

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1338

September Term, 2002

Filed On: October 24, 2002 [709661]

Sundor Brands, Inc.,
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: EDWARDS,* RANDOLPH, and TATEL, *Circuit Judges*

J U D G M E N T

This cause came to be heard on a petition for review and cross-application for enforcement of an order of the National Labor Relations Board, and was briefed and argued by counsel. It is

ORDERED AND ADJUDGED that the petition for review is hereby granted, and the Board's cross-application for enforcement is denied. Although NLRB's counsel did an outstanding job of parsing the record and offering a viable explanation for the Board's position, the Board's findings do not match counsel's arguments. In *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515 (D.C. Cir. 1999) ("*Sundor I*"), the court rejected a Board finding that the employer's maintenance employees comprise a distinct, separate, and cohesive grouping of employees appropriate for collective-bargaining purposes. In particular, the court held that "three of the six factors upon which the Board relied in reaching its decision are, in whole or in part, without support in the record." *Id.* at 520. The case was therefore remanded "for the Board to reconsider its decision." *Id.*

In *Sundor I*, the court found that there was substantial evidence to support the Board's findings that the employees in the proposed unit had a community of interest distinct from other employees, because (1) they had specialized skills related to the maintenance of plant equipment and (2) they "spend some part of their working day in the maintenance shop." *Id.* at 518. The court also found that, subject to further clarification by the Board, there might be substantial evidence to support the finding that the unit employees earned relatively high salaries. *Id.* at 518 n.**. However, the court found no

* Judge Edwards' concurrence in the judgment is attached.

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substantial evidence to support the Board's findings that the unit employees (1) are responsible for the performance of maintenance tasks, (2) interact frequently with each other, and (3) insofar as they do maintenance work, are supervised separately. *Id.* at 518-20. The court thus concluded that,

[b]ecause there is no suggestion in either the Regional Director's decision or the Board's order affirming it that any of those factors was unnecessary to its decision, we must assume that the Board relied upon each of them. If any one is unsupported by the evidence in the record, therefore, the Board must reconsider its unit determination.

Id. at 519.

On remand, in response to the court's direction to "adequately . . . explain its unit determination," *id.* at 517, the Board cited four factors to justify the disputed bargaining unit: (1) the unit employees' specialized skills related to the maintenance jobs at issue; (2) the relatively high wages earned by the unit employees; (3) the fact that unit employees are supervised, at least in part, separately from production employees; and (4) that, "[s]ignificantly, the level 3 maintenance employees spend a great deal of time working in a shop dedicated to their needs," as if to suggest a strong, separate community of interest among these employees. See *Sundor Brands, Inc. and Int'l Union of Operating Eng'rs, Local 48*, 334 N.L.R.B. No. 100 (July 24, 2001) ("Order"), reprinted in Joint Appendix ("J.A.") 318-24. The record indicates clear substantial evidence to support the first two of these four factors. Although the Board's finding on the third point is arguable, it too appears to be supported by substantial evidence and good reason. However, the fourth factor – relating to time spent by unit employees in the maintenance shop – is entirely unsupported in the record. In *Sundor I*, the court agreed that there was substantial evidence in the record to support the finding that unit employees "spend some part of their working day in the maintenance shop." On remand, rather than resting with this finding, the Board found that, "significantly," unit employees "spend a great deal of time working in a shop dedicated to their needs." This conclusion finds no substantial evidence in the record. There is evidence in the record indicating that the unit technicians spend 75% of the work day on the floor with non-unit employees. Transcript of Proceedings Before the Nat'l Labor Relations Bd., In the Matter of *Sundor Brands, Inc.*, 334 N.L.R.B. No. 100 (July 24, 2001) (No. 22-RC-11374), reprinted in J.A. 87 (statement of Jay Webb). However, the fact that they spend 75% of their work day on the floor emphatically *does not* mean that the other 25% is spent in the maintenance shop. Indeed, the record suggests that the employees' remaining time is spent doing a variety of tasks (including "ordering parts" and "training others") that may not entail use of the maintenance shop. *Id.* at J.A. 87-88. In light of this record, we are again constrained to remand this case, because the

NLRB did not distinguish between the factors upon which it relied. See *Sundor I*, 168 F.3d at 519

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(holding that if any one of the Board's undifferentiated factors is unsupported by the evidence in the record, the Board must reconsider its unit determination).

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:

Michael C. McGrail
Deputy Clerk

EDWARDS, *Circuit Judge, concurring in the judgment*. During oral argument in this case, counsel for the NLRB faced some sharp questioning. Counsel's argument was thoughtful, intelligent, and well focused, so he no doubt left court feeling somewhat bruised by the court's stern interrogation. I was the source of many of the inquiries from the bench, so I want to reassure counsel. The court's pointed questions during oral argument were prompted by the frailty of the Board's position, a position that made little sense in light of the fact that the Board's action was taken pursuant to a remand in *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515 (D.C. Cir. 1999). Counsel presented a quite good argument. However, the Board's findings, which are the subject of this court's review, do not mirror the thoughtful arguments raised by counsel; and there was nothing that counsel could say to overcome the infirmities of the Board's decision. Therefore, once again finding that the sufficiency of the evidence supporting the Board's unit determination is wanting, we must remand the case for further proceedings.