United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1316 **September Term, 2007**

FILED ON: OCTOBER 9, 2007 [1072157]

PACE UNIVERSITY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 06-1337

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

Before: GARLAND and GRIFFITH, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*

J U D G M E N T

This cause was considered on the record from the National Labor Relations Board ("Board") and on the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). It is

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

In two elections, a bargaining unit of transportation employees at Pace University voted to accept union representation by the New York State United Teachers. The Board set aside the first election, held on October 20, 2005, after the union and the university agreed that it was flawed. Following a re-run election, held on January 30, 2006, the Board certified the union as the unit's exclusive representative, but the university refused to bargain, arguing that the second election was also invalid. The Board held this refusal to be an unfair labor practice and ordered the university to bargain with the union.

On appeal, the university challenges the validity of the election on four grounds, none of which persuades us to discount the "wide degree of deference" to which the Board is entitled.

NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946). The university argues that the Board should have held a hearing to address improprieties in the first election. Given the Board's decision to set aside the first election and hold a second, we can find no error, let alone any abuse of discretion, in the Board's determination that no hearing was needed. *See N. of Mkt. Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1166 (D.C. Cir. 2000) (acknowledging that a re-run election is a sufficient substitute for a hearing). The university's suggestion that the taint from the first election somehow invalidated the second not only fails to account for the law of this circuit that "a court will overturn a Board decision to certify an election in only the rarest of circumstances," *id.* at 1167, but also relies entirely on a case from the Seventh Circuit whose facts bear only scant resemblance to those before us. *See NLRB v. Fresh'nd-Aire Co.*, 226 F.2d 737 (7th Cir. 1955) (invalidating re-run election after the Board failed to correct the union-aided misperception that employer's conduct had voided initial election, where the initial election's actual flaw was the egregiously pro-union conduct of a Board agent). The university's resort to a "totality of the circumstances" argument offers nothing new but asks us, in effect, to displace the Board and its expertise with our own judgment, something we may not do. *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1562–63 (D.C. Cir. 1984).

The university also alleges a procedural defect. The Board solicited date proposals for the second election from the university and the union. The university suggested February 28. The university contends that the Board showed pro-union bias by choosing January 30, which it mistakenly argues was the union's suggested date. *See* Appendix at 47 ("[I]t is noted that the [union] initially proposed that the election be conducted in or about the second week of January, during the break between semesters."). The Board did not select the union's suggested date over the university's, but instead chose a date between their proposals.

Without any legal justification for invalidating the second election, the university cannot prevail. 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. R. 41.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk