United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1145 **September Term, 2000**

Lone Star Steakhouse & Saloon **Filed On: January 29, 2001** [572159]

of New Jersey, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Petition for Review of an Order of the
National Relations Labor Board

Before: **HENDERSON, ROGERS** and **TATEL,** *Circuit Judges.*

J U D G M E N T

This case was heard on the record from the National Relations Labor Board and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). Accordingly, for the reasons set out in the accompanying memorandum, it is

ORDERED that the petition for review be denied and the cross-petition for enforcement be granted.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:

Mark J. Langer

Clerk

Lone Star Steakhouse & Saloon of New Jersey, Inc. v. NLRB, No. 00-1145

MEMORANDUM

Petitioner Lone Star Steakhouse & Saloon of New Jersey, Inc. (Lone Star) seeks review of an order of the National Labor Relations Board (NLRB or Board) requiring it to bargain with Local 54, Hotel Employees, Restaurant Employees International Union, AFL-CIO (Union). Lone Star contends that the Board's determination of the bargaining unit was inappropriate and that impermissible electioneering activity tainted the election. The Board in turn cross-petitions for enforcement. For the reasons set forth below, we deny Lone Star's petition and grant the Board's cross-petition for enforcement.

I. BACKGROUND

Lone Star engages in the operation of casual "Texas-style" steakhouse restaurants throughout New Jersey. On April 8, 1999 the Union filed a petition with the Board seeking certification as the representative of "all line cooks, prep cooks, cooks, dishwasher/potwashers, saute cooks and prep persons" (back of the house employees) employed by Lone Star at its restaurant located at 3117 Fire Road, Egg Harbor Township, New Jersey (Restaurant). Joint Appendix (J.A.) at A-54. At a hearing on the appropriate bargaining unit, Lone Star argued that only a "wall-to-wall" unit–including back of the house employees as well as servers, bartenders and hosts (front of the house employees)–was

appropriate. The Regional Director of the NLRB agreed with the Union[1] and the Board denied Lone Star's request for review.

A representation election was held on June 23, 1999 with a majority of the votes cast for the Union. Lone Star, however, challenged the election result, alleging that the Union engaged in impermissible electioneering activities on the day of the election.[2] The Regional Director overruled Lone Star's objections without holding a hearing and the Board again declined review of the Director's decision.

After the Union was certified as the authorized representative of the back of the house employees, Lone Star refused to bargain with it, prompting the filing of an unfair labor practice charge. The Board found Lone Star in violation of section 8(a)(5) and (1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(5), (1), and ordered Lone Star to bargain with the Union. *See Lone Star Steakhouse and Saloon of New Jersey, Inc.*,

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[1]The Director defined the bargaining unit as follows:

> All full-time and regular part-time line cooks, prep cooks, cooks, dish washers, pot washers, sauté cooks, prep persons and [the] back of the house key employee employed by the Employer at its Egg Harbor Township, New Jersey restaurant, excluding bartenders, hosts, hostesses, servers, and guards and supervisors as defined in the Act.

J.A. at A-61.

[2]Specifically, Lone Star contended that (1) a Union representative's automobile parked at the back of the Restaurant near an entrance to the polling place displayed on the window a "VOTE YES LOCAL 54" sign and that (2) two or three Union agents had talked to one of the eligible voters in front of the Restaurant.

330 N.L.R.B. No. 129, 2000 WL 281871 (Mar. 13, 2000). This petition for review and the cross-petition for enforcement followed.

II. DISCUSSION

We must decide whether the Board erred in its determination of the appropriate bargaining unit and in refusing to require a new election or hold a hearing in view of allegations of impermissible electioneering activities. We discuss each issue separately.

A. The Appropriate Unit

Pursuant to section 9(b) of the NLRA,[3] the NLRB "exercises broad discretion when determining the composition of the bargaining unit," *B B & L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995) (per curiam) (citing *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)), and the court will "uphold the Board's exercise of discretion unless its action is unreasonable, arbitrary or unsupported by the evidence." *Id.* (citations omitted).

Lone Star first argues that the Board's decision is not supported by substantial evidence.[4] We disagree.

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[3]Section 9(b) of the NLRA, as codified, provides: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." 29 U.S.C. § 159(b).

[4]The substantial evidence standard is familiar:

> To meet the requirement of "[s]ubstantial evidence," the Board must produce "more than a mere scintilla" of evidence; it must present on the record "such

When the Board defines an appropriate bargaining unit,

> [t]he central test is whether the workers share a "community of interest," that is, "'substantial mutual interests in wages, hours, and other conditions of employment.'" *Allied Chem. & Alkali Workers*, 404 U.S. at 172 (citation omitted); *see also Food Store Employees Union v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969). The Board considers several factors, but "there are no per se rules" to resolve unit determinations: "we examine the community of interest of the particular employees involved, considering their skills, duties, and working conditions, the Employer's organization and supervision, and bargaining history, if any, but no one factor has controlling weight." *Airco, Inc.*, 273 N.L.R.B. 348 (1984).

Bentson Contracting Co. v. NLRB, 941 F.2d 1262, 1265 (D.C. Cir. 1991); *accord Skyline Distribs., a Div. of Acme Mkts., Inc. v. NLRB*, 99 F.3d 403, 406-07 (D.C. Cir. 1996); *see also Washington Palm, Inc.*, 314 N.L.R.B. 1122 (1994). Moreover, under section 9(b), "[t]he Board need only select an appropriate unit, not the most appropriate unit." *Cleveland Constr., Inc. v. NLRB*, 44 F.3d 1010, 1013 (D.C. Cir. 1995) (citation omitted); *accord Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 236 (D.C. Cir. 1996).

> relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), taking into consideration the "record in its entirety . . . including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Our review for substantial evidence also must ensure that the Board has "draw[n] all those inferences that the evidence fairly demands." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378-79 (1998).

Pacific Micronesia Corp. v. NLRB, 219 F.3d 661, 665 (D.C. Cir. 2000).

Our review of the record convinces us that substantial evidence supports the Board's decision here. The Director appropriately concluded that the compensation, duties, skills and supervision of the back of the house employees support the conclusion that they share "substantial mutual interests in wages, hours, and other conditions of employment." *Bentson Contracting*, 941 F.2d at 1265 (citations and internal quotation marks omitted). For example, the Director pointed out that back of the house and front of the house employees are subject to different compensation schemes: the former receive only hourly wages while the latter rely primarily on tips as their income. Moreover, back of the house employees spend most of their time preparing food, cooking, grilling and washing dishes. In contrast, front of the house employees, although performing some sidework (which includes stocking napkins, polishing and stocking kabob forks, refilling cinnamon sugar containers, making coffee and tea, filling ice and stocking butter), spend most of their time taking customer orders, retrieving and serving food and collecting payments. Furthermore, as the Director recognized, back of the house employees participate in "the behind-the-scenes aspects of the restaurant's business dealings, and [these tasks] involve skills different than those needed by front of the house employees, who have significant guest contact and in most cases, handle money." J.A. at A-60. Finally, although subject to the overall supervision of the general manager and the manager on duty, the back of the house employees are more specifically accountable to the kitchen manager, who prepares their

weekly schedules, gives them quarterly performance evaluations and is present during most of their shifts.

Based on this record, we cannot say that the Director's decision to treat only the back of the house employees as an appropriate bargaining unit was not supported by substantial evidence or was arbitrary and capricious.

B. Impermissible Electioneering

We turn now to the electioneering issue. “The Board's discretion to assess the propriety and results of representation elections is broad,” *North of Mkt. Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1167 (D.C. Cir. 2000), and “a court will overturn a Board decision to certify an election in only the rarest of circumstances.” *Id.* (citing *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445 (D.C. Cir. 1996)). “A party seeking to overturn an election bears a heavy burden of showing that the election is invalid.” *Id.* (citing *Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 861 (D.C. Cir. 1993)). Lone Star has not met its “heavy burden” here.

Although the Board “attempts, as near as possible, to hold elections in a laboratory condition,” *id.* at 1167-68 (citing *NLRB v. Schwartz Bros., Inc.*, 475 F.2d 926, 930 (D.C. Cir. 1973); *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948)), it “does not prohibit all electioneering in the vicinity of the polling place on election day.” *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 269 (D.C. Cir. 1998). “Indeed, the Board has recognized that 'it is unrealistic to expect parties or employees to refrain totally from any and all types of

