United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1122 **September Term, 2017**

FILED ON: APRIL 24, 2018

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

21ST CENTURY CONCRETE CONSTRUCTION, INC., ET AL.,
INTERVENORS

Consolidated with 17-1131

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

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

J U D G M E N T

This case was considered on a petition for review and cross-application for enforcement of a Decision and Order of the National Labor Relations Board ("NLRB" or "Board") and was briefed by counsel. It is

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

This case is one in a long series of efforts by the Board to deal with disputes between the International Union of Operating Engineers, Local 18, petitioner, and Laborers' International Union of North America, Locals 310 and 894, over forklift and skid steer work at construction jobsites in northeastern Ohio. Here, Local 18 seeks review of a Board order determining that Local 18 violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(b)(4)(ii)(D), by filing collective bargaining grievances against 21st Century Concrete Construction, Inc., Independence Excavating, Inc., KMU Trucking and Excavating, Inc., Nerone

& Sons, Inc., Platform Cement, Inc., RG Smith Company, Inc., and Schirmer Construction Co. ("Charging Parties" and members of a multiemployer bargaining unit) because they assigned work to employees represented by Local 310 rather than to petitioner's members. The Board determined that the grievances were inconsistent with its prior Section 10(k) determinations, *see* 29 U.S.C. §160(k), in which it awarded the disputed work to the employees represented by Local 310.

Section 8(b)(4)(ii)(D) of the Act prohibits unions from using threats, coercion, or restraint with an object of forcing or requiring an employer to assign certain work to employees in one labor organization instead of another. Where there is reasonable cause to believe that a Section 8(b)(4)(ii)(D) violation has occurred, the Board is authorized to suspend proceedings on a charge filed under that section, and to resolve, pursuant to Section 10(k) of the Act, the underlying dispute between the unions. Any action taken in contravention of a Section 10(k) award violates Section 8(b)(4)(ii)(D) of the Act.

Because the Act does not provide for independent judicial review of a Section 10(k) determination, the only way a losing party in a Section 10(k) disposition can challenge the award is in conjunction with judicial review of a subsequent Section 8(b)(4)(i) and (ii)(D) unfair labor practice finding by the Board. *NLRB v. Int'l Longshoremen's & Warehousemen's Union,* 378 F.2d 33, 35–36 (9th Cir. 1967). Judicial review of a Section 10(k) determination is limited. *Int'l Longshoremen's & Warehousemen's Union, Local 62-B v. NLRB,* 781 F.2d 919, 923 (D.C. Cir. 1986). The court must sustain the Section 10(k) determination so long as substantial evidence supports the Board's findings of fact and the Board has not acted arbitrarily or capriciously in making the award. *Int'l Longshoremen's & Warehousemen's Union, Local 14 v. NLRB,* 85 F.3d 646, 651 (D.C. Cir. 1996).

Background

The Board has issued a number of Section 10(k) awards against Local 18. On January 10, 2014, the Board issued a Section 10(k) Decision and Determination of Dispute regarding the forklift and skid steer work at the employer's (Donley's Inc.) "Flats East" and "Goodyear" projects. *Laborers' Int'l Union of N. Am., Local 894* (*Donley's I*), 360 N.L.R.B. 104 (2014)). The Board also rejected Local 18's defenses that its strike threats were lawful acts to preserve its own work, and that the employers improperly colluded with the Laborers (Locals 310 and 894 of the Laborers) by negotiating for more specific forklift and skid steer language in the work jurisdiction clause of their 2012–15 agreement. The Board then considered the relevant factors and awarded the disputed forklift and skid steer work to the Laborers. Local 18, however, refused to withdraw its grievance over the forklifts and skid steers at the Goodyear project and, on March 7, 2014, filed another pay-in-lieu grievance against Cleveland Cement Contractors, Inc., another one of the employers in the multiemployer bargaining unit.

On May 15, 2014, the Board issued a Section 10(k) Decision and Determination, *Int'l Union of Operating Eng'rs, Local 18* (*Donley's II*), 360 N.L.R.B. No. 113 (2014), regarding more disputed forklift and skid steer work, this time offered by employers Donley's, Hunt Construction Group (now AECOM), Precision Environmental Co., Cleveland Cement, and B&B Wrecking and

Excavating, Inc. The Board again rejected Local 18's work preservation and collusion defenses, and again awarded the disputed work to the Laborers. Local 18 again refused to withdraw its grievances over the forklifts and skid steers at the individual employers' jobsites, and filed additional pay-in-lieu grievances against Donley's and Cleveland Cement.

On September 3, 2014 (following Local 18's filing of pay-in-lieu grievances against 21st Century, Independence, Schirmer, KMU, and Platform over forklift and skid steer work at various projects) the Board issued a Section 10(k) Decision and Determination, *Laborers' Int'l Union of N. Am., Local 310* (*Donley's III*), 361 N.L.R.B. No. 37 (2014), regarding the relevant disputed forklift and skid steer work offered by those employers and Donley's. The Board made the same required threshold findings that it did in *Donley's I* and *II*, again rejected Local 18's work preservation and collusion defenses, and again awarded the disputed work to the Laborers. On September 12, 2014, Local 18 filed another pay-in-lieu grievance against Independence.

