United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1226 **September Term, 2018**

FILED ON: APRIL 12, 2019

HENDRICKSON TRUCKING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), LOCAL 1038,
INTERVENOR

Consolidated with 17-1234

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

Before: HENDERSON, SRINIVASAN and MILLETT, *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, as well as on the briefs 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. As explained in the Board's thoroughgoing and persuasive briefing, the Board's decision hewed to settled law and its factual findings and credibility judgments were amply supported in the record.

Petitioner Hendrickson Trucking Company is a trucking business based in Jackson, Michigan. The Company provides a hauling service for aggregate materials like sand and gravel on a seasonal basis, running between April and November. In 2012, Hendrickson Trucking and the union representing its employees, the International Brotherhood of Teamsters, Local 1038, entered into negotiations to replace their expiring collective bargaining agreement. The National

Labor Relations Board found that, in the course of those failed negotiations, Hendrickson Trucking committed numerous unfair labor practices in violation of Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) & (5). In particular, the Board found that Hendrickson Trucking wrongly (i) withheld pertinent information about business operations requested by the Union; (ii) unilaterally implemented the terms of its final offer without first bargaining to impasse; (iii) refused to resume bargaining at the Union's request; and (iv) failed to reinstate employees who had engaged in an unfair labor practice strike. *Hendrickson Trucking Co.*, 365 N.L.R.B. No. 139 (Oct. 11, 2017). Hendrickson Trucking petitions this Court for review and the Board, joined by the Union as intervenor, cross-applies for enforcement.

The rocky course of negotiations for a new collective bargaining agreement that gave rise to this litigation began in February 2012 with the first of seven bargaining sessions. At the outset, there appeared to be a substantial gap between Hendrickson Trucking's and the Union's positions, with Hendrickson Trucking looking to curtail its expenses, and the Union seeking to increase wages and benefits. At their second meeting in April, Hendrickson Trucking explained that it could not expand benefits because the Company needed to stem financial losses. That representation prompted the Union's president, Alan Sprague, to request "detailed cost-savings calculations" relating to the Company's economic proposals, including its proposals to rollback overtime and its 401(k) match, and to increase the employees' share of insurance premiums. J.A. 58. The Company "threw numbers out," but Sprague insisted that the Union needed concrete substantiation of the amounts the Company would save. J.A. 223.

Hendrickson Trucking did not provide the requested financial information. Instead, at the parties' third meeting, the Company withdrew many of its initial proposals and reduced the employees' proposed share of insurance premiums. The Union rejected the offer, and then voted both to pre-ratify a one-year contract that largely preserved the status quo and to strike if necessary.

Hendrickson Trucking's and the Union's recollections of the fourth meeting diverge. The Company's chief financial officer testified that this meeting was the first occasion on which Sprague requested cost-saving information related to Hendrickson Trucking's proposals. The Company says that it then provided a spreadsheet documenting the business's finances. But Sprague testified that he had no recollection of ever seeing such a document, and that he had asked for the relevant financial information two meetings earlier. The administrative law judge and the Board credited Sprague's version of events because the chief financial officer "waivered [sic] in his testimony" and was "not entirely forthcoming." J.A. 66, 67 n.17. The administrative law judge also concluded that, in any event, the spreadsheet was "an insufficient response as it did not include cost savings calculations or data for each of those economic proposals." J.A. 74.

At the fifth meeting, Sprague reminded Hendrickson Trucking that the Union was still awaiting the cost-saving information. No response came.

At the sixth meeting, Hendrickson Trucking presented what it denominated its "LAST BEST OFFER." J.A. 486–515. When the Union rejected that offer, Hendrickson Trucking declared a bargaining impasse. Sprague instantly disagreed. Hendrickson Trucking subsequently conveyed a "Revised Proposal and [another] Last, Best, and Final Offer," J.A. 516–579, which the Union rejected.

At the seventh and last meeting, the Union presented its "Final Proposal." That proposal offered Hendrickson Trucking three options: (1) implement the one-year pre-ratified offer; (2) implement a slightly altered offer; or (3) "Work Stoppage." J.A. 582. The administrative law judge found, and the Board agreed, that the Union "did not intend to end negotiations with [its] final offer." J.A. 69.

The Union waited for Hendrickson Trucking's response. But it never came. Instead, Hendrickson Trucking unilaterally implemented its own last offer. Upon learning of that, the Union instituted a strike in June 2012. A month later, the Union filed a grievance with Hendrickson Trucking and requested information about its use of trucks bearing the name AGG Trucking, LLC during the strike period.

At the end of November, the Union made an unconditional request to return to work, and also expressed a willingness to "meet and bargain in good faith" if Hendrickson Trucking would rescind its unilateral changes to the agreement and provide the requested information about the use of AGG Trucking vehicles. J.A. 71, 594. Hendrickson Trucking refused to reinstate the employees, relying instead on replacement workers.

In late December, the Union sent a second grievance letter to Hendrickson Trucking that challenged the Company's hiring of replacement workers and renewed both of the Union's still-unanswered information requests. Hendrickson Trucking responded with a letter asserting that "Hendrickson Trucking and AGG Trucking are a single employer." J.A. 72, 609.

In the aftermath of the failed negotiations, the Board's General Counsel issued a complaint against Hendrickson for (i) unilaterally implementing the terms of a final offer without bargaining to a valid impasse; (ii) refusing to provide the Union with the information it requested related to AGG Trucks; (iii) refusing to resume bargaining after the strike ended; and (iv) failing to reinstate the striking workers after they made an unconditional offer to return to work.

Following a two-day hearing, the administrative law judge sustained all of the General Counsel's charges. Hendrickson filed exceptions to the Board, challenging both the ALJ's substantive findings and her authority to preside over the case under *NLRB v. Noel Canning*, 573 U.S. 513 (2014). That case held that the Board had lost the quorum required to operate as of January 4, 2012. The Board did not regain a quorum through valid appointments until August 2013, several months after the administrative hearing in this case. In addition, the Board had not ratified the ALJ's appointment until after her initial decision had issued.

In light of *Noel Canning*, and "without concluding or suggesting that the judge lacked the authority to issue the May 16, 2014 decision," the Board remanded the case to the ALJ to "consider anew the issues presented now that her appointment has been ratified by a fully confirmed five-member Board," in the hope that would "remove any lingering questions." J.A. 52. On remand, the ALJ "fully reviewed" her prior decision and ruled that it was correct "[i]n its entirety." J.A. 61.

The Board again affirmed in all relevant respects. The Board ordered Hendrickson

Trucking to: (i) rescind the unilateral changes it had made in June 2012; (ii) make unit employees and strikers whole for any losses occasioned by the unilateral changes; (iii) offer full reinstatement to those who had engaged in the strike in response to the Company's unfair labor practices; and (iv) bargain with the Union upon request. Hendrickson Trucking then petitioned this court for review, arguing that the Board's findings are not supported by substantial evidence and that the ALJ lacked the legal authority to adjudicate the case.

Under the National Labor Relations Act, an employer commits an unfair labor practice if it "refuse[s] to bargain collectively with the representatives of [its] employees," 29 U.S.C. § 158(a)(5), or if it "discriminat[es] in regard to hire or tenure of employment or any term or condition of employment" as a way to "encourage or discourage membership in any labor organization," *id.* § 158(a)(3). An employer's failure to abide by either requirement also violates Section 8(a)(1) of the Act, which prohibits "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the right[]" under the Act to "bargain collectively through representatives of their own choosing," 29 U.S.C. § 157. *Enterprise Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 546 (D.C. Cir. 2016) (first, second, and third alterations in original) (quoting 29 U.S.C. § 158(a)(1)) (explaining that a violation of 29 U.S.C. § 158(a)(5) produces a derivative violation of § 158(a)(1)); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) (same for 29 U.S.C. § 158(a)(3)).

Hendrickson Trucking raises five challenges to the Board's determination that it committed multiple unfair labor practices. None of them succeeds.

