

NLRB ORDERS EMPLOYER TO REOPEN A CLOSED FACILITY WHERE CLOSURE WAS MOTIVATED BY ANTI-UNION REASONS

On August 25, 2023, a National Labor Relations Board ("Board") majority concluded that Quickway Transportation, Inc. ("Employer") violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act ("NLRA") and committed unfair labor practices. In making the decision, the Board majority reversed the decision of the Administrative Law Judge and found that the General Counsel properly vacated and set aside two informal settlement agreements that occurred shortly before these unfair labor practices occurred. As part of its remedy, the Board ordered the Employer to reopen a shuttered facility, because the Board concluded that the facility closure was motivated by anti-union reasons.

Section 8(a)(1) of the NLRA prohibits an employer from interfering with, restraining or coercing employees in the exercise of their rights to self-organize, form, join, or assist labor organizations, bargain collectively through representatives of their own choosing, and engaged in other concerted activities for the purpose of collective bargaining or other mutual aid of protection. Section 8(a)(3) of the NLRA prohibits an employer from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Section 8(a)(4) of the NLRA prohibits an employer from discharging or otherwise discriminating against an employee because he has filed charged or given testimony under this subchapter. Section 8(a)(5) prohibits an employer from refusing to bargain collectively with the representatives of his employees.

The Board analyzed and ultimately relied on the Supreme Court decision in *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), in which the Court held that when an employer closes part of its business for antiunion reasons, such a partial closing violates Section 8(a)(3) only if it was motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect. The Court noted that if the persons exercising control over a plant that is being closed for antiunion reasons: (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, then an unfair labor practice has been made out.

The Board concluded that the Employer violated Section 8(a)(1) and 8(a)(3) on December 9, 2020 by ceasing operations at its Louisville, Kentucky terminal and discharging all of its drivers at that terminal in the bargaining unit represented by the Union, motivated by antiunion reasons and a desire to chill unionism at other locations. In its analysis, the Board noted that the Employer: (1) threatened the employees with the closure of the terminal if they selected the Union as their representative; (2) instructed an employee to provide it with a list of

employees who were involved in the Union's organizing campaign or who supported the Union; (3) threatened employees that it would lose its contract with The Kroger Company and be forced to discharge all the employees at the Louisville terminal if they selected the Union as their representative; (4) threatened to cease making contributions to employees' employee stock ownership plan accounts if they selected the Union as their representative; (5) coercively interrogated employees about their union activities, all in violation of 8(a)(1). The Board also noted that the fact that the Employer operated several other terminals nationwide, and it was foreseeable that the Employer's decision to cease operations at the Louisville terminal would have had the effect of chilling unionism at these other terminals and affiliates. However, the Board also noted that the Employer did not violate 8(a)(1) when it instructed a manager to engage in surveillance of its employees' union activities.

The Board concluded that the Employer violated Section 8(a)(1) and 8(a)(4) by singling out an employee and implicitly threatening to take legal action against him because he filed an unfair labor charge. Finally, the Board concluded that due to the fact that the Employer's decision to close part of its business was motivated by antiunion reasons in violation of Section 8(a)(3), the Employer also violated Section 8(a)(1) and 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain regarding its decision to cease operations at the Louisville terminal and discharge all the unit employees.

The Board majority provided a broad remedy that included the following orders: (1) the Employer must reopen and restore its business operations at the Louisville terminal as they existed on December 9, 2020; (2) offer reinstatement to the unlawfully discharged unit employees to the extent that that their services are needed at the Louisville terminal to perform the work that the Employer is able to attract and retain from The Kroger Company or new customers after a good-faith effort; (3) offer reinstatement to any remaining unit employees to any positions in its existing operations that they are capable of filling, with appropriate moving expenses; (4) place any unit employees for whom jobs are not now available on a preferential hiring list for any future vacancies that may occur in positions in its existing operations that they are capable of filling; and (5) the certification year be extended by 12-months with its accompanying 12-month decertification bar.

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