United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1165 **September Term, 2018**

FILED ON: MAY 20, 2019

MICHAEL CETTA, INC., D/B/A SPARKS RESTAURANT,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1171

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

Before: ROGERS, TATEL, and PILLARD, *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 and argued by counsel. Michael Cetta, Inc. d/b/a Sparks Restaurant ("Sparks") petitions for review of the Board's Decision and Order finding Sparks committed unfair labor practices in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3). 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). For the reasons that follow, it is

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

In December 2014, Sparks and the union representing its waiters and bartenders had been unsuccessfully attempting to negotiate a contract for a year and a half. Following a brief, two-hour strike on December 5, a Sparks manager tried to convince an employee to leave the union. That effort failed, and no contract agreement resulted.

On December 10, thirty-six of Sparks's waiters and bartenders went on strike to protest the lack of progress in negotiations. After nine days, the strikers made a voluntary and unconditional offer to return to work. Sparks's management refused the offer, accusing the

strikers of having committed picket-line violence and intimidation. At a January negotiation session, Sparks's representatives again refused to allow the strikers to return to work, repeating their insinuation that the striking employees posed a threat. When union officials asked Sparks to identify a particular violent incident, the restaurant refused.

It later became clear that Sparks had hired workers to replace the strikers. And although several of those replacement employees left in early 2015, Sparks waited until August before it invited a single striking worker to return.

As relevant to this petition, the Board found that Sparks committed three unfair labor practices in violation of the National Labor Relations Act: (1) discharging striking workers; (2) failing to reinstate striking workers following a voluntary and unconditional offer to return to work; and (3) soliciting workers to withdraw their support from the union. Sparks's petition challenges the Board's findings with respect to discharge and failure to reinstate the strikers.

We begin with discharge. Sparks does not challenge the governing legal framework. For purposes of the Act, an employee is considered discharged "if the words or conduct of the employer would reasonably lead an employee to believe that he had been fired." *Elastic Stop Nut Division of Harvard Industries, Inc. v. NLRB*, 921 F.2d 1275, 1282 (D.C. Cir. 1990). The test is an objective one: it "depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer." *NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990), *as amended* (May 20, 1991) (emphasis omitted) (internal quotation marks omitted). Board precedent—uncontested by Sparks—supplements this rule by providing that "the employer will be held responsible when its statements or conduct create an uncertain situation for the affected employees" leading to "a climate of ambiguity and confusion" that would "reasonably cause[] strikers to believe . . . that their employment status was questionable because of their strike activity." *In re Kolkka*, 335 NLRB 844, 846 (2001) (internal quotation marks omitted).

Sparks challenges the Board's factual finding that the striking workers would reasonably have concluded that their employment status was ambiguous. But "we may not disturb the Board's findings of fact when those findings are supported by substantial evidence based upon the record taken as a whole." *Elastic Stop Nut*, 921 F.2d at 1279. "Indeed, the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (internal quotation marks omitted).

Here, ample evidence supported the Board's discharge finding, including Sparks's repeated rejections of the employees' offer to return, its "shifting explanations" for those rejections, and its ban on the employees "returning to the restaurant for any purpose." *In re Michael Cetta, Inc.*, 366 NLRB No. 97, slip op. at 14–16 (May 24, 2018). Contrary to Sparks's argument, the Board's general counsel was under no obligation to call any employees to testify to their subjective belief that they had been discharged; as Sparks concedes, the test is objective.

See Champ Corp., 933 F.2d at 692. Similarly, statements by union officials suggesting they believed the workers were "locked out" rather than discharged offer no basis to disturb the Board's finding. The test "depends on the reasonable inferences that the *employee* could draw," and characterizations by the union's officers are not dispositive of what the employees might have concluded. *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626, 629 (10th Cir. 1984). Nor did the Board unfairly punish Sparks for exercising the right to decline to disclose the existence of replacement workers. Assuming such a right exists, the Board is still entitled to consider how an employer exercises that right as evidence of a different unfair labor practice. *See New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006) (concluding that an employer's concealment of a replacement campaign might be evidence of "an independent unlawful purpose," such as "an illicit motive to break a union").

With respect to the failure-to-reinstate charge, Sparks again does not contest the controlling law. The National Labor Relations Act requires an employer to "reinstate strikers" following their voluntary and unconditional offer to return. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). An employer, however, may refuse reinstatement if "it can demonstrate that it acted to advance a legitimate and substantial business justification." *New England Health Care Employees Union*, 448 F.3d at 191 (internal quotation marks omitted). "The burden of proving justification is on the employer." *Fleetwood Trailer*, 389 U.S. at 378. Sparks offered two independent justifications to the Board.