First, Hendrickson Trucking challenges the Board's finding that it impermissibly imposed new terms of employment without first bargaining with the Union to impasse. But the Board's holding that Hendrickson Trucking could not declare an impasse because it had failed to provide the Union the financial information it needed to evaluate the Company's representations was grounded in settled law. This court has long recognized that an employer's failure to provide requested information that affects negotiations generally "preclude[s] the Company from declaring an impasse." *United States Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1998) (citations omitted); *accord E.I. Du Pont de Nemours & Co. v. NLRB,* 489 F.3d 1310, 1315 (D.C. Cir. 2007) ("'[I]mpasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations.'") (quoting *Decker Coal Co.,* 301 N.L.R.B. 729, 740 (1991)); *id.* at 1316 (Union "entitled to inspect the data relied on by an employer and does not have to accept the employer's bald assertions or generalized figures at face value[.]").

Hendrickson Trucking disputes the facts, arguing that it did provide the relevant financial information when (in its view) it was first requested at the fourth meeting. But substantial evidence supports the Board's contrary factual findings that (i) Sprague asked for the information repeatedly before that meeting; (ii) the requested information was never provided; and (iii) the spreadsheet that was belatedly provided was not responsive to the Union's specific requests. Plus Hendrickson Trucking has not come close to meeting the weighty burden of discrediting the underlying credibility determinations made by the ALJ and adopted by the Board. *See Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) ("[W]e accept all credibility determinations

made by the ALJ and adopted by the Board unless those determinations are 'patently insupportable.'") (citations omitted).

Second, Hendrickson Trucking disputes the Board's finding that it committed an unfair labor practice by failing to timely furnish information that the Union requested about the use of trucks from AGG Trucking, which the Board found was "relevant and necessary for the Union to carry out its representative function." J.A. 80; *see also Public Serv. Co. of New Mexico v. NLRB*, 843 F.3d 999, 1005 (D.C. Cir. 2016). Hendrickson argues that its January letter satisfied the Union's July request, and that in any event the Union accepted it as adequate and thereby waived its objection. Hendrickson Trucking Br. 38–39.

Those arguments fall flat. For starters, the Board found that, even assuming it were adequate, Hendrickson Trucking's reply was unreasonably delayed. That by itself constitutes an independent basis for sustaining the finding of an unfair labor practice under the Act—and it is a rationale to which the Company has voiced no objection here. *See Monmouth Care Ctr.*, 354 N.L.R.B. 11, 51 (2009), *reaffirmed and incorporated by reference*, 356 N.L.R.B. 152 (2010), *enforced* 672 F.3d 1085 (D.C. Cir. 2012).

In any event, the Board found that the cursory January letter was insufficiently responsive to the Union's numerous, granular information requests about the Company's use of AGG trucks. *See, e.g.*, *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556 (D.C. Cir. 2012) (rejecting the argument that some disclosed material sufficed because "any requested information that has a bearing on the [collective] bargaining process *must* be disclosed") (emphasis added) (citations and quotations omitted). Once again, Hendrickson Trucking offers no meaningful response. And Hendrickson Trucking's waiver contention baldly flouts the record evidence documenting that the Union never abandoned its more detailed information requests. J.A. 322 (testimony from Hendrickson Trucking's counsel that the Union's attorney made clear he "wasn't waiving anything" with respect to "information requests").

Third, Hendrickson Trucking contests the Board's finding that it unlawfully rebuffed the Union's November 30th request to resume negotiations. The "duty to bargain survives" impasse, and requires that employers "stand ready to resume collective bargaining" upon a union's reasonable request. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996). Hendrickson Trucking accepts that legal rule, raising only a factual dispute over whether it was the Union, rather than the Company, that resisted the resumption of bargaining. Hendrickson Trucking Br. 34–35. Hendrickson Trucking points to testimony from its counsel, Tim Ryan, stating that he called Sprague in early December with an offer to resume bargaining. *Id*.

The problem for Hendrickson Trucking is that the ALJ did not believe Ryan's version of events. The ALJ instead credited Sprague's contrary testimony that, to his recollection, no such call took place. The ALJ discredited Ryan's testimony both because he could not remember the circumstances of the call, and because Ryan's version of events was inconsistent with basic facts about when the Company's "busy season" and "winter slowdown" take place. J.A. 72, 316–323. Hendrickson Trucking has provided us no basis to upset that credibility judgment. *See Inova Health Sys.*, 795 F.3d at 80.