In late September 2014, the Board's General Counsel issued a complaint alleging that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by threatening to strike, striking, and maintaining and pursuing pay-in-lieu grievances against Donley's, Hunt, Precision, Cleveland Cement, and B&B despite the Board's Section 10(k) awards of the disputed work to the Laborers in *Donley's I* and *II*. On April 9, 2015, the administrative law judge ("ALJ") issued a recommended decision and order, finding that Local 18 violated the Act as alleged. On May 16, 2016, the Board found that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by striking and threatening to strike Donley's, Precision, Hunt, Cleveland Cement, and B&B with an object of forcing them to assign work to Local 18 rather than to the Laborers. *Int'l Union of Operating Eng'rs Local 18* (*Donley's IV*), 363 N.L.R.B. No. 184 (2016). In addition, the Board agreed with the ALJ's findings that Local 18 violated Section 8(b)(4)(ii)(D) of the Act by filing and pursuing grievances that were inconsistent with the Board's Section 10(k) determinations in *Donley's I* and *II*. In so finding, *Donley's IV* – like *Donley's I* and *II* – rejected Local 18's work preservation and collusion defenses.

On October 1, 2015, the Board issued a Section 10(k) Determination, *Int'l Union of Operating Eng'rs, Local 18* (*Nerone 10(k)*), 363 N.L.R.B. No. 19 (2015), regarding the relevant disputed forklift and skid steer work offered by employers Nerone and RG Smith. The Board made the same required threshold findings that it did in *Donley's I, II*, and *III*, again rejected Local 18's work preservation and collusion defenses, and again awarded the disputed work to the Laborers. From January through March 2016, Local 18 continued to file pay-in-lieu grievances against Independence, Nerone, KMU, and Platform.

In the matter leading to the instant petition for review, the General Counsel filed a complaint alleging that Local 18 violated Section 8(b)(4)(ii)(D) of the Act by filing and pursuing grievances against the Charging Parties that were inconsistent with Board Decisions and Determinations under Section 10(k). The Board adopted the findings and recommendations of the ALJ, holding that Local 18 had again violated Section 8(b)(4)(ii)(D) of the Act by maintaining and filing pay-in-lieu grievances, this time against the Charging Party employers. *Int'l Union of Operating Eng'rs Local 18*, 365 N.L.R.B. No. 18 (2017). The Board found that these grievances violated the Act

because they were inconsistent with the Board's Section 10(k) decisions in *Donley's III* and *Nerone 10(k)* awarding the work in dispute to employees represented by the Laborers. *Id.*

Standard of Review

A court reviewing the Board's determination that a union has violated Section 8(b)(4)(ii)(D) of the Act may perform only a "limited inquiry," as that determination is entitled to affirmance if its underlying factual findings are supported by substantial evidence and its legal conclusions are not arbitrary or capricious. *Int'l Longshoremen's & Warehousemen's Union*, 781 F.2d at 923. Thus, a reviewing court may not displace the Board's choice between conflicting views, even if it could justifiably have made a different choice de novo. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Analysis

This case raises no question that has not already been decided against Local 18 nearly half a dozen times. In Section 10(k) proceedings (*Donley's I*, *II*, and *III*) and in an unfair labor practice proceeding (*Donley's IV*), the Board has again and again considered and rejected petitioner's work preservation and collusion defenses. The Sixth Circuit in *International Union of Operating Engineers, Local 18 v. NLRB*, 712 F. App'x 511 (6th Cir. 2017), likewise rejected those defenses. With respect to work preservation, the Sixth Circuit found adequate evidence to support the Board's conclusion that Local 18 had acted not to preserve work, but to acquire it. *Id.* at *514. With respect to collusion, the Sixth Circuit concluded that the accusation was of no moment because the Board had jurisdiction to hear the dispute independently, due to the existence of a work dispute and Local 18's use of strikes, threats, and grievances to attempt to acquire that work. *Id.* at *515. Because Local 18 has identified no new issues in this case, we likewise deny its petition for review.

A union's filing of grievances under its collective bargaining agreement to challenge employers' assignments of work to a second union is "coercion" within the meaning of the Act when the union's goal is to undermine a Board decision awarding the work to the second union. *Int'l Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1413–14 (D.C. Cir. 1989). While the Union suggests that its work preservation and collusion charges raise new issues sufficient to derail such a conclusion here, we disagree.

The Board examined the scope of the work Operating Engineers and Laborers had previously performed for employers in the bargaining unit. Finding that employees represented by Local 18 had only rarely been employed to perform the disputed work in the past, the Board reasonably concluded that Local 18's pay-in-lieu grievances sought not to preserve work, but to acquire it. *See Laborers Int'l Union of N. Am., Local 265*, 360 N.L.R.B. 819, 823 (2014) (distinguishing between preservation and acquisition).

The Board also found that Local 18's claim of collusion between the Charging Parties and the Laborers had been previously litigated and rejected in *Donley's I*, 360 N.L.R.B. at 108 n.6;

Donley's II, 360 N.L.R.B. No. 113 at *7; *Donley's III*, 361 N.L.R.B. No. 37 at *4; *Donley's IV*, 363 N.L.R.B. No. 184 at *3; and *Nerone 10(k)*, 363 N.L.R.B. No. 19 at *5. The Board also concluded that the claim lacked merit in any event.

We have no grounds to overturn the Board's findings and conclusions. On the basis of the record before us, we hold that the Board properly ordered Local 18 to withdraw all of its pending pay-in-lieu grievances. We hereby deny the 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. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk