United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1222 **September Term, 2018**

FILED ON: JUNE 25, 2019

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCAL 14300-12,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

DURA-LINE CORPORATION,
INTERVENOR

On Petition for Review of an Order
of the National Labor Relations Board

Before: HENDERSON and MILLETT, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This case comes before the court on a petition for review of the National Labor Relations Board's order dismissing an unfair labor practice charge against Respondent Dura-Line Corporation. 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.

In September 2014, Respondent Dura-Line decided to close its Middlesboro, Kentucky manufacturing facility ("Middlesboro Facility"), which happened to be its only plant with a unionized workforce. The National Labor Relations Board concluded that Dura-Line would have made that same decision regardless of the union's presence at the Middlesboro Facility. Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, Local 14300-12 ("Union") petitions this court for review of that determination. Because the Board's decision is adequately reasoned and supported by substantial evidence, we deny the petition for review.

The Middlesboro Facility was used for manufacturing polyethylene conduit, pipe, and related products for the telecommunications industry. The Union began representing the

Middlesboro Facility's production and maintenance employees in 1987, and it continued to do so until the Middlesboro Facility ceased operations in December 2015. While the Middlesboro Facility was still in operation, several local supervisors harassed and threatened workers who belonged to the Union. More than one supervisor said that, if the plant were ever to close, it would be because of union activity.

The Middlesboro Facility was profitable, but it was old and had substantial physical limitations on its production capacity. For one thing, the plant's footprint was small and had no room to expand to meet clients' growing demand for Dura-Line's products. The cramped space also prevented the addition of a research-and-development area, which Dura-Line needed to keep abreast of evolving technology. In addition, the Middlesboro Facility's remote location made transporting products and materials logistically challenging and expensive. On top of all that, the Middlesboro Facility was physically deteriorating. It experienced regular flooding, and much of its equipment required replacement or substantial repairs. And in early 2015, the roof collapsed. The Facility also could not operate "24/7" according to the terms of Dura-Line's agreement with the Union, which was set to expire in April 2016.

Mexichem, a multinational chemical company, purchased Dura-Line in September 2014. Shortly before the acquisition, Dura-Line's Chief Executive Officer delivered a presentation to Mexichem that proposed closing the Middlesboro Facility. That presentation focused on the economic reasons for transferring operations elsewhere, discussing at length the plant's space constraints, aging systems, inefficient layout, and productivity limitations. The presentation also mentioned that the Middlesboro Facility was unionized and subject to a collective bargaining agreement prohibiting 24/7 operations. When Dura-Line decided to close the Facility during that same month, none of the local managers that had made anti-union statements were consulted or participated in the decisionmaking process.

In May 2016, the Board's General Counsel filed a complaint alleging, along with other claims not at issue in this petition, that Dura-Line had violated the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3), by closing the Middlesboro Facility and relocating its work because of the workers' union activity. After a hearing, an administrative law judge agreed with the General Counsel that Dura-Line had committed an unfair labor practice.

On review, the Board disagreed. It ruled that the weight of the evidence showed that, notwithstanding the anti-union animus expressed by local managers, Dura-Line would have made the same decision to close the Middlesboro Facility for "compelling economic reasons" that were independent of any anti-union sentiment. *See Dura-Line Corp.*, 366 N.L.R.B. No. 126, 2018 WL 3415630, at *2 (July 12, 2018). Specifically, the Board found that Dura-Line "need[ed] * * * a modernized facility that could accommodate its production requirements and permit significant expansion, utilize new technology, establish a dedicated research and development line, and improve transportation options[.]" *Id*. For those reasons, the Board dismissed the charge. *Id.* at *3. The Union petitioned for review.

The Board's decision must be upheld "unless its findings are unsupported by substantial evidence in the record considered as a whole, or unless the Board acted arbitrarily or otherwise erred in applying established law to facts." *United Food & Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007) (internal quotation marks omitted). Under that generous standard of review, we will reverse the Board "only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Teachers College, Columbia Univ. v. NLRB*, 902 F.3d 296, 302 (D.C. Cir. 2018) (internal quotation marks omitted). "Greater still is the deference due [to] * * * a finding regarding motive." *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008). That said, we will not affirm a decision where "the Board fails to adequately explain its reasoning, or where the Board leaves critical gaps in its" analysis. *David Saxe Prods., LLC v. NLRB*, 888 F.3d 1305, 1311 (D.C. Cir. 2018) (formatting altered).

As both parties agree, the determination whether the closure was impelled by anti-union animus is analyzed through the Board's *Wright Line* test. *See Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 218 (D.C. Cir. 2016). Under that test, the General Counsel "must first make a prima facie showing sufficient to support the inference" that union-related conduct was "a motivating factor" for the adverse action. *Id*. (quoting *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001)). Once that happens, the burden shifts to the Company to show, by a preponderance of the evidence, that it would have made the same decision "in the absence of the unlawful motive." *Id.* at 218 (quoting *Tasty Baking Co.*, 254 F.3d at 126); *see also NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1983).

The Board agreed with the Union that, given the extensive evidence of anti-union threats and misconduct by local managers, a *prima facie* showing had been made that hostility to unionized conduct was a motivating factor in the decision to close the plant. Not even Dura-Line contests the Board's finding on the first prong. The Union asserts that there was even more evidence of anti-Union animus than the Board recognized. But for purposes of *Wright Line*'s first step, that would just be piling on. The Union has already won this prong.

Where the Union's case stumbles is at *Wright Line*'s second step. The Union argues that substantial evidence does not support the Board's decision that Dura-Line would have closed the Middlesboro Facility regardless of the workers' union activity. But under our deferential standard of review, the Union had to show that no reasonable factfinder could have found that, anti-union animus aside, Dura-Line's economic motives would have led to the same result. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Union does not clear that hurdle.

The record is replete with evidence of economic reasons for closing the Middlesboro Facility that had nothing to do with its unionized workforce. The plant's size and location choked off opportunities to expand or to improve efficiency. As a result, the production process was significantly slower than a larger facility would allow. Add to that the facility's crumbling and outdated physical structure. Its aging water, resin-handling, and power systems all needed to be replaced. The Facility was inconveniently located, without a rail spur or easy access to highways

for transporting goods and supplies. It flooded after heavy rains. To top it off, the roof collapsed. The building was literally falling apart. All of that is why Dura-Line's CEO testified that he would not have changed his mind about closing the Facility even if the collective bargaining agreement's prohibition on 24/7 operations had been lifted.

The record also supports the Board's determination that the anti-union animus of local facility managers did not influence or even taint the corporate-level decision to close the Middlesboro Facility. Not one of those local managers had any involvement in or input into the decision to close the plant.

Taken together, those reasons provide substantial evidence supporting the Board's finding that Dura-Line would have relocated the Middlesboro Facility's operations even in the absence of any anti-union animus. *See Ozburn-Hessey*, 833 F.3d at 218; *Tasty Baking Co.*, 254 F.3d at 126.

The Union separately argues that the Board wrongly departed from its own precedent, upon which the administrative law judge had relied. But those cases—*Amglo Kemlite Labs., Inc.*, 360 N.L.R.B. 319 (2014), *Allied Mills, Inc.*, 218 N.L.R.B. 281 (1975), and *Royal Norton Mfg. Co.*, 189 N.L.R.B. 489 (1971)—are materially different. In each case, a relevant corporate decisionmaker admitted that the company's actions were taken precisely because of union activity. *See Amglo*, 360 N.L.R.B. at 321 (company president said that the company was moving production to another location "because of" a union strike); *Allied Mills*, 218 N.L.R.B. at 284 (plant superintendent refused to allow union workers to be relocated to his facility because "as long as he was superintendent there would never be a union if he could help it"); *Royal Norton*, 189 N.L.R.B. at 490 (company president told another officer that he was moving a factory's operations because union activities "were the straw that 'broke the camel's back'"). In this case, the record established no such linkage between the corporate-level decision to close the Middlesboro Facility and the local officials' hostile comments.

For all of those reasons, we deny the Union's petition for review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk