

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1024

September Term, 2015

FILED ON: JUNE 10, 2016

FLAMINGO LAS VEGAS OPERATING COMPANY, LLC,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 15-1047

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

Before: KAVANAUGH and WILKINS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

This petition for review and cross-application for enforcement of an order of the National Labor Relations Board (Board) was presented to the Court, and briefed and argued by counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the petition for review be **GRANTED IN PART AND DENIED IN PART**, and the Board's cross-application for enforcement be **GRANTED IN PART AND DENIED IN PART**.

Flamingo Las Vegas Operating Company, LLC (Flamingo) seeks review of a National Labor Relations Board (Board) decision finding that Flamingo committed a series of unfair labor practices under the National Labor Relations Act (NLRA) in its response to its security officers' union organizing activities. Specifically, Flamingo challenges the Board's findings that the following were unfair labor practices in violation of Section 8(a)(1) of the NLRA: 1) Flamingo's reprimand of security officer Francis Bizzarro on September 3, 2011; 2) Flamingo's distribution of a flyer featuring a blank union authorization card on or about October 7, 2011; 3) Flamingo's comments and questions during the October 14, 2011 pre-shift meeting; 4) Flamingo's distribution of a flyer featuring the word "BIZARRE" on or around October 16, 2011; 5) the conversation between Flamingo supervisor Eric Golebiewski and security officer Ty Evans

during November 2011; 6) the conversation between Golebiewski and security officer Christopher Rudy in December 2011; and 7) a conversation between Bizzarro and Flamingo's vice-president of operations, Paul Baker.¹ While we conclude that the Board lacked substantial evidence to support its findings that Flamingo's two distributions of the flyers were unfair labor practices, we reject the remainder of Flamingo's challenges.

First, Flamingo challenges the Administrative Law Judge's (ALJ) credibility determinations. Flamingo argues that the ALJ should not have credited Bizzarro's versions of events with regard to his September 3, 2011 reprimand; the October 14, 2011, pre-shift meeting; and Bizzarro's conversation with Baker. Flamingo also challenges the ALJ's credibility determination made with regard to the conversation between Golebiewski and Evans but specifies no error in the ALJ's determination. "We must accept the ALJ's credibility determinations, as adopted by the Board, unless they are patently insupportable." *NLRB v. Creative Food Design, Ltd.*, 852 F.2d 1295, 1297 (D.C. Cir. 1988). Here, none of the ALJ's credibility determinations are "patently insupportable." *Id.* Furthermore, Flamingo's only specific challenge is that the ALJ's decision to discredit portions of Bizzarro's testimony required the ALJ to discredit other portions of Bizzarro's testimony that conflicted with other witnesses' testimony. *See, e.g.*, Pet'r's Br. at 39-40. However, "[t]he trier of fact is surely entitled . . . to credit some but not all of a witness's testimony, particularly when he must resolve conflicts among witnesses none of whom seems entirely reliable." *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 825 (D.C. Cir. 2001). Accordingly, we reject Flamingo's challenge to the ALJ's credibility determinations.

Flamingo also contends that the Board's findings are not supported by substantial evidence. "As we have noted many times before, our role in reviewing an NLRB decision is limited. We must uphold the judgment of the Board unless, upon reviewing the record as a whole, we conclude that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 646-47 (D.C. Cir. 2013) (quoting *Wayview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011)). "In reviewing the Board's conclusions, '[w]e ask not whether [petitioner's] view of the facts supports its version of what happened, but rather whether the Board's interpretation of the facts is reasonably defensible.'" *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (quoting *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 938 (D.C. Cir. 1998)).

The Board's finding that Flamingo's reprimand of Bizzarro on September 3, 2011 was an unfair labor practice is supported by substantial evidence. "Section 8(a)(1) of the NLRA prohibits an employer's interference with, or restraint or coercion of, the rights of employees to organize and join unions, bargain collectively, and engage in certain other 'concerted activities.'" *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 930 (D.C. Cir. 2013) (quoting 29 U.S.C. § 157). "An employer's statement violates the NLRA if, considering the totality of the circumstances, the statement has a reasonable tendency to coerce or to interfere with those rights." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). Bizzarro testified that he objected to Flamingo's new customer service initiative as discouraging to his fellow security officers. After

¹ Flamingo withdrew its challenge to the Board's remedy in its Reply. *See* Reply Br. at 10.

Bizzarro's objection, Larry Myatt, one of Bizzarro's superiors, threatened Bizzarro with unspecified "consequences" if he did not stop "inciting the men." Tr. 224:25-225:2, D.A.² 66. These unspecified reprisals would reasonably interfere with an employee's rights, *cf. Ozburn-Hessey Logistics, LLC v. NLRB*, 605 F. App'x 1, 3 (D.C. Cir. 2015), and the Board's finding is supported by substantial evidence.

Substantial evidence also supports the Board's findings that Flamingo violated Section 8(a)(1) during the October 14, 2011 pre-shift meeting by conducting an unlawful interrogation, soliciting grievances, promising benefits, and threatening to enforce rules more strictly. The Board received testimony that the October 14, 2011 pre-shift meeting ran longer than usual, occurred shortly after the union organizing activity began, differed in substance from other meetings, and began with a question about union sympathies. These factors support a finding of unlawful interrogation. *See Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835-36 (D.C. Cir. 1998). The Board also received testimony that during the meeting, Golebiewski identified individuals in the past whom he had helped, asked other individuals what problems they were experiencing, and offered to look into fixing those problems, supporting a finding of solicitation of grievances. *See Traction Wholesale Ctr.*, 216 F.3d at 103. Additionally, Golebiewski announced during the meeting that an unpopular supervisor would be transferred, providing substantial evidence for the Board's finding that, during the meeting, Flamingo unlawfully promised improved terms and conditions of employment. *See Perdue Farms*, 144 F.3d at 836. Finally, Bizzarro testified that Golebiewski informed the security officers that he would no longer be able to "bend the rules" to save their jobs, Tr. 237:16, D.A. 69, supporting a finding that Golebiewski threatened to enforce rules more strictly. *See Tasty Baking Co.*, 254 F.3d at 124-25.

The Board's findings that three conversations violated Section 8(a)(1) of the NLRA are also supported by substantial evidence. First, the Board found that Golebiewski's conversation with Evans was an interrogation. This is supported by Golebiewski's status as Evans's superior officer, and Golebiewski's asking Evans for his opinion about the union. *See Perdue Farms*, 144 F.3d at 835-36. The Board also found that Golebiewski threatened Rudy with discipline. Rudy testified that Golebiewski told him that if a union were in place, Golebiewski "would have to write [Rudy] up" for his conduct. Tr. 359:25-360:1, D.A. 100. Accordingly, the Board's finding is supported by substantial evidence. *See Tasty Baking Co.*, 254 F.3d at 124-25. Finally, the Board found that the conversation between Baker and Bizzarro was an accusation of disloyalty amounting to a threat of termination. According to Bizzarro, Baker accused Bizzarro of betrayal. Such statements provided the Board with substantial evidence to support its finding. *See Hialeah Hosp.*, 343 NLRB 391, 391 (2004).

However, the Board's findings that the distribution of the two flyers violated Section 8(a)(1) of the NLRA because the flyers created impressions of surveillance are not supported by substantial evidence. "The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance." *Mountaineer Steel*,

² "D.A." refers to the Deferred Appendix.

Inc., 326 NLRB 787, 787 (1998), *enforced NLRB v. Mountaineer Steel, Inc.*, 8 F. App'x 180 (4th Cir. 2001). The Board found that the October 7, 2011 flyer created an impression that Flamingo was surveilling employees' union organizing and other concerted activities. The flyer reproduced the union authorization card that Bizzarro handed out to the employees and circled the spaces where employees would sign. The flyer also included the following advice: "Don't sign away your signature. You're giving authority to a union you know nothing about by signing these cards." Tr. 235:23-25, D.A. 69. Flamingo obtained the card from an employee who turned it over voluntarily. The only evidence supporting the Board's finding appears to be that Flamingo reproduced the authorization card. Although Flamingo did not explain to employees how it came to possess the card, there was no evidence that the union organization activities were conducted in secret, or that the employees intended to hide their participation in the organizing activities. No reasonable employee would assume, by the simple reproduction of a union authorization card during an open campaign for unionization, that the employer surveilled union activities.³

Similarly, although Flamingo's contention that the word "BIZARRE" in the October 16, 2011 flyer was not intended to reference Bizzarro is laughable, the Board's conclusion that such a reference would create an impression of surveillance is not supported by the record. The ALJ acknowledged that Bizzarro's role in union organization was an "open secret." D.A. 272. No employee would reasonably assume that Flamingo was monitoring the union organizing activities solely because of this flyer. Finally, an artless pun on an employee's name without suggesting adverse consequences would not otherwise reasonably coerce employees in the exercise of their Section 7 rights. *Cf. Trailmobile Trailer, LLC*, 343 NLRB 95, 95-96 (2004). Accordingly, we grant Flamingo's petition for review and deny the Board's petition for enforcement as to the two flyers.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate 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(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

³ Judge Wilkins would find that substantial evidence supports the Board's finding that distribution of the October 7, 2011 flyer created an impression of surveillance. Bizzarro testified that he began distributing the blank union authorization cards "about a week" before the flyer was circulated. Tr. 235:16, D.A. 69. Furthermore, the evidence in the record demonstrates that management did not discuss the campaign openly until the October 14, 2011 pre-shift meeting. Finally, Flamingo did not disclose to the employees how it obtained the union authorization card, which would reasonably cause the employees to fear their activities were under surveillance.