United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1125 **September Term, 2018**

FILED ON: MAY 10, 2019

LONG BEACH MEMORIAL MEDICAL CENTER, D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED,
INTERVENOR

Consolidated with 18-1143

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

Before: WILKINS, *Circuit Judge*, and GINSBURG and RANDOLPH, *Senior Circuit Judges*.

J U D G M E N T

This petition for review and cross-application for enforcement of a National Labor Relations Board order were presented to the court and briefed and argued by counsel. 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, the Board's cross-application for enforcement be granted, and the petitioner's motion to supplement the record be denied.

The Board concluded that petitioner Long Beach Memorial Medical Center violated 29 U.S.C. § 158(a)(1) by maintaining two overly broad workplace insignia rules. *Long Beach Memorial Med. Ctr., Inc.*, 366 N.L.R.B. No. 66 (2018). The first rule, part of Long Beach's Dress Code and Grooming Standards, directs that "[o]nly [hospital] approved pins, badges, and

professional certifications may be worn." The second, part of the Appearance, Grooming and Infection Prevention Standards for Direct Care Providers, directs that identification "[b]adge reels may only be branded with [hospital] approved logos or text." The Board ordered Long Beach to rescind the rules or else revise them to conform with applicable law.

We may not consider Long Beach's central argument in this appeal: that the Board should have applied the framework set out in *Boeing Co.*, 365 N.L.R.B. No. 154 (2017). Under section 10(e) of the National Labor Relations Act, we lack jurisdiction over any "objection that has not been urged before the Board . . . unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The Board's decision in *Boeing* issued four months before its decision in this case. Long Beach therefore had time enough to raise *Boeing*'s applicability in supplemental briefing before the Board issued its decision here or in a motion to reconsider afterward. Long Beach did not raise the issue then, so it may not do so now. *Id.*; *accord HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016). Long Beach argues that a motion for reconsideration would have been futile because "the applicable law to this matter changed during the Board's review of the Judge's decision." Reply Br. 8.[1] Asking an adjudicator to apply newly decided law in a pending case is hardly futile: it is a routine practice in the federal courts of appeals, for example. *See* Fed. R. App. P. 28(j), 40(a)(2). Even if Long Beach would have faced "an uphill battle," a motion for reconsideration based on intervening law would not have been "clearly doomed." *Ga. State Chapter Ass'n of Civilian Technicians v. FLRA*, 184 F.3d 889, 892 (D.C. Cir. 1999). The section 10(e) bar therefore applies to Long Beach's *Boeing* arguments.

The Board presumes that workplace rules prohibiting insignia are invalid absent special circumstances. *See, e.g.*, *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1067 (D.C. Cir. 2015). In the healthcare setting, there is an exception to this presumption for rules that apply only to "[i]mmediate patient care areas," such as "patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." *Id.* at 1068 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 780 (1979)).[2] We see no error in the Board's application of the presumption in this case. Neither of the hospital's rules contains language restricting its application to patient care areas. Although the badge-reel rule applies only to direct-care providers, it contains no restriction about where in the hospital it applies.

[1] Long Beach offers *Robin American* as an example of another case in which "the applicable law . . . changed during the Board's review." Reply Br. 8 (citing *NLRB v. Robin Am. Corp.*, 667 F.2d 1170 (5th Cir. Unit B 1982)). As the Fifth Circuit's opinion makes clear, the law in that case changed during the appeal, not during the Board's review, so the petitioner could not possibly have raised the change before the Board. 667 F.2d at 1170.

[2] Because Long Beach failed to preserve the applicability of *Boeing*, we have no occasion to consider whether the Board's decision in that case unsettled the Board's earlier decisions establishing these presumptions in the healthcare context. *See* Memorandum GC 18-04 from Peter B. Robb, Gen. Counsel, NLRB, 2018 WL 2761555, at *1 & n.4 (June 6, 2018).

The Board determined that Long Beach failed to overcome the presumption of invalidity with respect to both of the challenged rules. Substantial evidence supported that determination.

As to the pin/badge rule, which directs that "[o]nly [hospital] approved pins, badges, and professional certifications may be worn," Long Beach explained that this was a security protocol to prevent employees from attaching unapproved pins and badges to their identification cards as opposed to, for example, their lapels or sleeves. There is no hint of this meaning in the text of the rule. The Board viewed the rule as a unqualified ban on unapproved pins and badges wherever they may be attached. Given the clarity of the rule's text, the Board did not have to accept the hospital's limiting gloss on the rule. Long Beach has not attempted to defend this blanket ban.

Similarly, as to the badge-reel rule, Long Beach relied solely on its interpretation of the rule as applying only in patient care areas. Whatever justifications might have supported the rules under Long Beach's unusual interpretations, they fail to support the rules as written. Ultimately, the Board ordered a modest remedy, allowing Long Beach to revise its broadly written rules to reflect the narrower policies the hospital now espouses. If Long Beach intended those narrower meanings all along as it now claims, we fail to see how the Board's order is objectionable.

Two other matters warrant brief discussion. Long Beach, in its reply brief, complains that the Administrative Law Judge excluded evidence concerning its business justifications for the rules. Long Beach failed to raise this argument in its opening brief and therefore forfeited it. *Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991). Second, Long Beach moved to supplement the administrative record with three briefs it filed in support of its exceptions before the Board. Nothing in those proffered briefs affects our disposition of the petition, and we therefore deny the motion to supplement. *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1231 n.6 (D.C. Cir. 1988).

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 hearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk