Fresenius USA Manufacturing, Inc. *and* International Brotherhood of Teamsters, Local 445. Case 02–CA–039518

June 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On September 19, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 138. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. 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 National Labor Relations 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. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order and the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions, agree with the rationale of the earlier decision, and adopt the judge's recommended Order only to the extent and for the reasons stated herein.[1]

Facts

As recounted more fully in the Board's earlier decision, employee Kevin "Dale" Grosso, an open and active supporter of the Union, anonymously scribbled vulgar, offensive, and, in isolation, arguably threatening statements on several union newsletters left in an employee breakroom in an attempt to encourage his fellow employees to support the Union in an upcoming decertification election. In a good-faith response to complaints about those statements from a number of female employees, Fresenius investigated the statements and questioned Grosso about them. During that investigation, Grosso committed two acts of dishonesty: he denied authorship of the statements during a September 21, 2009 interview, and after he unwittingly confessed to management the following day during a telephone call that he initiated, he attempted to conceal his identity as the confessor. Upon confirming Grosso's authorship, Fresenius suspended and discharged him both for his handwritten statements and for his dishonesty during the investigation.

Discussion

In the now-vacated Decision and Order, the Board concluded that Grosso's handwritten statements were not so egregious as to cost him the protection of the National Labor Relations Act. The Board further found that Grosso's dishonesty during Fresenius' lawful investigation was protected and thus could not serve as a lawful basis for discipline. For the reasons stated below, however, we conclude that, even assuming, without deciding, that the handwritten statements retained the Act's protection, Fresenius lawfully discharged Grosso for his acts of dishonesty.[2]

Grosso's Dishonesty

The Board has recognized that employers have a legitimate business interest in investigating facially valid complaints of employee misconduct, including complaints of harassment. See, e.g., *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). And as part of a full and fair investigation, it may be appropriate for the employer to question an employee about facially valid claims of harassment and threats, even if that conduct took place during the employee's exercise of Section 7 rights. See, e.g., *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528–529 (2007).[3]

As the Board found in its previous decision, Fresenius had a legitimate business interest for investigating the handwritten comments at issue here. Based on the writ-

[1] We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[2] Member Johnson would not find that the handwritten statements at issue were protected, but he agrees with his colleagues that even assuming, arguendo, they were protected, the Respondent lawfully discharged Grosso for dishonesty.

[3] At the same time, Board precedent recognizes that in some circumstances employees have a legitimate interest in shielding their Sec. 7 activity from employer inquiry, even by lying. See, e.g., *Tradewaste Incineration*, 336 NLRB 902, 907 (2001) (employee's untruthful denial that he posted a wage-related notice was protected where it "did not relate to the performance of his job performance or the [r]espondent's business."); see also, e.g., *St. Louis Car Co.,* 108 NLRB 1523, 1525–1526 (1954) (employee's untruthful denial of her union organizing activity was protected where the denial "related not to the [r]espondent's business at all, but to personal rights guaranteed by [the Act] which she desired not to disclose.").

ings themselves and the complaints received, Fresenius' decision to investigate was consistent with its anti-harassment policy and with other Federal statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and state anti-discrimination statutes as well. In these respects, Fresenius' investigation clearly was related to its ability effectively to operate its business.

Fresenius conducted its investigation in a manner that was consistent with the purpose of its investigation. When Grosso asked why he was being questioned, Fresenius truthfully explained that several employees had complained that the statements were intimidating, vulgar, and offensive, a characterization Grosso partially accepted. The questioning of Grosso, moreover, was reasonably tailored. Fresenius never asked Grosso about his union views generally or about any of his other union activity, including the prounion content of the newsletters on which the comments under investigation were handwritten. Instead, its questioning focused exclusively on the handwritten comments alleged to be harassing and threatening.

Further, although we agree with the Board's earlier finding that Fresenius violated the Act by prohibiting Grosso from speaking to other employees about the investigation, there is no credible evidence that the investigation occurred in a context of employer hostility to protected union activity.[4] Thus, on these facts, we do not believe that Fresenius' investigation of Grosso could be viewed as a pretext to delve into Grosso's union activity.

Moreover, in the circumstances here, we find that Grosso's lies did not implicate a legitimate interest in shielding his Section 7 activity from employer inquiry. He had no reasonable basis to believe that Fresenius was attempting to pry into protected union activity generally or that he would suffer reprisal for the activity in question because of its prounion content. On these facts, we find that Grosso's false statements to his employer were not protected activity.

Suspension and Discharge

As explained above, we assume, without deciding, that Grosso's handwritten statements constituted protected union activity and did not lose the protection of the Act. Since there is no dispute that Fresenius relied on those handwritten statements as one reason for suspending and discharging Grosso, we assume that the General Counsel has met his initial burden of showing that protected activity was a motivating factor in Grosso's suspension and discharge. As stated above, however, we have further found that Grosso's dishonesty during the investigation, which served as yet another basis for his suspension and discharge, was not itself protected by the Act. We must determine, therefore, whether Fresenius has met its burden under *Wright Line*[5] of showing that it would have taken the same action even in the absence of Grosso's handwritten statements. See *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000).

We find that it has. As the judge stated, Fresenius' discharge of Grosso for dishonesty was consistent with discipline it had imposed for similar violations in the past. The record reveals that, when questioned pursuant to an investigation into kickbacks, two employees lied. Fresenius discharged both employees solely for their dishonesty during that investigation and neither had previously committed an act of serious misconduct. This was enough to satisfy Fresenius' burden here. We cannot predict every circumstance involving employer investigations that serve a legitimate business interest, where the employer could assert that dishonesty during its investigation constitutes a valid basis for termination. However, depending on the evidence in a particular case, employers may also satisfy their *Wright Line* burden in these circumstances, for example, by demonstrating that dishonesty has served as an independent (if not sole) reason for prior terminations, or that a practice of discipline for similar acts of dishonesty exists.

Accordingly, we shall dismiss the allegations that Fresenius suspended and discharged Dale Grosso in violation of Section 8(a)(3) and (1).[6]

ORDER

The National Labor Relations Board orders that the Respondent, Fresenius USA Manufacturing, Inc., Chester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from discussing disciplinary investigations with their coworkers.

(b) 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.

[4] There is no evidence, for example, that in its questioning of Grosso or other employees, Fresenius disregarded any request for a *Weingarten* representative. For the reasons set forth in his partial dissent in *E.I. Dupont de Nemours & Co.*, 362 NLRB No. 98, slip op. at 6–7 (2015), Member Johnson would not find that such evidence should preclude an employer from discharging an employee for unprotected activity occurring during an unlawful *Weingarten* interview.

[5] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[6] Given our conclusion, we do not adopt the amendments to the judge's conclusions of law and remedy found in the now-vacated Decision and Order.

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

(a) Within 14 days after service by the Region, post at its Chester, New York facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 2 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. If 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 22, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 2 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 24, 2015

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[7] 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 prohibit you from discussing disciplinary investigations with your coworkers.

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

FRESENIUS USA MANUFACTURING, INC.

The Board's decision can be found at www.nlrb.gov/case/02-CA-039518 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.