United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1250 **September Term, 2002**

Filed On: September 30, 2002 [704939]

Westchester Iron Works Corp.,
Petitioner

v.

National Labor Relations Board,
Respondent

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

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

J U D G M E N T

This cause was considered on the record compiled before the National Labor Relations Board and on the briefs and oral arguments of counsel. For the reasons set forth in the attached memorandum, it is

ORDERED and **ADJUDGED** that the petition for review by Westchester Iron Works is denied, and the cross-application for enforcement by the National Labor Relations Board is granted.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.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 rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

Westchester Iron Works Corp. v. National Labor Relations Board

MEMORANDUM

Petitioner Westchester Iron Works Corporation petitions for review of a decision of the National Labor Relations Board finding that it engaged in unfair labor practices in violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1) and (3). Although it takes only "substantial evidence" to support the findings of the Board, *see* 29 U.S.C § 160(e), the record in this case contains far more than substantial evidence that the petitioner egregiously disregarded the commands of the NLRA.

First, Westchester admits that its president, Vincent Sergi, directed employees not to speak to union representatives. Although petitioner claims that this direction represented nothing more than an admonishment not to waste work time, substantial evidence supports the Board's conclusion that the order was both too general (not limited to work hours) and too specific (targeting only discussions with union representatives) to constitute a reasonable limit on employees' use of work time. It therefore violated NLRA § 8(a)(1). *See Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510-11 (8th Cir. 1993).

Second, corroborated testimony, unrefuted by the petitioner, supports the Board's finding that Sergi instructed employees to "beat [union representatives] in the head" and to hit one of them in the head with a sledgehammer. Notwithstanding petitioner's effort to downplay these threats as a "somewhat strongly worded encouragement to employees not to let the Union push them off the job," Pet'r Br. at 25, the Board properly found Sergi's version of events less than credible and rightly concluded that Westchester had directed its employees to engage in physical violence toward union representatives, in violation of NLRA § 8(a)(1). *See, e.g.*, *NLRB v. American Thread Co.*, 204 F.2d 169, 170 (5th Cir. 1953); *Beverly California Corp.*, 326 N.L.R.B. 153, 208 (1998).

Third, ample evidence supports the Board's finding that Westchester violated § 8(a)(1) by threatening employees with discharge because they spoke with the union and filed state prevailing wage complaints with the New York City Office of the Comptroller, by unlawfully interrogating employees regarding the filing of those complaints, by warning employees to withdraw the complaints and to solicit withdrawals from other employees, and by threatening employees that it would call the Immigration and Naturalization Service unless they withdrew the complaints. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895-96 (1984); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-20 (1969); *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998); *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1365-66 (D.C. Cir. 1997).

Fourth, we affirm the Board's conclusion that petitioner unlawfully discharged employees Juan Cabrera and Cesar Barillas because of their protected activities, in violation of NLRA § 8(a)(1) and (3). The Board's finding that the employees' protected activities were a motivating factor in their dismissal is well supported by evidence including Sergi's threats, the temporal proximity of the discharges to the protected activities, *see, e.g.*, *Traction Wholesale Ctr. Co v. NLRB*, 216 F.3d 92,

99 (D.C. Cir. 2000), and the testimony of Cabrera and Barillas that Sergi discussed the union and the wage complaint, respectively, in the same meetings in which he terminated their employment. The Board reasonably discredited Sergi's testimony that work slowdowns made the discharges necessary regardless of the employees' protected activity. Petitioner admitted that significant work on its subway station project continued until July 1998, two months after Cabrera was discharged, and that the company had a backlog of work valued at between $200,000 and $300,000 at the time of the discharge. Petitioner's claim is further belied by the fact that it replaced the discharged employees **--** both by hiring a series of replacement employees and by putting the company vice president to work in the field. *See Norco Products*, 288 N.L.R.B. 1416, 1421 (1988). The Board's analysis was fully in accord with the familiar *Wright Line* test for evaluating claims of unlawful discharge, *see NLRB v. Transportation Management Corp.*, 462 U.S. 393, 394-95, 402-03 (1983), and its findings of fact are supported by more than substantial evidence.

Finally, petitioner contends that Barillas is excluded from the NLRA's protections because he was a supervisor. *See* 29 U.S.C. § 152(3) and (11). At best, petitioner's evidence might support the following proposition: once in his eighteen years as an employee, Barillas *may* have recommended that the company fire another employee, and the company *may* have done so. Such a speculative claim of authority to discharge is insufficient to establish that an employee was a supervisor. *See Micro Pacific Development, Inc. v. NLRB*, 178 F.3d 1325, 1334 (D.C. Cir. 1999). In any event, even this speculative claim is disputed: the petitioner's own vice president testified that Barillas never had authority to discharge employees, while Barillas denied ever firing another employee or recommending that one be fired. Furthermore, substantial evidence supports the Board's conclusion that Barillas did not, using independent judgment, responsibly direct other employees; rather, he simply followed "detailed orders and regulations issued by the employer." *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 714 (2001). Thus, the Board reasonably concluded, on substantial evidence, that Barillas was not a supervisor.

For the foregoing reasons, we uphold the decision of the Board in all respects.