United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1238 **September Term, 2018**

FILED ON: AUGUST 9, 2019

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1094

No. 17-1239

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1093

No. 18-1017

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1049

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

Before: MILLET, *Circuit Judge*, and SENTELLE and RANDOLPH, *Senior Circuit Judges*.

J U D G M E N T

The petitions for review and cross-applications for enforcement were considered on the record from the National Labor Relations Board ("Board"), as well as on the briefs and oral arguments of the parties. We have accorded the issues full consideration and determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petitions for review be denied and that the cross-applications for enforcement be granted.

Midwest Terminals of Toledo International ("Midwest") is a business that provides stevedoring (the loading and unloading of ships) and warehousing services. Stevedoring workers at Midwest's Toledo, Ohio facility are represented by Local 1982, International Longshoremen's Association, AFL-CIO ("Union"). Midwest challenges the Board's November 31, 2015 order and three December 15, 2017 orders adopting in substantial part three decisions in which administrative law judges found Midwest liable for committing collectively sixteen unfair labor practices, in violation of Sections 8(a)(1), 8(a)(3), 8(a)(4), and 8(a)(5) 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. § 158(a)(1), (a)(3)–(5)). The Board has filed cross-applications for enforcement of its decisions and related orders.

The Act makes it unlawful "for an employer * * * to encourage or discourage membership in any labor organization" by "discriminat[ing] in regard to hir[ing] or tenure of employment or any term or condition of employment[.]" 29 U.S.C. § 158(a)(3). An employer that violates Section 158(a)(3) will also necessarily violate Section 158(a)(1), which prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed" under the Act. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217–218 (D.C. Cir. 2016) (quoting 29 U.S.C. § 158(a)(1)); *see also Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). To state it simply, an "employer violates [Sections 158](a)(3) and (1) if it takes adverse action against an employee because of [her or his] protected union activity." *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1280 (D.C. Cir. 1999). Section 158(a)(5) of the Act separately prohibits employers from "refus[ing] to bargain collectively with the representatives of [its] employees." 29 U.S.C. § 158(a)(5). When an employer violates Section 158(a)(5), it also derivatively violates Section 158(a)(1). *Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 325 n.2 (D.C. Cir. 2015). One way an employer violates Sections 158(a)(5) and 158(a)(1) is by making a unilateral change to a mandatory subject of bargaining, whether or not the change was made in good faith. *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

On appeal, Midwest raises numerous legal challenges to the Board's decisions. It argues that (i) the evidence does not support a whole host of the Board's liability determinations, (ii) the Board's inferences of anti-union animus were improper, and (iii) many of the Board's credibility determinations were incorrect. None of those arguments surmount our deferential standard of review.

The central question on a petition for review is whether the Board's liability findings are supported by substantial evidence. *See, e.g.*, *NLRB v. Ingredion Inc.*, No. 18-1155, 2019 WL 3242548, at *2 (D.C. Cir. July 19, 2019). Under that standard of review, we will not "displace the Board's choice between two fairly conflicting views," *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), and will only overturn the agency's decision if the record is "so compelling that no reasonable factfinder" could have found as the agency did, *Teachers Coll., Columbia Univ. v. NLRB*, 902 F.3d 296, 302 (D.C. Cir. 2018) (quoting *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016)). The Board's assessments of "motive" enjoy even "[g]reater" deference. *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008). And the Board's credibility determinations will stand "unless * * * hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005)).

Midwest's efforts to overturn the Board's factual findings, motive determinations, and credibility judgments come nowhere close to meeting those strict standards. *See* 17-1238 Midwest Br. 20–53; 17-1238 Midwest Reply Br. 5–26; 17-1239 Midwest Br. 20–44; 17-1239 Midwest Reply Br. 4–18; 18-1017 Midwest Br. 17–41; 18-1017 Midwest Reply Br. 4–21. We need not analyze each of those arguments one by one because the common denominator is that, on this record, they each succumb to the standard of review. *See, e.g.*, *Cayuga Med. Ctr. at Ithaca, Inc. v. NLRB*, 748 F. App'x 341, 342–343 (D.C. Cir. 2018). The Board permissibly adopted the conclusions in the ALJs' three comprehensive opinions, which recount in painstaking detail, with

substantial record support and permissible credibility judgments, the years of anti-union activity by Midwest.

In addition to those substantial-evidence and credibility challenges, Midwest also raises a grab bag of other arguments, none of which succeeds.

