United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1074

September Term, 2016

FILED ON: MARCH 3, 2017

AMPERSAND PUBLISHING, LLC,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, DOING BUSINESS AS SANTA BARBARA NEWS-PRESS,
RESPONDENT

GRAPHICS COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
INTERVENOR

Consolidated with 15-1130

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

No. 15-1082

AMPERSAND PUBLISHING, LLC, DOING BUSINESS AS SANTA BARBARA NEWS-PRESS,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 15-1154

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

Before: KAVANAUGH and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

These cases were considered on the record from the National Labor Relations Board and the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is hereby

ORDERED and **ADJUDGED** that the petitions for review be **DENIED** and the Board's cross-applications for enforcement be **GRANTED**.

In 2000, Ampersand Publishing, LLC (Ampersand) acquired a daily newspaper known as the Santa Barbara News-Press (the News-Press or the Paper). Six years later, the Paper's news-gathering staff selected the Graphic Communications Conference, International Brotherhood of Teamsters (the Union) as their collective bargaining representative. The Union has since brought a bevy of unfair labor practice (ULP) charges against Ampersand, including the charges at issue here.

The first set of ULP charges (the First Case) stemmed from Ampersand's efforts to curb employee protests in 2006 and 2007. The Board sustained many of the ULP charges in the First Case, *see Ampersand Publ'g, LLC*, 357 NLRB 452 (2011), but we reversed the Board's decision, *see Ampersand Publ'g., LLC v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012) (*Ampersand I*).

The second set of ULP charges is before us in Case Number 15-1074 (the Second Case), where the Union alleged—and the Board found—that Ampersand had violated the National Labor Relations Act (NLRA or Act) by: (1) telling employees that they could speak with Ampersand's attorneys if Board investigators were bothering them; (2) telling employees that management's statements in a mass employee meeting about terms and conditions of employment must be kept secret; (3) suspending and then discharging an employee for serving on the Union's bargaining committee; (4) shifting work that would ordinarily be performed by unionized employees to (non-unionized) independent contractors without consulting the Union; (5) changing the terms and conditions of employment for unionized writers without first negotiating with the Union; (6) failing to give the Union the information it needed to represent workers effectively; and (7) violating its obligation to bargain with the Union in good faith.

The third set of ULP charges is before us in Case Number 15-1082 (the Third Case), where the Union alleged—and the Board found—that, in the course of preparing for the administrative trial in the Second Case, Ampersand subpoenaed copies of confidential statements that Ampersand's current and former employees had provided to the Board, as well as any personal notes the witnesses made in preparation for trial. By serving the subpoenas, the Board held, Ampersand violated the employees' NLRA right to be free from a coercive work environment.

Ampersand has challenged both of the Board's decisions on First Amendment grounds, arguing that: (1) Ampersand is largely immune from ULP charges brought by the Union,

including those at issue in both the cases now before us, because the Union had a history of attempting to seize editorial control of the News-Press (the broad First Amendment argument); and (2) Ampersand is immune from the ULP charges that stem from Ampersand's refusal to bargain over reporter staffing decisions because Ampersand has a First Amendment right to choose the individuals who write articles for the paper (the narrow First Amendment argument).

As the Board has observed, our court lacks jurisdiction to consider Ampersand's broad First Amendment argument (that the entire Union is so tainted by its errant foray into editorial control that all of its ULP charges must be rejected). Section 10(e) of the NLRA provides that, when an argument has "not been urged before the Board," a reviewing court lacks jurisdiction to consider the argument absent "extraordinary circumstances." 29 U.S.C. § 160(e); *see W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008); 29 C.F.R. § 102.46(b)(2) (establishing that any exception "which is not specifically urged" before the Board is "waived"). Having considered all of the evidence in the record, as well as the documents that Ampersand submitted belatedly, we conclude that Ampersand failed to urge the broad First Amendment objection before filing its appeals in this court.

To urge an objection before the full Board, a litigant must raise the objection in a timely fashion. Thus, if a litigant objects to the results of a trial before an Administrative Law Judge (ALJ), the litigant must file an "exception" to the ALJ's decision. 29 C.F.R. § 102.46(b)(2), (g). Alternatively, if a litigant has no problem with the ALJ's decision but believes that the full Board made a mistake in reviewing it, the litigant must file a motion seeking reconsideration or rehearing of the Board's decision. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). In addition to raising an objection in a timely manner, a litigant must present its objection in sufficiently clear terms to "put the Board on notice" of a specific problem with the ALJ's analysis or the Board's reasoning. *N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011).

Ampersand does not dispute that it failed to raise the broad First Amendment argument in its exceptions to the ALJ's decision or its motion for reconsideration in the Third Case. And we are not persuaded that Ampersand adequately pressed the argument in the Second Case. Ampersand's exceptions did fault the ALJ for characterizing as "Manichean" the Paper's suggestion that News-Press employees were attempting to "[w]rest editorial control from the publisher." 15-1074 J.D.A. 1918. Crucially, however, neither the exceptions nor the supporting brief suggested that the employees' misguided attempt to gain control of the paper immunized Ampersand from any and all ULP charges. *See Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009 (D.C. Cir. 1998) (examining a litigant's exceptions and supporting brief to determine whether an argument had been preserved). To the contrary, the brief argued that Ampersand was immune from a handful of specific ULP charges. *See* Exceptions Br. 43-45. Thus, Ampersand's exceptions did not "put the Board on notice" of the broad First Amendment argument. *N.Y. & Presbyterian Hosp.*, 649 F.3d at 733. Nor did Ampersand raise a broad First Amendment challenge in its motion for reconsideration. *See* 15-1074 J.D.A. 2042 n.5. Ampersand therefore waived its broad First Amendment argument.

No "extraordinary circumstances" justify Ampersand's failure to preserve its broad constitutional argument. 29 U.S.C. § 160(e). Ampersand contends that it would have been impossible to press the argument before the Board because the argument rests on our decision in *Ampersand I*, which postdates Ampersand's exceptions to the ALJ decisions now under review. In *Ampersand I*, we held that Ampersand was free to discipline employees who had participated in pro-Union activities if the "focus" of those activities was taking control over the content of the Paper. 702 F.3d at 58. We handed down that decision on December 18, 2012—after Ampersand had argued these cases to the Board and briefed its motion for reconsideration. Even assuming our decision fortified its position, nothing prevented Ampersand from timely raising before the Board the very arguments that it presented to this court in its *Ampersand I* briefs.

Ampersand also claims that it would have been futile to raise the challenge because the Board in *Ampersand I* had rejected a version of the same argument. *See NLRB v. Fed. Labor Relations Auth.*, 2 F.3d 1190, 1197 (D.C. Cir. 1993) (extraordinary circumstances existed where the Board had already rejected the argument in an earlier proceeding, making it "futile" to raise again). But the Board's *Ampersand I* decision was decided on a different record. In that case, the Board considered whether evidence of employee conduct between 2006 and 2007 demonstrated that reporters were running an impermissible campaign to wrest editorial control from the Paper's publisher. This case concerns the broader swath of employee conduct between 2006 and 2009. With a larger body of evidence before it, the Board might have been willing to revisit its conclusions in *Ampersand I*. *See* 15-1074 J.D.A. 1762 (ALJ in the Second Case explaining that the Board's *Ampersand I* opinion "contained a significant amount of uncontested background information which underlay the larger picture of the controversy"). Indeed, the Board in *Ampersand I* cautioned that, if post-2007 evidence showed that the Union was unlawfully pressuring the News-Press to change the way it reported the news, the Paper would "not be without recourse." *Ampersand Publ'g, LLC*, 357 NLRB at 458. Thus, putting aside whether the argument itself ultimately would have been found meritorious, we cannot say that it would have been futile for Ampersand to have taken exception to the ALJ's decision of all the ULP charges based on its broad First Amendment argument. We therefore hold that no extraordinary circumstances excused Ampersand's failure to preserve its broad First Amendment argument, and we are without jurisdiction to consider it.

Ampersand's narrower First Amendment argument about reporter staffing, by contrast, is properly before us because Ampersand raised the point during the trial before the ALJ in the Second Case and again in the brief supporting its exceptions to the ALJ's decision. But the argument is unpersuasive on its merits. The Supreme Court has rejected the idea that "any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press." *Associated Press v. NLRB*, 301 U.S. 103, 131 (1937). Thus, the Court has recognized that, while newspapers have complete discretion to select authors for particular articles, and to fire authors who perform unsatisfactory work, they do not have an unfettered right to fire authors for engaging in protected union activities. *See Associated Press*, 301 U.S. at 132 (upholding a Board order reinstating a journalist who was fired for his union affiliation). Nor do news organizations have unilateral say over how to compensate their unionized employees. *See Ampersand I*, 702 F.3d at 58 (acknowledging that, in general, newsroom staff has a right to engage in concerted activity for

the purpose of obtaining higher wages). Consistent with those principles, the Board's decision in the Second Case did not obligate the News-Press to print any particular work a reporter submits, but held that the News-Press could not take a bargaining unit reporter off its payroll without consulting the Union; nor could it remove a reporter in response to legitimate union activities. In the same vein, the News-Press was free to hire individuals of its choosing to write pieces it requested for the paper, but it could not pay those individuals at the rate for freelance rather than unionized employees. Neither of those conclusions offends the First Amendment.

Ampersand has also raised a smattering of non-First-Amendment arguments in both cases. We reject Ampersand's non-First-Amendment arguments in the Second Case for the reasons stated in the Board's brief, with two minor clarifications. First, contrary to the Board's suggestion, there is no evidence that Ampersand had a settled practice of giving reporters merit-based wage increases before 2003. Rather, the evidence establishes that, from 2000 to 2003, Ampersand exercised complete discretion regarding employee raises, and only in 2003 did Ampersand "for the first time in several years" introduce a "structured system" for determining which employees would receive salary increases. Ampersand was obligated to consult the Union before modifying or scrapping that structured system. *NLRB v. Katz*, 369 U.S. 736, 743 (1962) ("[A]n employer's unilateral change in conditions of employment under negotiation is . . . a violation of [the Act].").

Second, in accepting the Board's argument that Ampersand bargained in bad faith, we place weight on the Board's finding that, during the negotiation process, the Union made a genuine effort to leave Ampersand complete control over the editorial content of the paper. The Board observed, for example, that Ampersand's "own bargaining notes state[d] that the 'Union does not disagree that Management has a right to determine the content of the paper,'" and further observed that the Union proposed a collective bargaining agreement that specified that "[n]othing in this provision shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper." 15-1074 J.D.A. 2043, *see id*. at 2048 (reaffirming after *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)). The Board found that, while the Union was trying to respect Ampersand's legal rights, Ampersand for its part was not making a good-faith effort to respect the Union's rights. Ampersand neither explained why it believed that the Union's proposals violated the First Amendment nor undertook to bargain with the Union over issues that had nothing to do with controlling the content of the paper. *See id.* at 2044 (Board explaining that, when the Union proposed language that would give Ampersand editorial control, Ampersand "refused to take 'yes' for an answer"); *id.* at 2048 (reaffirming after *Noel Canning*). We sustain the Board's finding that Ampersand failed to make a "sincere, serious effort" to "reach an acceptable common ground" with the Union. *NLRB. v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981).

Turning to the Third Case, substantial evidence supports the Board's conclusion that, under the totality of the circumstances, Ampersand's issuance of subpoenas to its workers demanding personally annotated copies of the witness statements they had provided to the Board had a reasonable tendency to coerce employees. *See Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 543-44 (D.C. Cir. 2016). The subpoenas were reasonably likely to undermine employees' confidence that their statements to Board investigators would be kept secret; lacking

such confidence, a reasonable employee likely would be less willing to cooperate with Board investigators in the future. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236-42 (1978). And without employee cooperation, the Board would be less effective in vindicating employee rights against any unfair labor practices by Ampersand. *See id.* at 236, 240-41. Moreover, this is not the first time Ampersand has impermissibly subpoenaed employees' confidential statements to Board investigators. The Board previously quashed such subpoenas and ordered Ampersand to post a remedial notice, explaining that witness statements are to be maintained in confidence unless and until the witness testifies at an NLRB trial. *See* 29 C.F.R. § 102.118. In light of that remedial notice, Ampersand's service of the subpoenas at issue here appeared quite deliberate. To a reasonable employee, an employer willing to violate such a squarely applicable Board rule might seem especially prone to retaliate against workers who exercise their NLRA rights. Ampersand's subpoenas risked chilling concerted action, and thereby effectively coerced employees to accept their current working conditions.

For these reasons, we deny the petitions for review and grant the Board's cross-applications for enforcement of its orders.

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