United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1318 **September Term, 2019**

FILED ON: OCTOBER 29, 2019

STATION GVR ACQUISITION, LLC, D/B/A GREEN VALLEY RANCH RESORT SPA CASINO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
INTERVENOR

Consolidated with 19-1006

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

Before: GARLAND, *Chief Judge*; TATEL, *Circuit Judge*; and SILBERMAN, *Senior Circuit Judge*.

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 and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has 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 NLRB's cross-application for enforcement be granted.

Petitioner Station GVR Acquisition's employees chose the Local Joint Executive Board of Las Vegas ("the Union") as their representative. But GVR refused to bargain with the Union, claiming that the Board-sponsored election was marred by misconduct. The Board certified the election and found that GVR had committed an unfair labor practice by refusing to bargain. GVR now seeks our review.

GVR presses three election objections. All center on the fact that, at the request of the Union, certain pro-Union "committee leaders" asked small groups of their fellow employees whether they had voted and then orally relayed this information to the Union. The Union recorded this information electronically. None of GVR's objections overcomes its "heavy burden" in challenging a Board-sponsored election, *Antelope Valley Bus. Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

First, the Board reasonably declined to set aside the election on GVR's theory that the committee leaders' questioning created impermissible voter lists. Under Board law, keeping a list of voters besides the official eligibility list "is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded." *Days Inn Mgmt. Co.*, 299 N.L.R.B. 735, 736 (1990). GVR contends (1) that the committee leaders' knowledge of who voted and relaying of that information to the Union created partial mental or oral lists of voters; and (2) that because the committee leaders were themselves employees, employees knew about the lists. Even assuming oral or mental lists made away from the polls would violate the *Days Inn* principle, here only "the union adherents involved in the list keeping, whose voting choices could have hardly been affected," knew about these "lists." J.A. 369 n.1 (quoting *Robert's Tours, Inc.*, 244 N.L.R.B. 818, 818 n.5 & 824 (1979)). Although impermissible list-keeping may justify setting aside an election "even when there has been no showing of actual interference with the voters' free choice," *Days Inn*, 299 N.L.R.B. at 736, the Board has long carved out an exception for "de minimis" conduct, *Cerock Wire & Cable Grp.*, 273 N.L.R.B. 1041, 1041 (1984). Any list-keeping by the "union adherents" here falls comfortably within that exception. *See Days Inn*, 299 N.L.R.B. at 736 (citing *Robert's Tours*, 244 N.L.R.B. 818, as an example of de minimis conduct).

Second, we cannot consider GVR's contention that the Union created an "impression of surveillance" because that objection was not properly raised before the Board. *See* 29 U.S.C. § 160(e); *Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008).

Third, notwithstanding GVR's claim to the contrary, substantial evidence supports the Board's conclusion that no employee knew about the Union's electronic list. No employee "testified to hearing or seeing any indications of list-keeping." J.A. 353. GVR speculates that committee leaders and employees who received targeted get-out-the-vote outreach could have inferred that the Union tracked voting. But neither committee leader who testified at the Board hearing professed to knowing about the list. One even stated that she did not know why the Union wanted to know who voted. J.A. 79. Before the Board, GVR offered no evidence that employees targeted for follow-up knew about the list. Its speculation now cannot meet its heavy burden to overturn the election.

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 rehearing *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