First, Sparks claimed that it lawfully hired permanent replacements. *See Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389 (D.C. Cir. 1995) ("That [the striker] was replaced by a permanent employee during the strike is [a legitimate and substantial business] justification . . . ."). Under unchallenged Board precedent, to succeed on that claim, Sparks had to prove "there was a mutual understanding between the [employer] and the replacements that the nature of their employment was permanent." *Target Rock Corp.*, 324 NLRB 373, 373 (1997), *enforced sub nom. Target Rock Corp. v. NLRB*, 172 F.3d 921 (D.C. Cir. 1998) (unpublished per curiam decision). Crucially, Sparks had to demonstrate that the understanding was reached "before [the strikers] made unconditional offers to return to work." *Supervalu, Inc.*, 347 NLRB 404, 405 (2006).

Sparks argues that the general counsel conceded that Sparks timely hired replacements and therefore that the Board was not entitled to make a contrary finding. This argument misses the mark. Although the general counsel's attorney agreed that Sparks had hired replacements *at some point*, she never conceded *when* that happened. *See* Hearing Tr. 17, Joint Appendix 122 (general counsel's opening statement: "You will also learn that at the time the employees offered to return to work on December 19th, Sparks had not replaced all the strikers and that positions were available for the former striker[s] to return to work."). Thus, Sparks still had to present evidence establishing that it reached the necessary mutual understanding with the replacements before the December 19 offer to return to work.

The Board found that Sparks failed to meet that burden, and substantial evidence supports that finding. Although Sparks introduced offer letters for the replacements that it had issued on or before December 19, those letters did not indicate when the replacements signed them and the testimony of Sparks's human resources officer fell short of filling the gap. Sparks cites *Gibson Greetings* for the proposition that an employer's unilateral statements can establish the necessary mutual understanding. And so they may, depending on the context. 53 F.3d at 390–91. But this case is very different from *Gibson Greetings*, where the replacements had been working for several months and had received confirmation of their jobs' permanency more than a month before the strikers offered to return. *Id.* at 387–91. The rapidly evolving events and compressed timeline here make it more critical to establish exactly when the replacements reached a mutual understanding with Sparks.

Sparks now contends that certain tip records from the week of December 15–21 would have helped clarify this timing issue. But Sparks failed to introduce those records into evidence at the hearing. Based in part on that omission, the ALJ drew an adverse inference against Sparks, assuming that the records would not have supported its position. To be sure, the ALJ also thought (erroneously, as it turns out) that Sparks had failed to even produce those records during discovery. Even if that mistaken impression contributed to the ALJ's decision to draw the adverse inference, however, any error was harmless because admitting the tip records would not have affected the outcome. *See Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 582 (D.C. Cir. 2015) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule: [section] 706 of the Administrative Procedure Act instructs reviewing courts to take due account of the rule of prejudicial error." (alteration, citation, and internal quotation marks omitted)). At most, the missing records would have shown that some of the replacements started work before December 19. Such evidence would not have resolved the crucial evidentiary issue in this case: when the replacements understood their arrangement with Sparks to be permanent. *See In re Michael Cetta, Inc.*, 366 NLRB No. 97, slip op. at 10 (records "would have established the precise dates that the newly hired employees *began working*," not when they understood their positions to be permanent (emphasis added)); *see also* Oral Arg. Rec. 13:18–14:54 (offering no explanation for how Sparks was prejudiced by the inference). Nor was the Board obligated to reopen the record for Sparks to introduce the tip sheets. Sparks's only excuse for failing to introduce them the first time around was the general counsel's supposed concession. Since that concession never happened, there was no reason to reopen the record.

Sparks argues that it had a second legitimate business reason for not reinstating its employees: a decline in business after December 2014. But the Board reasonably found based on five years' worth of sales records that Sparks's business suffered a downturn every year after the holiday rush. Despite this cyclical pattern, Sparks had never before reduced its staffing levels during off-peak periods. Thus, the Board found, the downturn in business failed to explain Sparks's failure to rehire the strikers. Sparks has given us no basis to upset that finding. *See Bally's Park Place*, 646 F.3d at 935 (Board accorded "a very high degree of deference" (internal quotation marks omitted)).

Finally, as Sparks chose not to challenge the unlawful solicitation finding in its petition for review, the Board is entitled to summary enforcement on that issue. *See CC1 Limited Partnership v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (finding "summary enforcement is appropriate" when an issue is not raised in petitioner's "opening[] brief").

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk