, particularly given that the Board's Rules instruct the Regional Directors to schedule elections "for the earliest date practicable." Board Rules Sec. 102.67(b). If and when the Union is ready to proceed to an election, it may file a petition for a new election based on the usual 30 percent administrative showing.

Member McFerran would reinstate the petition and order a second election. The petition was dismissed in the initial Board decision in this case solely because the *Gissel* bargaining order mooted it; but the *Gissel* order has now been deleted, and thus the petition should naturally be reinstated so that a second election – which is a default remedy for cases like this where unfair labor practices taint an election -- may be conducted. See *Research Fed. Credit Union*, 327 NLRB 1051, 1051–1054 (1999) (following court remand, Board deleted *Gissel* remedy, reinstated petition, and ordered second election, almost 9 years after original election was conducted and where there was substantial employee turnover); *UARCO, Inc.*, 286 NLRB 55, 55 (1987) (where "unfair labor practices do not warrant a bargaining order…. [but do] warrant setting aside the election. . . we shall direct a second election"). A failure to reinstate and resume processing the petition after a *Gissel* order is removed leaves the question of representation that the Board is statutorily bound to decide "unresolved." *J.L.M. Inc.*, 316 NLRB 238, 238 (1995) (reinstating petition and ordering new election after *Gissel* order was deleted on remand, notwithstanding passage of around 5 years and turnover, and without requiring new showing of interest). Further, if the Union does not want an election, Board procedures contemplate that a petitioner may affirmatively withdraw its petition after the validity of the first election has been adjudicated and a second election ordered. See *Casehandling Manual (Part Two)*, Sec. 11116.4.

Given that a rerun election is routinely ordered in cases like this, Member McFerran finds it unsurprising that the holding of such an election is presumed both in the Second Circuit's decision, see *Novelis Corp. v. NLRB*, supra, 885 F.3d at 109, 111 (observing that "the Board carries a heavy burden to justify a bargaining order *in lieu of a second election*" and that here the evidence failed to show that "*a new, fair election* more than three years after the violations is not reasonably possible") (emphases added), and in the special remedies proposed by

We shall also remand to the administrative law judge the two workplace rule violations involving the Respondent's email use and social media rules for further proceedings consistent with the Board's decision in *Boeing,* including reopening the record if necessary.

ORDER

The National Labor Relations Board orders that paragraphs 1(j), 1(o), and 2(b)-(e) be deleted from the Board's Decision and Order reported at 364 NLRB No. 101 (2016).

IT IS FURTHER ORDERED that the complaint allegations that the Respondent violated Section 8(a)(1) of the Act by maintaining social media and email use policies are remanded to the administrative law judge for further proceedings consistent with the Board's decision in *The Boeing Company*, 365 NLRB No. 154 (2017)*,* including reopening the record if necessary.

IT IS FURTHER ORDERED that the Respondent, Novelis Corporation, Oswego, New York, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request made within 1 year of the date of this Supplemental Decision and Order, furnish the Union with the full names, addresses, telephone numbers and e-mail addresses of its current unit employees.

(b) Immediately on request, for a period of 2 years from the date of this Supplemental Decision and Order, grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices are customarily posted in its Oswego, New York facility.

(c) Within 14 days after service by the Region, post at its Oswego, New York facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 3, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) 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 Respondent has taken to comply.

Dated, Washington, D.C. December 7, 2018

| | |
|---|---|
| John F. Ring, | Chairman |
| Lauren McFerran, | Member |
| Marvin E. Kaplan, | Member |

(SEAL) 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 supply the Union, on request made within 1 year of the date of the Board's Supplemental Decision and Order, the full names, addresses, telephone numbers, and email addresses of our current employees in the following appropriate bargaining unit:

All full-time and regular part-time employees employed by the Employer at its Oswego, New York facility, including the classifications of Cold Mill Operator, Finishing Operator, Recycling Operator, Remelt Operator, Crane Technician, Mechanical Technician,

---

the General Counsel and joined by the Union (which suggest that the special remedies for the Union will be in connection with a new election). Under these circumstances, she would not infer that the Union has waived the presumptive remedy of a second election simply by failing to explicitly request it.

[6] 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."

Welding Technician, Remelt Operations Assistant, Hot Mill Operator, Electrical Technician, Process Technician, Mobile Equipment Technician, Roll Shop Technician, Production Process & Quality Technician, Production Process & Quality Specialist, EHS Facilitator, Planner, Shipping Receiving & Packing Specialist, Stores Technician, Maintenance Technician, Machinist, Facility Technician, and Storeroom Agent, excluding Office clerical employees and guards, professional employees, and supervisors as defined in the Act, and all other employees.

WE WILL, immediately on the Union's request, for a period of 2 years from the date of the Board's Supplemental Decision and Order, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted at our facility in Oswego, New York.

NOVELIS CORPORATION

The Board's decision can be found at www.nlrb.gov/case/03-CA-121293 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 Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.