electioneering in the vicinity of the polls.'" *Id.* (quoting *Boston Insulated Wire & Cable Co.*, 259 N.L.R.B. 1118, 1118 (1982), *enforced*, 703 F.2d 876 (5th Cir. 1983); citing *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 732 (9th Cir. 1985)). Accordingly, the Board "considers a range of factors and circumstances in determining whether electioneering activity is sufficient to justify overturning an election." *Id.* It first "determines whether the activity violates the *Milchem* rule prohibiting 'prolonged conversations between representatives of any party to the election and voters waiting to cast ballots.'" *Id.* (quoting *Milchem, Inc.*, 170 N.L.R.B. 362, 362-63 (1968)). If so, it orders a new election. When, however, "an employer objects to electioneering not encompassed within the *Milchem* rule, the Board will overturn the election only if the electioneering substantially impaired the exercise of free choice." *Id.* (citations and quotation marks omitted). In those cases, the Board considers a variety of factors, including "the nature and extent of the electioneering, whether it happened within a designated 'no electioneering' area, whether it was contrary to the instructions of the Board's election agent, whether a party to the election objected to it, and whether a party to the election engaged in it." *Id.* (citations omitted).

Here, Lone Star alleges two incidents of impermissible electioneering: a conversation among two or three Union agents and an eligible voter and the display of a pro-Union sign in the Restaurant's parking lot. As to the first, Lone Star argues that Union conduct violated the *Milchem* rule. We disagree. *Milchem* applies only when the alleged conversation

occurs at the polling place or while an employee is "waiting to cast" his ballot. *See id.* at 269-70; *Boston Insulated Wire & Cable Sys., Inc. v. NLRB*, 703 F.2d 876, 881 (5th Cir. 1983). Here, the Lone Star employee was not at the polling place nor, apparently, waiting in line to cast his ballot, making *Milchem* inapplicable.[5]

As to the second incident, Lone Star relies on *NLRB v. Carroll Contracting & Ready-Mix, Inc.*, 636 F.2d 111 (5th Cir. Unit B Feb. 1981). The case is easily distinguished. In *Carroll Contracting*, the Fifth Circuit described the objectionable conduct as follows:

> The undisputed evidence revealed that before the polls opened, two former Carroll employees wearing "Vote Teamsters" signs on their hats and enlarged reproductions of the ballot with an "X" marked in the "Yes" box pinned on their shirts, positioned themselves in the parking lot where the line of waiting voters formed. This line was approximately 25 feet from the polls. At one time there were as many as 45 employees waiting to vote. As the line of

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[5]Lone Star's reliance on *Star Expansion Indus. Corp.*, 170 N.L.R.B. 364 (1968), and *NLRB v. McCarty Farms, Inc.*, 24 F.3d 725 (5th Cir. 1994), is misplaced. Although the Board in *Star Expansion* stated that it "prohibits electioneering at or near the polls," 170 N.L.R.B. at 365, the decision turned on the fact that the union agent electioneered within an area declared a no-electioneering zone by the Board's election agent. *See Marvil Int'l Sec. Serv. Inc.*, 173 N.L.R.B. 1260, 1260 (1968) (describing *Star Expansion*'s holding as prohibiting electioneering in established no-electioneering areas).

McCarty Farms is distinguishable because the communication there occurred with employees who had to wait in line outside of the polling area because the voting line had become too long. Under the circumstances, the Fifth Circuit reasoned "[o]nce the polls opened, the employees waiting outside in line to vote became a part of the polling place, and were entitled to the safeguards against interference espoused by *Milchem*." *See McCarty Farms*, 24 F.3d at 731. The record does not manifest whether the Lone Star employee had already voted or was about to vote.

> voters passed them by, both men urged the employees to vote for the union and repeatedly gestured to the "Yes" box on the ballot pinned to their shirt. These activities continued throughout the polling hours.

Carroll Contracting, 636 F.2d at 112-13. Here, Lone Star made no showing that any voters waiting in line to vote saw the sign; in fact, Lone Star failed to demonstrate that any eligible voters even saw the sign. Under such circumstances, we cannot say that the conduct substantially impaired the exercise of free choice by Lone Star employees. Thus, the Director acted reasonably in overruling Lone Star's objection. *See Boston Insulated*, 703 F.2d at 878 (upholding Board's decision not to order new election even though "union agents passed out a campaign leaflet and spoke to employees as the employees entered the building through either the main entrance" or through glass-paneled doors ten feet away from the polling place).

For the reasons set forth above, we deny Lone Star's petition for review and grant the Board's cross-petition for enforcement.