United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1083 **September Term, 2018**

FILED ON: MARCH 14, 2019

MIKE-SELL'S POTATO CHIP COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1106

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

Before: TATEL and KATSAS, *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 on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has accorded 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 for the reasons stated in the attached memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.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 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

M E M O R A N D U M

Mike-Sell's Potato Chip Company petitioned this Court for review of a National Labor Relations Board ("NLRB" or "the Board") decision and order. Finding no reversible error, we deny the petition for review and grant the NLRB's cross-application for enforcement.

Mike-Sell's Potato Chip Company ("Mike-Sells") manufactures and distributes snack foods. The Teamsters Local Union No. 957 (the "Union") represents the company's employees. During ongoing bargaining negotiations for a new contract, Mike-Sells declared itself and the Union to be at an impasse and unilaterally changed terms of employment. In an earlier round of litigation, the Board held, and we sustained, that there was no legal impasse. *See Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 139–40 (2014); *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318, 325 (D.C. Cir. 2015). The Board's order, which was enforced by this Court, required (1) restoration of the previous terms of employment and (2) make-whole relief in the form of backpay. *See Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 140–41 (2014).

In June of 2013, between the first incident and this Court's decision, Mike-Sells again declared that it and the Union were at an impasse and unilaterally changed terms. During compliance proceedings, Mike-Sells argued that its make-whole obligation ran only until this intervening impasse, and that the company should be relieved of further compliance with the order. Mike-Sells also sought to mitigate its backpay liability based on a series of alleged overpayments for commission-based wages.

The administrative law judge ("ALJ") disagreed that any intervening impasse cut-off Mike-Sells's make-whole obligation because the company failed to ever restore the previous terms of

employment pursuant to the Board's order. The ALJ also found the alleged overpayments to be nonequivalent to the backpay relief owed. As a result, the ALJ excluded evidence of both the alleged intervening impasse and the company's overpayments. The ALJ's supplemental decision ordered Mike-Sells to pay its full liability, and the Board affirmed. *See Mike-Sells Potato Chip Co.*, 366 NLRB No. 29 (Mar. 7, 2018) (noting that "[t]he backpay continues to accrue" until restoration of the previous terms of employment). The company's petition for review challenges these two evidentiary rulings.

We review the Board's evidentiary rulings under an abuse of discretion standard and will grant relief only when the ruling "unduly prejudiced the complaining party." *See Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 551 (D.C. Cir. 2016). This is to say, where the "admission of the excluded evidence would have compelled or persuaded to a contrary result." *See id.* (internal quotations omitted).

Intervening Impasse. As an initial matter, the NLRB avers that it lacked jurisdiction to modify the imposed remedy because the Court had already reviewed the case and enforced the Board's original order. The Board is correct. Once the record was filed, the Court gained exclusive jurisdiction over the matter and "its judgment and decree [became] final." *See Scepter, Inc. v. NLRB*, 448 F.3d 388, 390–91 (D.C. Cir. 2006) (quoting 29 U.S.C. § 160(e)). Having never previously challenged the nature of the remedy imposed by the Board's original order, Mike-Sells missed its chance to do so.

If the Board's original order was a *restoration order*—as opposed to a *make-whole order*—then the employer was required to restore the original terms and conditions of employment. *See Deming Hosp. Corp. v. NLRB*, 665 F.3d 196, 203 (D.C. Cir. 2011). Absent restoration, an intervening impasse could not cut-off liability because the remedy imposed was, in part, restoration.

Accord id. Thus, liability would continue to accrue until the employer complied with the restoration requirement. Here, however, the parties dispute the nature of the Board's original order. The Board characterizes it as a *restoration order*; Mike-Sells argues that it was a *make-whole order*.

We owe "substantial deference" to the NLRB's interpretation of its own orders. *See Pub. Serv. Co. of New Mexico v. NLRB*, 843 F.3d 999, 1004 (D.C. Cir. 2016). Here, the order first mandated that the company "shall immediately put into effect all terms and conditions of employment" as outlined in the original collective bargaining agreements, and then imposed backpay requirements. Additionally, its ordering paragraphs required Mike-Sells to "restore, honor and continue the terms of the [prior collective bargaining agreements] until the parties agree to a new contract or bargaining leads to a good-faith impasse." Since the imposed remedy was both restoration and backpay, the Board reasonably concluded that the order was, at least in part, a restoration order.

Because Mike-Sells never complied with the restoration requirement, it cannot toll backpay liability with an alleged intervening impasse. *Accord Deming*, 665 F.3d at 203. Any evidence of an impasse lacked relevance and could not have "compelled or persuaded to a contrary result." *See Quicken Loans*, 830 F.3d at 551. As a result, its exclusion was not an abuse of discretion.

Overpayments. The Board has broad discretionary power to fashion remedies involving backpay for unfair labor practices. *See NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346–47 (1953); *accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015). It is the Board's longstanding policy to separately calculate an employee's losses in each area of compensation to ensure that the imposed remedy makes the employee whole for each distinct injury suffered. *See, e.g.*, *Mining Specialists, Inc.*, 330 NLRB 99, 103 (1999) (permitting offsets only when "equivalent to the element of backpay claimed in the specification").

In this case, wages, as well as sick, vacation, and holiday pay were "separately set out in the labor agreements, separately maintained, calculated, and paid." It was reasonable for the Board (1) to conclude that commission-based wages for work performed were nonequivalent to the various types of paid leave, and (2) to disallow overpayments of the former to offset backpay liability from the latter. Since the overpayments could not reduce the company's net liability, Mike-Sells cannot establish that evidence of those overpayments would have "compelled or persuaded to a contrary result." *See Quicken Loans*, 830 F.3d at 551. Therefore, the Board did not err in its evidentiary ruling.

Finally, we grant the NLRB's motion to strike the portions of Mike-Sells's briefs that disclosed communications made in the course of the parties' participation in this court's Appellate Mediation Program. We treat such communications as confidential as a matter of course. *See* Court of Appeals for the District of Columbia Circuit Appellate Mediation Program, Confidentiality 2 ("Confidentiality is ensured throughout the mediation process."). We need not reach the question of whether this type of communication could ever be properly disclosed, as the information that the NLRB seeks to strike is not relevant to our disposition in this case.

For the foregoing reasons, we deny the petition for review and grant the cross-application for enforcement.