United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1178 **September Term, 2016**

FILED ON: OCTOBER 21, 2016

LIFESOURCE,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 15-1201

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

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

JUDGMENT

This case was considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has afforded 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 **DENIED** and the Board's cross-application for enforcement be **GRANTED**.

LifeSource challenges the Board's administration of a representation election. In March 2012, certain employees at a LifeSource facility voted to be represented by Local 881, United Food and Commercial Workers. LifeSource filed objections to the election. A Board Regional Director then conducted an investigation and recommended overruling the objections without a hearing. After a review process interrupted by *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board eventually adopted the Regional Director's findings and recommendations and certified the union. LifeSource refused to bargain, and the Board issued a Decision and Order in June 2015 finding that LifeSource violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), (1), and ordering LifeSource to recognize and bargain with the Union. We uphold the Board's decision.

This court reviews the Board's Decision and Order for abuse of discretion. *U-Haul Co. of Nev. v. NLRB*, 490 F.3d 957, 961 (D.C. Cir. 2007). "On questions regarding representation, we accord the Board an especially wide degree of discretion." *Id.* (quoting *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996)).

According to LifeSource, the Board should have at least held an evidentiary hearing, or even better invalidated the election. To get a hearing, the objecting party must produce "specific evidence which prima facie would warrant setting aside the election." *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970) (quoting *U.S. Rubber Co. v. NLRB*, 373 F.2d 602, 606 (5th Cir. 1967)). To set aside an election, "the objecting party must produce 'specific evidence' that the election was improperly conducted and that the acts complained of 'interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.'" *Id.* at 827 (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)).

The Board did not abuse its discretion in concluding that LifeSource failed to make a prima facie showing of any material effect on election results. LifeSource presented an affidavit from one of its election observers showing three supposed flaws in the election procedure: the election observers briefly left the voting area twice; voters could see the official list tracking who had already voted; and the Board agent briefly left the voting area and later could not remember whether she brought the unmarked ballots with her. Those facts—which the Board accepted—do not indicate any effect on voters' choices or the vote tally. LifeSource hypothesizes various forms of tampering that could have occurred as a result of the alleged flaws, but that speculation does not amount to the "specific evidence," *id.* at 828, necessary to warrant a hearing. LifeSource also contends that the flaws destroyed the ideal "laboratory conditions" to which the Board aspires, but a party objecting to deviations from election procedures must still "show that such a deviation had a material effect on the election such as an impact on an individual vote." *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1123 (D.C. Cir. 2012). LifeSource failed to show that here. The Board was therefore within its discretion to conclude that LifeSource's objections did not warrant a hearing, much less a new election.

LifeSource makes several additional arguments, none of which saves its case. First, closer scrutiny because of the three flaws' cumulative effect and the election's close result does not transform LifeSource's hypothetical harms into specific evidence. Second, LifeSource argues that the Board gave its claims only conclusory consideration. Nothing, however, about the Regional Director's report or the Board's review calls into question the "strong presumption of regularity" that the Board receives. *Nat'l Small Shipments Traffic Conference, Inc. v. Interstate Commerce Comm'n*, 725 F.2d 1442, 1450 (D.C. Cir. 1984). Third, LifeSource requests access to compulsory process, but it made no proper application to the Board for a subpoena, and it identifies no legal entitlement to one here. Fourth, "post-election turnover [of employees] is an insufficient ground to set aside an election." *Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 133 (D.C. Cir. 2004) (quoting *Avis Rent-A-Car Sys., Inc.*, 285 N.L.R.B. 1032, 1033 (1987), *enforced*, 849 F.2d 599 (3d Cir. 1988)). Finally, no authority provides that elections become invalid merely because substantial time has passed during Board and judicial review.

Accordingly, we deny LifeSource's petition for review and grant the Board's cross-application for enforcement.

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(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk