United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1150 **September Term, 2017**

FILED ON: MAY 29, 2018

JACMAR FOODSERVICE DISTRIBUTION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 630,
INTERVENOR

Consolidated with 17-1167

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: HENDERSON* and GRIFFITH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

These cases were considered on a petition for review and cross-application for enforcement of a Decision and Order of the National Labor Relations Board ("Board") and briefed and argued by counsel. *See Jacmar Foodservice Distribution*, 365 N.L.R.B. No. 91 (June 6, 2017). The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied and the cross-application for enforcement be granted for the reasons stated below.

Petitioner Jacmar Foodservice Distribution ("Jacmar") operates a food-delivery service in California. On May 9, 2016, the International Brotherhood of Teamsters Local 630 (the "Union") filed a petition with the Board to represent Jacmar's delivery drivers. On May 26, 2016, the Board's regional office conducted an election in which Jacmar's drivers voted 15-9 for the Union to serve as their collective-bargaining representative. Jacmar objected to the fairness of the election and asked for an evidentiary hearing. On September 26, 2016, the Board's Acting Regional

Director for Region 21 certified the Union as the exclusive representative for Jacmar's drivers. Concluding that the conduct the company alleged would not justify setting aside the election, he declined to hold an evidentiary hearing. Jacmar requested review from the Board, which affirmed the Acting Regional Director's decision to deny an evidentiary hearing and certify the Union. However, Acting Chairman Philip A. Miscimarra would have granted a hearing for Jacmar's allegations of pre-petition intimidation by employees and misconduct by the Board's election agent. The company refused to accept the election result, and on June 6, 2017, the Board ordered Jacmar to recognize the Union. Jacmar now petitions the court to review that order by reviewing the Board's affirmance of the Acting Regional Director's decision to deny a hearing, and the Board cross-applies for enforcement of its order. We deny Jacmar's petition and enforce the Board's order.

We review for abuse of discretion the Board's decision to deny an evidentiary hearing. *Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1350 (D.C. Cir. 2004). An evidentiary hearing is appropriate only "[w]hen an objecting party raises substantial and material issues of fact sufficient to support a prima facie showing of objectionable conduct." *Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 862 (D.C. Cir. 1993). Our standard requires that Jacmar cite "specific events and specific people" to show that the facts it alleges, if true, would make a prima facie case of objectionable conduct. *Id*. (quoting *Anchor Inns, Inc. v. NLRB*, 644 F.2d 292, 296 (3d Cir. 1981)). In general, conduct is objectionable if it interferes with the freedom of employees to vote how they wish. *See Serv. Corp. Int'l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007).

Jacmar objects to alleged conduct that occurred before the Union filed its petition to campaign to represent the delivery drivers. In March and April 2016, there were four occasions on which a Jacmar employee who supported the Union approached another employee about signing a union authorization card. Three of the occasions involved the same two employees, and during the last encounter the Union supporter threatened to persuade a supervisor to fire the other employee if he did not sign the card. Under the *Ideal Electric* doctrine, conduct that takes place before a union files a petition is not considered objectionable. *See Amalgamated Clothing Workers v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984) (citing *Ideal Elec. & Mfg. Co.*, 134 N.L.R.B. 1275 (1961)). The intimidation alleged here does not fall within the "narrow exception[s]" to this general rule. *Harborside Healthcare*, 343 N.L.R.B. 906, 912 (2004); s*ee also Mek Arden, LLC*, 365 N.L.R.B. No. 109 (July 25, 2017); *Pac. Coast M.S. Indus. Co.*, 355 N.L.R.B. 1422, 1443 (2010) (distinguishing as exceptions to the rule cases involving financial incentives or particularly egregious conduct and applying the rule to the "isolated solicitation of an authorization card").

Jacmar also objects to conduct that took place after the Union filed its petition but before the election. A pro-Union bumper sticker was placed on an employee's car without the owner's knowledge or consent, and eight pro-Union posters were placed on Jacmar's property without permission. Viewed objectively, those actions could not have interfered with the fairness of the election. *See Amalgamated Clothing*, 736 F.2d at 1568-69 (finding that anonymous trespass in support of a union is not by itself objectionable); *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 59 (D.C. Cir. 2016) (explaining that distribution of union propaganda on an employer's campus is not objectionable).

Finally, Jacmar claims misconduct by the Board agent who administered the election. The agent did not know how many employees were eligible to vote and relied on observers instead of the official voter list to monitor eligibility. She also gave a voter an extra ballot, which he turned in blank and which she disposed of according to the steps given by the Board's Casehandling Manual. Moreover, her demeanor expressed a preference for the Union. But even assuming the truth of Jacmar's allegations, the company failed to show that they "had a material effect on the election." *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1123 (D.C. Cir. 2012); *see also Physicians & Surgeons Ambulance Serv., Inc.*, 356 N.L.R.B. 199, 199 (2010) ("In order to set aside an election based on Board agent misconduct, there must be evidence that raises a reasonable doubt as to the fairness and validity of the election." (quoting *Polymers, Inc.*, 174 N.L.R.B. 282, 282 (1969))). Whatever errors the Board agent made were either alleviated by following proper procedures or were so minimal that they could not have had a material effect on the election. *See Fresenius USA Mfg., Inc. & Int'l Bhd. of Teamsters Local 445*, 352 N.L.R.B. 679, 687-88 (2008) (collecting cases affirming election results despite Board agent misconduct, including leaving the ballot box unattended and failing to ensure that observers wore required identification badges). And any favoritism she might have expressed while counting votes could not have influenced voters who had already cast their ballots.

Under our deferential standard of review, and based on the negligible effect that could have resulted from the alleged misconduct, we conclude that the Board did not abuse its discretion by denying Jacmar an evidentiary hearing. Because the denial of an evidentiary hearing is the sole basis for Jacmar's petition for review, we deny Jacmar's petition and grant the Board's cross-application for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

* A separate statement concurring in part and dissenting in part by Circuit Judge Henderson is attached.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in part and dissenting in part: I agree with the portions of my colleagues' judgment denying the company's challenges to the pre-election conduct. I part company with them, however, regarding the company's challenge to the Board agent's election-day misconduct. I take no position on whether the election must be set aside. But the Board should have *at least held a hearing* because the allegations that the Board agent failed to use a voter list as required by the Board's Casehandling Manual and that the Board agent gave one voter an extra ballot "raise[d] substantial and material issues of fact sufficient to support a prima facie showing," *Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 862 (D.C. Cir. 1993), that a "reasonable doubt" exists about the "validity" of the election, *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 958 (D.C. Cir. 1984).

The Board brushed off the alleged misconduct by stating that it is "customary Board practice" to bring extra ballots, preserve blank ballots found in the ballot box and use observers to check off voters' names on copies of the voter list. JA 107 n.2. These practices do not alleviate the problems identified in the allegations. As dissenting Board member, now Chairman, Miscimarra ably articulated, Jacmar's evidence raises factual questions about who voted and how many times. *See* JA 109 ("I believe it is improper to overrule this allegation without conducting a hearing to determine" how an extra ballot ended up in the ballot box and noting "there should never be a situation where a single voter" in a majority-vote election "is given multiple ballots"). Indeed, Board precedent manifests that finding an extra blank ballot in the voting box is sufficiently serious to warrant a hearing. *See T.K. Harvin & Sons, Inc.*, 316 NLRB 510, 537 (1995) (holding hearing after election in which "two ballots . . . were taken from the ballot box one inside the other"). Because Jacmar raised material factual disputes about the validity of the election, "the NLRB *may not* reject the evidence and sidestep the need for an evidentiary hearing." *Swing Staging*, 994 F.2d at 862 (emphasis added); *see* 29 C.F.R. § 102.69(c)(1)(i). I would grant Jacmar's petition for review with respect to the alleged election-day misconduct because the Board failed to hold a hearing to determine whether the lack of a voter list and the presence of an extra ballot in the ballot box were in fact the innocuous mistakes the Board majority assumed or, as Jacmar alleges, something more serious.