Fourth, Hendrickson Trucking objects to the Board's finding that the strike was in response to its own unfair labor practice. By deeming the strike to be unjustified, the Company asserts that it had no obligation to reinstate the employees when they unconditionally offered to return to work. Hendrickson Trucking is wrong on both fronts.

The law is settled that an employer violates the National Labor Relations Act if it fails to reinstate strikers who have made an offer to return to work following a strike that was taken in response to an employer's unfair labor practice. *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1137 (D.C. Cir. 2015). A strike will be found to have arisen out of an unfair labor practice if the strike is motivated "in part" by the unfair labor practice. *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990) (citation omitted). The unfair labor practice need not be the "sole or even the major cause" of the strike. *Id.* (citation omitted).

Hendrickson Trucking's chief argument is that the strike was motivated purely by economics and was not in response to unfair labor practices. Hendrickson Trucking Br. 35–38. But substantial evidence supports the Board's contrary conclusion. The timeline of relevant events itself contradicts the Company's argument. The Union voted to strike in late April, and again at the end of May. In so doing, the Union expressly conditioned the strike on Hendrickson Trucking first committing the unfair labor practice of "implement[ing] [its] offer" unilaterally. J.A. 244. True to those words, the strike commenced on June 25 *after* the Union learned that the Company had unilaterally implemented its own proposed terms and conditions. That more than suffices to show that Hendrickson Trucking's unfair labor practice motivated the strike at least in part.

In response, Hendrickson Trucking cites inapt cases where (i) the unfair labor practices occurred after the decisive strike vote, *Mobile Homes Estates, Inc.*, 259 N.L.R.B. 1384 (1982), *enforced on other grounds*, 707 F.2d 264 (6th Cir. 1983); (ii) the union put into writing the purely economic reasons for its strike, *Facet Enters., Inc.*, 290 N.L.R.B. 152 (1988), *enforced on other grounds*, 907 F.2d 963 (10th Cir. 1990); or (iii) the unfair labor practices were never "specifically mentioned" during strike-vote deliberations, *Reichhold Chems. Inc.*, 288 N.L.R.B. 69, 79 (1988), *rev'd*, 906 F.2d 719 (D.C. Cir. 1990), *on remand*, 301 N.L.R.B. 706 (1991). Here, by contrast, the Union expressly conditioned its strike on Hendrickson Trucking's commission of an unfair labor practice, which makes the causation question quite straightforward.

Fifth, and finally, Hendrickson Trucking argues that it was entitled to a hearing before a new administrative law judge because the ALJ who conducted the hearing was appointed at a time when the Board lacked the legally required quorum. Hendrickson Trucking Br. 39–43. In particular, Hendrickson Trucking notes that the Board did not have a proper quorum until several months after the ALJ's hearing, and the Board did not ratify her appointment until after she had already issued her initial decision. The Board then remanded the case so that the same ALJ could "consider anew the issues presented now that her appointment has been ratified by a fully confirmed five-member Board." J.A. 52. On remand, the ALJ "fully reviewed" her prior decision and reaffirmed it "[i]n its entirety." J.A. 61.

Hendrickson Trucking argues that the remand was invalid because the ALJ had a "closed mind," and the rules prohibit ALJs' acting with "actual bias," "deep-seated favoritism[,] or

antagonism" to one side. Hendrickson Trucking Br. 40–43 (citations omitted). Neither the law nor the record supports the Company's challenge. In *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364 (D.C. Cir. 2017), we held that an invalidly appointed Regional Director could lawfully ratify his own prior actions after a properly constituted Board ratified his appointment, *id*. at 371. *Wilkes-Barre* emphasized that "no evidence suggest[ed] that [the Regional Director] failed to make a detached and considered judgment or that he was 'actually biased' against [the losing party]." *Id.* at 372 (quoting *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996)). So too here. The ALJ on remand carefully reviewed the evidence and formulated a reasoned opinion, without displaying any bias toward the parties or pre-judgment as to the outcome.

For all of those reasons, we deny Hendrickson Trucking'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 rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk