United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1151 **September Term, 2018**

FILED ON: MARCH 12, 2019

MURRAY AMERICAN ENERGY, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION,
INTERVENOR

Consolidated with 18-1180

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

Before: HENDERSON and WILKINS, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on a petition for review and cross-application for enforcement of a Decision and Order of the National Labor Relations Board ("NLRB" or "Board") and was briefed by counsel. Murray American Energy, Inc., a coal mining company, petitions for review of a Decision and Order issued by the NLRB. The Board found that the company committed unfair labor practices in violation of sections (8)(a)(1), (3), (4), and (5) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158(a)(1), (3), (4), (5). It is

ORDERED and **ADJUDGED** that the petition for review is hereby denied, and the Board's cross-application for enforcement is granted.

I. Background

Murray American Energy, Inc., is the parent company of four wholly owned subsidiaries: Harrison County Coal, Marion County Coal, Marshall County Coal, and Monongalia County Coal. Each subsidiary operates a coal mine in West Virginia. Murray and its four subsidiaries are a single employer for purposes of the Act (collectively, "Petitioner"). Petitioner and the United Mine

Workers of America International Union (the "Union") are signatories to the National Bituminous Coal Wage Agreement of 2016. The Agreement covers a bargaining unit of approximately 1,400 hourly production and maintenance employees who are represented by the Union.

In February 2016, Union representative Michael S. Phillippi filed an unfair labor practice charge with the Board claiming that Petitioner had committed several violations of the Act at the Monongalia County Mine. In March, April, August, and October 2016, the Union filed additional unfair labor practice charges complaining about allegedly unlawful activities at all four subsidiaries of Petitioner. The Board's General Counsel then issued a consolidated complaint asserting that Petitioner had violated sections 8(a)(1), (3), (4), and (5) of the NLRA. The complaint referenced employees at Petitioner's subsidiaries, including: Joshua Peek at Harrison County, Joshua Preston and Mark Moore at Marshall County, and Jamie Hayes and Mike DeVault at Marion County.

As noted above, the complaint asserts that Petitioner committed unfair labor practices in violation of four different sections of the NLRA. First, section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed [under section 7 of the Act]." 29 U.S.C. § 158(a)(1). Section 7, in turn, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Second, section 8(a)(3) "makes it an unfair labor practice for an employer to discriminate against employees 'in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.'" *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 955 (D.C. Cir. 1988) (quoting 29 U.S.C. § 158(a)(3)). Third, section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the Act]." 29 U.S.C. § 158(a)(4). And, finally, section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).

Following a hearing on the complaint, an Administrative Law Judge ("ALJ") found merit in most of the charges against Petitioner. In its Decision and Order, the Board adopted all of the ALJ's recommended findings, rulings, and conclusions. We summarily enforce the violations that have not been challenged. Relevant to this appeal, the Board found that Petitioner had committed the following violations of the Act:

Section 8(a)(1):

- (1) Directing employees not to file safety complaints, (2) threatening employees with discipline for filing grievances, (3) threatening an employee for requesting union representation, and (4) surveilling Union activities.

Sections 8(a)(1), (3), and (4):

- Retaliating against an employee for pursuing an unfair labor practice charge against the company.

Sections 8(a)(1) and (5):

- (1) Refusing to provide or unreasonably delaying giving requested information to the Union and (2) unilaterally changing the place at which the parties convene for grievance meetings.

As part of its Order, the Board directed Petitioner to: (1) cease and desist from the unlawful activity, (2) compensate one employee for lost earnings, (3) furnish the requested information to the Union, and (4) rescind its unilateral change of the place where the parties convene for grievance meetings. Petitioner filed a timely petition for review in this court, and the Board cross-petitioned for enforcement. The Union intervened on behalf of the Board.

II. Standard of Review

The Board's decision must be upheld "unless, upon reviewing the record as a whole, we conclude that [its] findings are not supported by substantial evidence, or that [it] acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012). We have made it clear that "the Board is to be reversed only when the record is 'so compelling that no reasonable factfinder could fail to find' to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (quoting *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). And we must "accept all credibility determinations made by the ALJ and adopted by the Board unless those determinations are 'patently insupportable.'" *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (quoting *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000)).

III. Analysis

For the reasons explained below, we find no merit in Petitioner's arguments and, therefore, deny the petition for review and grant the Board's cross-petition for enforcement.

1. Direction Not to File Safety Complaints

The Board found that Petitioner violated section 8(a)(1) when a supervisor instructed employees, during a meeting on safety issues, to submit their complaints regarding safety to management rather than to federal and state authorities. Petitioner does not contest that discouraging safety complaints in this manner is unlawful. Rather, Petitioner challenges the Board's assessment of the credibility of the witnesses who testified about the meeting. In particular, Petitioner points out that one company witness denied that the supervisor instructed employees to submit safety complaints to management. The Board declined to credit this testimony, however, because the person was not at the meeting and, therefore, was an unreliable

witness. Given the record on this matter, we have no basis upon which to second-guess the Board's credibility determinations.

2. Threat of Discharge for Protected Activity

The Board found that, in the aftermath of the aforementioned safety meeting, management representatives threatened Jamie Hayes with discharge for voicing grievances about the company. Petitioner contends that Hayes forfeited protection under the Act because he was loud and belligerent at the safety meeting. It is true that employees may lose their protections under the Act if they "engage[] in 'opprobrious conduct' in the course of otherwise protected activity." *Inova Health Sys.*, 795 F.3d at 86 (quoting *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979)). On the record before it, the Board found that Hayes did not lose his protections under the Act because he never engaged in "opprobrious" conduct when he complained about the company's safety record. Indeed, Petitioner concedes that Hayes' disputed outburst was neither flagrant, violent, nor extreme. Moreover, his behavior did not rise to the level of conduct that has satisfied this standard in the past. The Board's finding is supported by substantial evidence and reasoned decision making.

3. Threat of Discipline for Filing Grievance

The Board found that a supervisor threatened Joshua Peek with "unspecified reprisals" if he pursued a grievance against the company. Petitioner challenges the Board's decision to credit Peek's testimony. We find no merit in Petitioner's claim. The Board's assessment was based on Peek's demeanor at trial and the fact that Peek had little to gain from fabricating a story. Substantial evidence supports the Board's determination.

4. Surveillance of Union Meeting

The Board found that Jeremy Devine, a supervisor, conducted unlawful surveillance of a Union meeting in violation of section 8(a)(1). Substantial evidence supports the Board's finding. The record shows that Devine went out of his way to peer into the room where the Union meeting was being held so that he could observe what was going on. Devine had no legitimate reason to monitor the Union activity, nor was his activity inadvertent. The Board's decision was fully justified.

5. Suspension for Intent to File Grievance

The Board found that Petitioner violated sections 8(a)(3), (4), and (1) when company representatives threatened and suspended Mark Moore for his stated intention to file a grievance. The Union filed an unfair labor practice charge based on the unlawful threats directed at Moore. The Board found that Petitioner then unlawfully suspended Moore based on his earlier protected activity and the grievance filed on his behalf.

Petitioner claims that it disciplined Moore pursuant to its attendance policy, but the Board reasonably found that explanation pretextual, because of both the suspicious timing of the

discipline and the disparate application of the policy. Thus, the Board found that Petitioner failed to demonstrate that the action taken against Moore would have occurred in the absence of his protected conduct. The law is clear that, where an employee's protected conduct is a "motivating factor" for an employer's disciplinary action, the discipline is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would have taken the same action in the absence of protected conduct. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400–03 (1983) (applying framework from *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981)). The Board's determination that Petitioner violated the Act when it threatened and suspended Moore for engaging in protected activity is clearly supported by the record and the applicable law.

6. Threat of Discipline for Requesting Union Representation

The Board found that Petitioner violated section 8(a)(1) when a supervisor threatened to write-up Joshua Preston because he requested Union representation during a meeting with company representatives. The record indicates that Preston was directed to go to Assistant General Foreman Ben Phillips' office, where both Phillips and foreman John Kirk were waiting, along with two other managers. Preston declined to participate in the meeting without union representation. Phillips questioned Preston's need for Union representation, and then told Preston: "if you want wrote up, I can find something to write you up with, and you can come back tomorrow at 4:00 with your union representation." Joint Appendix ("J.A.") 332–33.

The Board found that Phillips' statement unlawfully threatened retaliation against Preston for requesting representation. In the Board's view, the supervisor's comments reflected an explicit threat to Preston that if he insisted on union representation it would lead to retaliatory discipline. In reaching this conclusion, the Board credited Preston's testimony over the contrary testimony offered by the company's witnesses. We have no ground to disturb the Board's credibility determinations. And we hold that the Board's judgment was perfectly reasonable and consistent with established law.

7. Refusal to Furnish Information to the Union

The Board found that Petitioner violated sections 8(a)(5) and (1) by failing to timely respond to several requests for information from the Union. Pursuant to the Act, unions are entitled to information relevant to negotiations and other union responsibilities. *See Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). "Information related to the wages, benefits, hours, [and] working conditions . . . of represented employees is presumptively relevant," *id.*, because it is "central to the 'core of the employer-employee relationship,'" *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 359 n.26 (D.C. Cir. 1983) (citation omitted) (internal quotation marks omitted). An employer's failure to furnish such information to the employees' bargaining agent is a violation of the duty to bargain.

The record indicates that Petitioner both delayed providing and failed to provide the Union with requested information regarding the company's attendance policy. Substantial evidence

supports the Board's finding that Petitioner's initial defense, that no responsive information existed, was untrue. Furthermore, although some of the information was eventually furnished after a long delay, the company offered no explanation as to why it could not locate the responsive information for over a year or how it eventually did. The Board also properly rejected Petitioner's claim that its failure to provide some information was justified because the Union already had the information. *See, e.g.*, *Lansing Automakers Fed. Credit Union*, 355 N.L.R.B. 1345, 1352 (2010) (absent special circumstances, "an employer may not refuse to furnish relevant information on the grounds that the union has an alternative source or method of obtaining the information").

Finally, substantial evidence supports the Board's finding that Petitioner unlawfully failed to provide the Union with requested information about the company's use of contractors at Monongalia County Coal. The Union explained that it sought the information to monitor compliance with the collective-bargaining agreement and to evaluate grievances. The Union's request was unsurprising because, as the record establishes, the alleged performance of bargaining-unit work by contractors was an ongoing source of disagreement between the parties, and also the subject of multiple grievances and arbitrations. On the record before it, the Board found that the Union's request was relevant to its bargaining obligations and reasonable, and that Petitioner's claims that the information was unavailable or too burdensome to produce were unsupported by the record. The Board's decision is fully supported by the record and consistent with applicable law.

8. Unilateral Change to the Location for Grievance Meetings

Petitioner concedes that it unilaterally changed the location where the parties convene for step-three grievance meetings, moving the meetings from multiple employee worksites to one central location. The change was never discussed with the Union even though it resulted in employees having to drive farther to attend grievance meetings. A unilateral change in a condition of employment that is a mandatory subject of bargaining is a violation of the duty to bargain. This is so because it results in "a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). However, to violate the Act, a unilateral change must be "material, substantial, and significant." *Pub. Serv. Co. of N.M. v. NLRB*, 843 F.3d 999, 1007 (D.C. Cir. 2016) (citation omitted).

Petitioner contends that a change in the place at which grievance meetings are held is "*de minimis*" and, therefore, not subject to the duty to bargain. The Board disagreed, finding that a "20–30 minute drive, unpaid (or 15–20 minutes on inhospitable back roads), and likely a return trip, is hardly a de minimis change, compared to the convenience of attending a meeting where one works." J.A. 148.

The record shows that employees had relied extensively on the parties' established policy of having meetings at the portal where the workers were assigned. Petitioner's unilateral change of the location created a burden for a number of employees. The Board reasonably found that the change was not insignificant, and also that it was a mandatory subject of bargaining. The Board's conclusions are supported by substantial evidence and consistent with established law. Therefore,

the Board did not err in finding that Petitioner violated its duty to bargain when it unilaterally changed the location where the parties convene for step-three grievance meetings.

IV. Conclusion

The Board's Decision and Order are supported by substantial evidence, sound credibility determinations, reasoned decision-making, and proper application of the law. Therefore, we deny the petition for review 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 hearing 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