First, Midwest argues that its due process rights were violated when the Board concluded that its decision to stop withholding dues check-off payments was an unlawful mid-term contractual modification of the May 22, 2012 Memorandum of Understanding between it and the Union. In Board cases, "due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134 (2d Cir. 1990); *see also Tasty Baking Co. v. NLRB*, 254 F.3d 114, 122 (D.C. Cir. 2001) (citing *Pergament* favorably).

That standard was met here. The General Counsel's consolidated complaint notified Midwest of the basic underlying facts of this dispute: that Midwest ceased dues check-off payments without prior notice to the Union. The Due Process Clause does not "require a precise statement of the theory upon which the General Counsel intends to proceed[.]" *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993) (citing *Pergament*, 920 F.2d at 136). In addition, the issue of mid-term modification was fully and fairly litigated. In its opening brief, the General Counsel listed the different types of evidence it would present, including evidence that "illustrates that [Midwest] ceased deducting dues at a time when they had legally and *contractually* been bound to continue deducting members' dues." 18-1017 J.A. 249 (emphasis added). At trial, the Memorandum of Understanding and relevant evidence about it were entered into evidence. Due process requires no more. *See NLRB v. Blake Constr. Co.*, 663 F.2d 272, 281 & n.27 (D.C. Cir. 1981) (topics discussed in the General Counsel's opening statement can be probative of whether an issue was fully and fairly litigated).

On top of that, Midwest has made no showing that it would have introduced additional evidence or litigated its case differently had more elaborate notice been provided. Absent any demonstration of prejudice, Midwest's due process rights were not violated. *See Davis*, 2 F.3d at 1169 ("When an employer is not prejudiced by the Board's reliance on a theory not specifically addressed in the complaint or at the hearing, the employer's due process rights are not violated."); *Pergament*, 920 F.2d at 134 ("The Board * * * concluded that Pergament was not prejudiced by the General Counsel's failure to amend the complaint to include a charge under § [15]8(a)(4), because Pergament's proffer of the evidence it would have presented, had the complaint included the § [15]8(a)(4) violation, would not have strengthened its defense.").

Second, Midwest argues that the doctrine of laches should have barred certain claims brought by the Board because of its undue delay. Laches is an equitable doctrine. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 47 (D.C. Cir. 2005). It bars a lawsuit if the plaintiff "unreasonably delays in filing a suit and as a result harms the defendant." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002).

The Board has "long held that the defense of laches does not lie against the Board as an agency of the United States Government." *Entergy Miss., Inc.*, 361 NLRB 892, 893 n.5 (2014); *see also Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("[L]aches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.").

Midwest nonetheless argues that the Board itself has made laches applicable to cases brought by the General Counsel when the employer demonstrates both that the delay in bringing the case was "entirely attributable to the General Counsel," and that it "has been prejudiced by a lack of due process that veritably precludes it from effectively presenting its case." *St. Anthony Hosp. Sys.*, 319 NLRB 46, 51 (1995); 18-1017 Midwest Br. 45.

Even assuming laches can lie against the Board on the terms that Midwest describes, that test is not met here. For starters, any delay in bringing the charges against Midwest was not "entirely attributable to [the] General Counsel[.]" *St. Anthony Hosp. Sys.*, 319 NLRB at 51. Public records demonstrate that many of the charges brought against Midwest were referred to arbitration, settled, or dismissed during the period of the proceeding. In addition, Midwest was not "veritably preclude[d]" from bringing a defense to the General Counsel's charges. *Id.* For example, the fact that Midwest's operations manager, John Staler, passed away before the General Counsel's complaint issued did not prevent Midwest from putting on a defense. Midwest does not dispute that other witnesses to some of Staler's relevant conduct—such as union steward Bob Moody and Midwest Director of Operations Terry Leach—were available to testify.

Third, Midwest contends that several of the unfair labor practices it was charged with were the product of a complaint filed by an improperly appointed General Counsel, and so were void. Midwest is right that some of the complaints at issue were filed by an improperly appointed General Counsel. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 944 (2017) (upholding this court's determination that the Acting General Counsel was serving in violation of the Federal Vacancies Reform Act). However, those complaints were later ratified by a different General Counsel, whose appointment no one disputes. "[R]atification can remedy a defect arising from the decision of an improperly appointed official * * * when * * * a properly appointed official has the power to conduct an independent evaluation of the merits and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotation marks omitted); *accord Allied Aviation Serv. Co. v. NLRB*, 854 F.3d 55, 64 (D.C. Cir. 2017); *FEC v. Legi–Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996). The Federal Vacancies Reform Act—the statute the original General Counsel's appointment violated—expressly permits such ratification in Board cases. 5 U.S.C. § 3348(e)(1); *see SW Gen., Inc. v. NLRB*, 796 F.3d 67, 78 (D.C. Cir. 2015).

To the extent Midwest's concern is that the complaint could not be ratified because the Board lacked a quorum when it rendered its November 31, 2015 decision, the Board later ratified that decision in 2017. *See* 18-1017 J.A. 233–234; *see also Wilkes-Barre Hosp. Co.*, 857 F.3d at 370–371 ("Because both the Board and Director Walsh ratified the actions taken during the period in which the Board lacked a valid quorum, we conclude that the Hospital's motion was properly denied.").

Fourth, Midwest argues that the Union exceeded the Act's six-month time limit for filing its complaints about Midwest's failure to follow the collective bargaining agreement's selection criteria and failure to bargain before adding employees to the skilled list. Not so. "[T]he Board has consistently held that the [six-month] period does not commence until the charging party has 'clear and unequivocal notice' of the violation." *Vallow Floor Coverings, Inc.*, 335 NLRB 20, 20 (2001) (quoting *A&L Underground*, 302 NLRB 467, 469 (1991)); *see also Leach Corp. v. NLRB*, 54 F.3d 802, 805–808 (D.C. Cir. 1995) (affirming the Board's application of this standard). Midwest, as the party raising a timeliness defense under 29 U.S.C. § 160(b), bore the burden of demonstrating that the General Counsel had "clear and unequivocal notice" of its violation. *See Vallow Floor Coverings*, 335 NLRB at 25. Midwest failed to meet that burden. Substantial evidence supports the Board's conclusions that (i) the Union did not have clear and unequivocal notice of Midwest's departure from the contractual selection criteria until the company actually departed from those criteria in April 2014 by adding two employees to the skilled list, and (ii) the Union did not have clear and unequivocal notice of Midwest's failure to bargain before adding people to the skilled list until it actually failed to bargain in April 2014.

Fifth, Midwest argues that the Union waived its right to bargain over changes to the method and criteria for adding workers to the skilled list. "A union may expressly waive its right to bargain by a waiver that is 'clear and unmistakable' or may implicitly waive by failing to timely demand bargaining." *StaffCo of Brooklyn, LLC v. NLRB*, 888 F.3d 1297, 1302 (D.C. Cir. 2018) (*quoting Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 312, 314 (D.C. Cir. 2003)). Midwest, as the party claiming waiver, bears the burden of proof. *See IMI South, LLC*, 364 NLRB No. 97, 2016 WL 4524115, at *3 n.6 (Aug. 26, 2016). Midwest did not show that the Union failed to timely demand bargaining. The company does not argue that the Union expressly waived its right to bargain. And because Midwest made no additions to the skilled list in 2012 or 2013, the Union's actions in those years cannot be construed as an implicit waiver of its bargaining rights. The Union did not know that Midwest was adding workers to the skilled list until Midwest actually did so.

Sixth, Midwest's former employee, Union Steward Mark Lockett, did not lose the protection of the Act when he used profanity in the course of a single verbal exchange in which (according to his credited testimony) both sides exchanged heated, profane words. *See Webster Men's Wear*, 222 NLRB 1262, 1267 (1976) (concluding that employee did not lose protection of the Act when, in the course of an in-person meeting, both the worker and management resorted to provocative statements and profanity); *see also Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 26 (D.C. Cir. 2011) ("[E]mployees are permitted some leeway for impulsive behavior when engaging in concerted activity[.]") (quoting *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994)).

Seventh, the Board reasonably concluded that Midwest was required to bargain over a change in its procedures for transferring aluminum using forklifts. In Midwest's view, it was not required to bargain for this change because a previous Board decision had awarded this work to employees represented by the Teamsters union. Midwest is mistaken. The Board reasonably explained that its prior decision concerned only the use of Teamsters to drive trucks filled with aluminum from one side of Midwest's facility to another. That prior decision said nothing about the operation and driving of forklifts to load aluminum on the side of the facility on which the Union's members

worked. 17-1238 J.A. 85; *see also* Board 10(k) Decision, 17-1238 J.A. 979–980 (stating that, "consistent with past practice," the Union's employees shall perform "the *loading* of any trucks used to transfer cargo and materials") (emphasis added).

Eighth, the Board properly upheld the ALJ's decision to strike testimony that Midwest submitted after briefing in the administrative hearing had concluded. Midwest argues that it would have been within the ALJ's discretion not to strike the material. *See* 17-1239 Midwest Reply Br. 20. Perhaps. But reversal requires Midwest to show that the ALJ abused its discretion in striking the material. *See Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1273 (D.C. Cir. 2012) (ALJ evidentiary rulings reviewed for abuse of discretion). Midwest did not move to reopen the record to admit new testimony and, even if it had, it has not shown that "the new evidence would compel or persuade to a contrary result." *Reno Hilton*, 196 F.3d at 1285 n.10 (quoting *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988)).

Ninth, the Board appropriately sustained the ALJ's decision to exclude the affidavit of a Teamsters Union business representative that Midwest proffered. The Board has the discretion to "rely on hearsay" in the form of "sworn statements," *Conley Trucking*, 349 NLRB 310 (2007), as long as the statements are "reliable and trustworthy," *EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002). The ALJ chose not to admit "hearsay evidence" about "a matter that [was] central to the * * * case," noting that the information contained in the affidavit came from a non-party's investigation that "had nothing to do * * * with what happened in this case." 17-1238 J.A. 484–485. Indeed, the affidavit includes only threadbare assertions, not facts. 17-1238 J.A. 1009. And any error would have been harmless to boot. Midwest has failed to demonstrate that the affidavit was not cumulative of evidence already offered by a Teamsters' steward that Midwest had called. *See Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 68 (D.C. Cir. 2015) (no prejudice where company did not seek "to introduce relevant, non-cumulative evidence").

Finally, the Board acted well within its discretion in declining to draw an adverse inference against the General Counsel for not calling Union officials to testify about certain conversations that occurred in 2012. Midwest has not shown that the officials were "peculiarly" within the Board's control. So if Midwest thought their testimony was important, it could have called them. *See Huthnance v. District of Columbia*, 722 F.3d 371, 378 (D.C. Cir. 2013) (noting that we have "denied the inference where the evidence was not peculiarly within the power of one party") (internal quotation marks omitted). Anyhow, the General Counsel's decision not to call those witnesses made sense because their testimony likely would have been cumulative of other testimony adduced at trial. *Id.* (explaining that an adverse inference should not be drawn when "there are innocuous explanations for the party's failure to introduce the evidence[,]" including considerations of "economy and logistics, reinforced by the rule against cumulative evidence"); *see also International Union, United Auto., Aerospace & Agricultural Implement Workers of America (UAW) v. NLRB*, 459 F.2d 1329, 1344 (D.C. Cir. 1972) ("Of course, in a situation where a party has good reason to believe he will prevail without introduction of all his evidence, it would be unreasonable to draw any inference from a failure to produce some of it.").

One more point in conclusion. Midwest purports to have raised other issues, which the Board says are not properly before the court. Midwest's briefs in 18-1017 and 17-1238 approach or reach the maximum allowable length under the applicable rules. *See* FED. R. APP. P. 32(a)(7); D.C. CIR. R. 32(a)(7), (e). Midwest attempted to circumvent the rules by offering little or no support or discussion for its asserted arguments, choosing instead to incorporate by reference arguments it had made before the Board.

We have repeatedly denounced that practice of incorporating arguments by reference and have found it inadequate to prevent the invocation of the word length rules against litigants attempting it. *See, e.g.*, *Davis v. Pension Guar. Benefit Corp.*, 734 F.3d 1161, 1166–1167 (D.C. Cir. 2013). Arguments of petitioners supported only by such unpermitted incorporation are deemed to be waived. *Accord City of Waukesha v. EPA*, 320 F.3d 228, 251 n.22 (D.C. Cir. 2003).

When the Board pointed out this failing, Midwest responded that it

> did not waive its challenges to the § 8(a)(1) violations. Midwest filed a motion with this Court seeking permission to exceed the 13,000 word limit informing the Court that the limit was not reasonable given the circumstances of this case. The Court and the Board disagreed. Accordingly, Midwest had no plausible choice but to refer the Court to its Exceptions and Brief in Support it filed before the Board.

No. 18-1017 Midwest Reply Br. 3.

In addition to the inherent illogic of arguing that it was entitled to circumvent the rule because the court did not give it the right to avoid the rule, Midwest's rebuttal is particularly ineffective in this case. Midwest had obvious other "plausible choice[s]." It could for example have omitted some of its weaker arguments. More helpfully, it could have condensed its lengthy and verbose briefs, which showed little sign of any editing.

In sum, we have considered each and every one of Midwest's properly presented arguments and have found that none of them warrant overturning or modifying the Board's judgment. Therefore, we deny all of Midwest'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 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