United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1001 **September Term, 2018**

FILED ON: DECEMBER 21, 2018

CAYUGA MEDICAL CENTER AT ITHACA, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1036

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

Before: HENDERSON, GRIFFITH and WILKINS, *Circuit Judges*.

J U D G M E N T

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board (the Board), as well as on the briefs and arguments of the parties. We have accorded the issues full consideration and 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 Cayuga Medical Center at Ithaca, Inc. (Cayuga) – a 1350-employee hospital located in Ithaca, New York – challenges the Board's December 16, 2017, order adopting in substantial part an October 28, 2016, decision of an administrative law judge (the ALJ). Relevant here, the ALJ found numerous violations of § 8(a)(1) and 8(a)(3) of the National Labor Relations Act of 1935 (the Act), Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69), because of actions by hospital supervisors and officials during an organizing campaign for the 1199 SEIU United Healthcare Workers East. *See generally Cayuga Med. Ctr. at Ithaca, Inc.*, 365 N.L.R.B. No. 170, 2017 WL 6554389 (Dec. 16, 2017). The Board has filed a cross-application

for enforcement of the decision and order.

We first consider our jurisdiction. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). "Section 10(e) is a 'jurisdictional bar,' in the face of which [this Court is] 'powerless, in the absence of extraordinary circumstances, to consider arguments not made to the Board.'" *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550 (D.C. Cir. 2016) (quoting *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008)).

Cayuga has failed to present four of its arguments to the Board – by neglecting to include them in its own exceptions, to respond to the General Counsel's exceptions, or to file a motion for reconsideration – and extraordinary circumstances do not warrant their review. The arguments are that: (1) an employer's invitation for employees to report harassment by union supporters is consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and thus may not serve as a § 8(a)(1) violation; (2) the Board violated constitutional due process or the Act's six-month statute of limitations because it failed to determine precisely when an anti-union hospital vice president made an allegedly improper comment discouraging wage discussions to one of the pro-union nurses; (3) the violations do not warrant the remedial order that Cayuga host an employee meeting in which a hospital official or Board representative would read a Board-drafted remedial notice; and (4) the Board erred in issuing an order rescinding two employee civility rules because it relied on an overruled precedent. We express no opinion on these matters.

We turn to the merits of Cayuga's remaining contentions. Section 7 of the Act guarantees employees the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) makes it an "unfair labor practice" to "interfere with, restrain, or coerce employees in the exercise of" their collective bargaining rights under § 7. *Id.* § 158(a)(1). Meanwhile, § 8(a)(3) generally makes it an "unfair labor practice" to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). The Board is "empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce." *Id.* § 160(a). If it finds a violation of the Act, the Board will issue an "order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies" of the Act. *Id.* § 160(c). Although we will not "rubber-stamp" the Board's orders, *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002), we review them "under a 'highly deferential standard,'" *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1119 (D.C. Cir. 2018) (quoting *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 650 (D.C. Cir. 2003)). We will uphold them if they are "not arbitrary, capricious, or founded on an erroneous application of the law," and if the Board's "factual findings are supported by substantial evidence." *Adv. Life Sys. Inc. v. NLRB*, 898 F.3d 38, 43 (D.C. Cir. 2018) (citations omitted).

Most of the remaining arguments amount to challenges to credibility or factual findings

made by the ALJ and adopted by the Board. We review those determinations for substantial evidence, and we reject the hospital's challenges. Under substantial evidence review, we will not "displace the Board's choice between two fairly conflicting views, even though [we] would justifiably have made a different choice had the matter been before [us] *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Parties seeking review must show that the agency record is "so compelling that no reasonable factfinder could fail to find" in their favor. *Teachers Coll., Columbia Univ. v. NLRB*, 902 F.3d 296, 302 (D.C. Cir. 2018). In addition, we may not "second guess 'the ALJ's credibility determinations, as adopted by the Board, unless they are patently unsupportable.'" *CC1 Ltd. P'ship v. NLRB*, 898 F.3d 26, 32 (D.C. Cir. 2018) (quoting *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 265 (D.C. Cir. 1993)). Cayuga fails to show that the agency record compels us to find in its favor, or that the ALJ's credibility determinations are patently unsupportable. The Board permissibly adopted much of the ALJ's comprehensive opinion, which outlined months of anti-union activity.

Cayuga otherwise contends that some of the violations are arbitrary and capricious because the Board missed or failed to distinguish prior precedents or record evidence. We disagree. We will defer to the Board's exercise of "reasoned decisionmaking." *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017). The Board deserves deference if it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Id.* (quoting *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). None of Cayuga's concerns gives us pause.

We have considered all of Cayuga's arguments and find them barred or without merit. We deny Cayuga'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 petition for hearing *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