United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1065 **September Term, 2017**

FILED ON: MARCH 27, 2018

T-MOBILE USA, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
INTERVENOR

Consolidated with 17-1111

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

Before: ROGERS and TATEL, *Circuit Judges*, and SENTELLE,* *Senior Circuit Judge*.

J U D G M E N T

This petition for review and the cross-application for enforcement were briefed and argued by counsel for the National Labor Relations Board and counsel for petitioner T-Mobile USA, Inc. 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). It is

ORDERED AND ADJUDGED that the petition for review be denied and the cross-application for enforcement be granted.

Petitioner challenges the Board's Decision and Order that its refusal to bargain with the Communications Workers of America and affiliated Local 1298 ("the Union") over a successor contract violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (5). *T-Mobile USA, Inc.*, 365 NLRB No. 23 (2017). The Board concluded that petitioner's selective bargaining with the Union was contrary to the principles established in *Levitz Furniture Company*, 333 NLRB 717 (2001). In *Levitz*, the Board balanced the competing interests of employees and employers under Section 7 and Section 8 of the Act and determined

that an employer with objective evidence that an incumbent union lacks majority support has two options: withdraw recognition from the union or await the outcome of a secret-ballot election while continuing to honor its bargaining obligations. 333 NLRB at 725, 727. Petitioner, by contrast, upon receiving such objective evidence, decided not to withdraw recognition but instead to bargain selectively with the Union: it suspended negotiations over a successor bargaining agreement but continued negotiating with the Union over interim matters of its own choosing, such as stock grants and use of company vehicles. In petitioner's view, this approach more effectively balances labor stability and employee free choice. *See* Pet'r's. Br. at 14.

The Board provided a fulsome analysis in *Levitz* of the reasoning to support its determination that an employer in petitioner's circumstances must either withdraw recognition from the union or continue to honor its bargaining obligations until the outcome of a special election it could request. 333 NLRB at 723-28. To the extent petitioner contends the Board's determination that petitioner's alternative of partially suspending bargaining destabilizes the bargaining process is contrary to law or unsupported by the record, its challenge fails. Petitioner overlooks, for example, the Board's intent to make withdrawal of recognition a high-stakes option that an employer chooses "at its peril." *Id.* at 725. In overruling *Celanese Corp.*'s good faith test and allowing unilateral withdrawal of recognition only upon showing the union had actually lost majority support, the Board focused on the Act's "fundamental policies" of "protect[ing] employees' right to choose or reject collective-bargaining representatives," "encourag[ing] collective bargaining," and "promot[ing] stability in bargaining relationships." *Id.* at 723. In so doing, the Board pointed to "compelling legal and policy reasons," *id*. at 717, including that "[a]llowing employers to withdraw recognition from majority unions undermines central policies of the Act" by "wrongfully destroy[ing] the parties' bargaining relationship," "frustrat[ing] the exercise of employees free choice," and "disrupt[ing] the bargaining relationship until the union reestablishes its majority status in an election," *id.* at 724. Even if the union wins the election, the Board observed, "its attention has been diverted from its representational functions and its stature as the employees' representative has been weakened." *Id*. at 724.

Applying these principles, the Board reasoned that selective bargaining, as petitioner chose, could enable an employer to act to its own advantage in a manner that undermines the union's ability to be effective. Decision at 2. An employer could limit bargaining "to areas where the employer holds an advantage" and "exclud[e] those subjects on which it may be more likely to give concessions to the union," thereby creating an "unbalanced playing field." *Id.* In the Board's view, the concerns presented by selective bargaining are analogous to those presented by "piecemeal bargaining" during contract negotiations. *Id.* at 3 n.4. The balancing of interests reflected in *Levitz* represents the type of policy decision Congress intended for the Board, not an individual employer, to make. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364-66 (1998); *Pacific Coast Supply v. NLRB*, 801 F.3d 321, 326 (D.C. Cir. 2015); *Terrace Gardens Plaza v. NLRB*, 91 F.3d 222, 228-29 (D.C. Cir. 1996). That discretion extends to deciding that greater flexibility for employers "would not be worth skewing bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).

As for what petitioner frames as selective bargaining precedent, the Board reasonably distinguished *Lexus of Concord*, 343 NLRB 851 (2004), where, unlike petitioner, the employer briefly put all bargaining "on hold" in order to determine the effect of a complex set of circumstances, including the intervening decision in *Levitz*, and subsequently withdrew recognition. *Abbey Medical*, 264 NLRB 969 (1982), and *Show Industries*, 326 NLRB 910 (1988), on which petitioner also relies, did not involve circumstances similar to petitioner's. In *Abbey Medical*, where an employer's unlawful failure to make fringe-benefit contributions tainted its subsequent withdrawal of recognition, the Board observed that an employer that lawfully announces its intention to withdraw union recognition prior to the expiration of the parties' contract is not obligated to bargain over a successor contract once their agreement expires. 264 NLRB at 969. Petitioner never withdrew recognition from the Union. In *Show Industries*, the employer's plant was closing and bargaining on the effects of the closure proceeded while a challenge to the union's certification was pending. 326 NLRB at 912. Petitioner's circumstances were not such that may render other matters "moot or at least less critical." *Id.* at 913. Given the deference owed to the Board's interpretation of its own precedent, *Pacific Coast Supply*, 801 F.3d at 333, petitioner fails to show the Board's decision was a departure from its precedent, much less an arbitrary or capricious departure.

The Board could also properly reject petitioner's reading of the record as affording it no choice other than to proceed as it did because the Union was "uninterested in negotiating a successor agreement." Pet'r's Br. at 23. Petitioner suggests the Union engaged in "dilatory" tactics by "cancelling sessions and not making proposals." *Id.* at 27 n.6. Yet the record evidence shows that although the Union cancelled the June 2014 bargaining session, the parties rescheduled bargaining sessions and met on two days in August and the Union requested additional bargaining dates after petitioner suspended negotiations in October.

Finally, although expressing practical concern due to delays inherent in the special election process as a reason to change the Board's policy of allowing a union's filing of an unlawful labor practice charge to block a decertification election, petitioner never challenged either the policy or its application before the Board. *See* Decision at 4 n.2 (Act'g Chrm'n Miscimarra, dissenting in part). Consequently, the court lacks jurisdiction to address it. 29 U.S.C. § 160(e). Going forward, the Board may adopt a different policy when an employer has objective evidence a union has lost majority support, but petitioner has not shown that the Board's Decision and Order are inconsistent with the Act or arbitrary or capricious.

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

Pursuant to D.C. Cir. 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 petition for 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: /s/
Ken Meadows
Deputy Clerk

*A separate dissenting statement by Senior Circuit Judge Sentelle is attached.

SENTELLE, *Senior Circuit Judge*, dissenting: I respectfully dissent from the majority's order and judgment in this case because the Board's decision is arbitrary and capricious.

As the majority acknowledges, the Board concluded that petitioner's selective bargaining with the Union was contrary to the principles established in *Levitz Furniture Company*, 333 NLRB 717 (2001). According to the majority, "[i]n *Levitz*, the Board balanced the competing interests of employees and employers under Section 7 and Section 8 of the Act and determined that an employer with objective evidence that an incumbent union lacks majority support has two options: withdraw recognition from the union or await the outcome of a secret-ballot election while continuing to honor its bargaining obligations." Maj. Op. at 1-2.

But nothing in *Levitz Furniture Company* rationally supports limiting an employer to those two all-or-nothing options. Although the Board approved two options in *Levitz Furniture Company*, it did not conclude that a lesser path between the two extreme options was impermissible.

As explained by the dissent to the Board's decision, "the evidence available to [T-Mobile] would have permitted [it] to *withdraw recognition entirely*." Decision at 4 (Act'g Chrm'n Miscimarra, dissenting in part). But T-Mobile chose a lesser path in this case. "[A]fter receiving objective proof that the Union had lost majority support, [T-Mobile] notified the Union that it would continue to recognize and bargain over all mandatory subjects, but until an election could be conducted . . . it would suspend bargaining with the Union for a successor CBA." *Id.* at 5 (Miscimarra, dissenting). Rather than analyze that lesser compromise path on the facts of this case, the Board concluded that there are no exceptions to the two options identified in *Levitz Furniture Company*.

In so concluding, the Board ignores that it has permitted exceptions in other decisions, including *Lexus of Concord*, 343 NLRB 851 (2004). Although the Board attempts to distinguish this case, it fails to consider allowing T-Mobile's action to form another exception to the two extreme options presented by the Board.

Instead, the Board majority justified its conclusion on two grounds: (1) "an employer that unilaterally removes certain bargaining subjects from negotiation can gain an advantage by excluding those subjects on which it may be more likely to give concessions to the union, reducing the likelihood that the parties will find common ground"; and (2) "allowing an employer to unilaterally dictate which subjects the parties can bargain undermines the union, making it appear ineffective and weak to the employees." Decision at 2.

But the first justification does not appear to apply in this case at all. The evidence appears to establish that T-Mobile initiated bargaining over changes that the Union viewed as beneficial to its members. As then-Acting Chairman Miscimarra explained in dissent, "[t]here is no resemblance between [T-Mobile's] extremely restrained, principled actions in the instant case and what [the Board majority] attempt[s] to portray as an arbitrary picking-and-choosing among different obligations imposed by our statute." Decision at 5 (Miscimarra, dissenting). To the

extent there were any examples of unfair negotiating tactics, the Board could have addressed those on an individual basis, rather than creating an all-or-nothing rule.

With respect to the second justification, the facts establish that the Union had already lost support of the majority of the employees. Decision at 1. Therefore, T-Mobile was entitled to withdraw recognition of the Union entirely. By taking the restrained approach it did, T-Mobile allowed the Union to continue to be involved in the day-to-day issues.

Although not essential to my dissent, I note that the continuing problem is of the Board's own making. On March 28, 2014, a unit employee filed a decertification petition, seeking an election to determine if a majority of the employees in the unit wished to be represented by the Union. Decision at 1. That decertification petition is still pending, but has been "held . . . in abeyance pursuant to the Board's blocking-charge policy." Decision at 4 n.2 (Miscimarra, dissenting). If there is unfair prejudice in this case, it is by the Board, not the employer.

In its decision, the Board attempts to announce an all-or-nothing rule that does not follow from its previous cases. Instead of making such a rule through adjudication, the Board would be better advised to engage in APA notice-and-comment rulemaking so that it can balance the competing interests and better understand the implications of its policy determination. Because I conclude that the Board's decision is arbitrary and capricious, I respectfully dissent.