United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1170 **September Term, 2018**

FILED ON: JULY 12, 2019

SHAMROCK FOODS COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC,
INTERVENOR

Consolidated with 18-1178, 18-1197, 18-1199

On Petitions for Review and Cross-Applications
for Enforcement of Orders of
the National Labor Relations Board

Before: WILKINS, *Circuit Judge*, and GINSBURG and RANDOLPH, *Senior Circuit Judges*.

J U D G M E N T

The petitions for review and the cross-applications for enforcement were considered on the record from the National Labor Relations Board (Board), and the briefs and oral arguments of the parties. After full review of the case, the Court is satisfied that appropriate disposition of the appeal does not warrant an opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED and **ADJUDGED** that the petitions for review are **DENIED** and the cross-applications for enforcement are **GRANTED**.

Petitioner Shamrock Foods Company (Shamrock) is a wholesale foods distributor that operates a distribution center in Phoenix, Arizona. In late 2014, the Bakery, Confectionary, Tobacco Workers' and Grain Millers International Union, Local No. 232 (Union) attempted to

organize Shamrock's warehouse employees. In two separate decisions issued on June 22, 2018 – Cases 28-CA-150157 and 28-CA-169970 – the Board adopted in substantial part the decisions of two administrative law judges (ALJ) who found that Shamrock committed numerous unfair labor practices during the Union's organizing drive. Shamrock challenges both of the Board's decisions. The Board has filed cross-applications for enforcement of the decisions and orders.

In 28-CA-150157, the Board found that Shamrock violated Section 8(a)(1) of the National Labor Relations Act of 1935 (Act), Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169), by: (1) threatening employees; (2) soliciting employee complaints and grievances; (3) instructing employees to ascertain and disclose the union activities of others; (4) informing employees that supporting the union would be futile; (5) promising employees a benefit in order to discourage union support; (6) surveilling employees and creating the impression of surveillance; (7) promulgating an "unlawful work rule" in response to union activity, instructing employees to report employees who violated that rule, and threatening employees with legal prosecution if they violated that rule; (8) interrogating employees; (9) confiscating and prohibiting the distribution of union literature; and (10) granting a wage increase in order to discourage union support. The Board also adopted the ALJ's findings that Shamrock violated Section 8(a)(3) and (1) by disciplining Mario Lerma and violated Section 8(a)(1) by discharging Thomas Wallace. The Board agreed with the ALJ that parts of Wallace's separation agreement violated Section 8(a)(1), though on a different theory not alleged or litigated by the Board's General Counsel. *Shamrock Foods Co.*, 366 NLRB No. 117 (June 22, 2018).

In 28-CA-169970, the Board found that Shamrock violated Section 8(a)(3) and (1) of the Act by: (1) subjecting its employees to stricter enforcement of its previously unenforced break schedule; (2) subjecting Steve Phipps to closer supervision; (3) counseling Phipps; and (4) issuing a verbal warning to Michael Meraz. *Shamrock Foods Co.*, 366 NLRB No. 107 (June 22, 2018).

In its petitions, Shamrock challenges nearly all of the Board's findings. None of the challenges is persuasive.

First, we consider whether the Board erred in adopting the ALJ's decisions regarding the parties' subpoenas in 28-CA-150157. Two weeks before the ALJ's hearing, the General Counsel served Shamrock with a subpoena. The ALJ denied Shamrock's petition to revoke the General Counsel's subpoena as well as Shamrock's motion for a continuance. Shamrock failed to provide all of the subpoenaed documents. Because the subpoenaed information was "reasonably relevant to the matters at issue," J.A. 1048, the ALJ imposed evidentiary sanctions against Shamrock that prohibited Shamrock from presenting certain witnesses, limited Shamrock's cross-examination of the General Counsel's witnesses, and granted an adverse inference that the subpoenaed documents would have corroborated certain testimony.

We review the decision to impose evidentiary sanctions for abuse of discretion. *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998). "The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying

party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party." *McAllister Towing & Transp. Co.*, 341 NLRB 394, 396-97 (2004), *enforced*, 156 F. App'x. 386 (2d Cir. 2005). We agree with the Board that the ALJ did not abuse his discretion in imposing sanctions and that the sanctions were proportionate to Shamrock's failure to comply with the General Counsel's subpoena.

Shamrock also takes issue with the ALJ's decision not to sanction the Union or grant an adverse inference because the Union failed to produce recordings of meetings that Shamrock alleged Phipps had secretly made, in response to Shamrock's subpoena. The Board agreed that the ALJ did not abuse his discretion in declining to sanction the Union because the recordings were not in the Union's possession or control. We agree with the Board and do not find that the ALJ's decision not to impose sanctions was an abuse of discretion.

Second, Shamrock argues that the Board erred in finding that parts of Wallace's separation agreement violated Section 8(a)(1) because the General Counsel neither litigated that violation under the theory adopted by the Board nor charged it in the complaint. However, Shamrock failed to object to the Board's finding in a motion for reconsideration before the Board; accordingly, this Court lacks jurisdiction to pass judgment on this issue. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board, its member, 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). When an employer claims "it was denied procedural due process because the Board based its order upon a theory of liability . . . allegedly not charged or litigated before the Board," it must file a motion for reconsideration. *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Shamrock failed to raise its arguments before the Board on a motion for reconsideration, and "extraordinary circumstances" do not warrant review here.

Third, we turn to the merits of Shamrock's remaining contentions, which challenge the ALJs' credibility determinations and factual findings undergirding Shamrock's Section 8(a)(1) and (a)(3) violations. Section 7 of the Act protects employees' 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 section 7 rights. *Id.* § 158(a)(1). Section 8(a)(3) 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).

We review the Board's decisions "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)); however, we do not "merely rubber-stamp" the Board's decision, *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002) (quoting *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1062 (D.C. Cir. 2001)). "The court will uphold the decision of the Board unless it was arbitrary or capricious or contrary to law, and as long as its

findings of fact are supported by substantial evidence in the record as a whole." *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 977 (2018). 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). We do 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)).

Shamrock fails to show that the ALJs' credibility determinations are patently unsupportable or that the Board impermissibly adopted the ALJs' thorough opinions. We agree with the Board that substantial evidence supports the factual findings undergirding its conclusions that (1) Art Manning is a supervisor who unlawfully surveilled union activity; (2) Kent McClelland's May 8 letter promulgated an "unlawful work rule" in response to union activity; (3) Mark Engdahl's January 28 and April 29 statements were unlawfully threatening and coercive; (4) Jake Myers unlawfully interrogated Wallace about his union views; (5) Joe Remblance unlawfully interrogated Phipps and Nile Vose; (6) Karen Garzon unlawfully interrogated two employees; (7) Natalie Wright unlawfully solicited grievances at a January 28 roundtable meeting; (8) Engdahl's April 29 no-layoff commitment constituted an unlawful promise of employee benefits; (9) Shamrock's May 2015 wage increase constituted an unlawful grant of employee benefits; (10) David Garcia unlawfully engaged in surveillance and created the impression of surveillance on May 1; (11) Shamrock unlawfully disciplined Lerma; (12) Shamrock unlawfully discharged Wallace; (13) Shamrock unlawfully enforced its break policy in January 2016; (14) Shamrock unlawfully subjected Phipps to closer supervision; (15) Shamrock unlawfully disciplined Phipps; (16) Shamrock unlawfully disciplined Meraz; and (17) Ivan Vaivao unlawfully solicited grievances at a February 5 meeting.

Finally, Shamrock argues that the Board abused its discretion by requiring the remedial notice be read to employees by its President/CEO or Vice President of Operations or by a Board agent in the presence of these company officials. We disagree. Section 10(c) of the Act grants the Board the power to remedy unfair labor practices by ordering an employer to "take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). The Board's power "is a broad discretionary one," and the remedies should be based on the "enlightenment gained from [the Board's] experience." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

In this case, the Board found that in addition to being posted, the notice should be read aloud "[g]iven the severity and scope of the Company's unfair labor practices, and the fact that many of them were committed by high-level officials and/or at large and small mandatory meetings." *Shamrock Foods*, 366 NLRB No. 117, at *7. This remedy falls within the Board's broad discretionary power, and we see no reason to disturb this aspect of the order. *See Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 86 (D.C. Cir. 2018) ("We have recognized that a public reading may be appropriate where, as here, upper management has been directly involved in multiple violations of the Act.").

Because we find all of Shamrock's arguments barred or without merit, we deny Shamrock's petitions for review and grant the Board's cross-applications 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