United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1329 **September Term, 2019**

FILED ON: NOVEMBER 18, 2019

ROCKWELL MINING, LLC,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION,
INTERVENOR

Consolidated with 19-1017

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

Before: GARLAND, *Chief Judge*, KATSAS, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

The petition for review and the cross-application for enforcement were considered on the record from the National Labor Relations Board (the "Board") and the briefs filed by 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 determined a published opinion is unwarranted. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the petition for review be denied and the cross-application for enforcement be granted.

Rockwell Mining challenges the Board's Order requiring Rockwell to bargain with the United Mine Workers of America. Rockwell argues that it should not be required to bargain with the Union, insisting that the Board should not have certified the representation election because the Union allegedly interfered with it. We disagree.

In the summer of 2016, the Union began organizing Rockwell's approximately 55 employees at the Glancy Surface Mine in Wharton, West Virginia. In early July 2016, shortly before the Union petitioned to represent those employees, a pro-Union Rockwell employee, Jerry Hager, organized a voluntary meeting for the approximately 23 night-shift workers. At the meeting, Hager sought to persuade the attending employees to sign union-authorization cards, and succeeded in persuading most of the attendees to do so. Shortly afterwards, on July 14th, the Union petitioned to represent Rockwell's employees. On August 3rd, the Board held an election and by a 27-25 majority, the employees voted for representation.

The crux of Rockwell's complaint is a comment Hager allegedly made at the meeting. The exact content of Hager's comment is uncertain, as the eight witnesses that testified about it gave differing accounts. But five of those eight witnesses remembered Hager's comment similarly. According to those witnesses, Hager told the employees that if they did not sign authorization cards, they would not be protected or covered by the Union if something bad happened. The Hearing Officer credited this version of events, and the Board's Regional Director agreed.

From this, the Board's Regional Director determined that Hager's statement was "at best, ambiguous" and "open to various interpretations" and thus not the type of threat that would warrant setting aside an election. It could plausibly be interpreted, as Rockwell contends it ought to be, as a threat by the Union to retaliate against employees that did not sign authorization cards by declining to vigorously represent those employees. But it could also be interpreted as explaining that if the employees did not sign authorization cards, and the Union consequently was not authorized, the employees would not be protected in the event of any adverse employment action by Rockwell. The Director concluded that such an ambiguous statement would not tend to interfere with employees' freedom of choice in a subsequent election, and thus did not warrant setting aside the election. This was particularly the case because, under the Board's rule from *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961), only clearly proscribed misconduct warrants setting aside an election when that misconduct occurred before the union petition was filed. But the Director also held that even if the *Ideal Electric* rule did not apply, and this comment was instead analyzed under the same standard as post-petition conduct, it still would not have warranted setting aside the election. The Board denied review of the Director's decision, finding it raised "no substantial issues warranting review." *Rockwell Mining v. United Mine Workers of America*, 367 NLRB No. 46 (2018).

Our review of Board decisions regarding the validity of elections is deferential. On "questions regarding representation, we accord the Board an especially wide degree of discretion" and "overturn a Board decision to certify an election in only the rarest of circumstances." *800 River Road Operating Co., LLC v. NLRB*, 846 F.3d 378, 385–86 (D.C. Cir. 2017) (citations and quotations omitted). Credibility determinations made by a Hearing Officer in this context should be upheld "absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its fac[e] incredible." *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984).

The Hearing Officer's determination of what Hager actually said in this case was well-explained and supported by the evidence in the record. Faced with conflicting testimony from a number of witnesses, the Hearing Officer reached a factual conclusion that best aligned with the

majority of those witnesses. He explained that he reached that conclusion based on the demeanor and mutually corroborative accounts of those witnesses. There are no extraordinary circumstances that would warrant overturning these findings. Accordingly, we defer to the Hearing Officer's factual conclusion that Hager told the employees that unless they signed the authorization cards, they would not be protected if something bad happened to them.

The Board's conclusion that Hager's comment did not warrant setting aside the election also warrants deference. Under the *Ideal Electric* rule, the Board will not set aside an election based on pre-petition conduct unless "it has found clearly proscribed activity likely to have a significant impact on the election." *Royal Packaging Corp.*, 284 NLRB 317, 317 (1987). The Board's determination that a single comment—which was plausibly ambiguous and not clearly a threat—did not qualify as "clearly proscribed activity" is reasonable. Moreover, the Hearing Officer found "that this pre-petition statement was not so severe as to likely cause fear among employees and that this particular statement did not persist in the minds of bargaining unit employees." Based on those factual findings, it is also reasonable to conclude that Hager's comment likely did not significantly impact the election.

Rockwell also contends that the *Ideal Electric* rule should be revisited in light of the Board's recent rule shortening the time between a union petitioning to represent workers and an election on representation. *See* 29 C.F.R. § 102.67(b). The Board's Order acknowledged that, in light of the shortened average time period between petition and election, the *Ideal Electric* rule may need to be revisited in a future case. *Rockwell Mining LLC*, 2018 WL 3091016 at *1 n.1 (N.L.R.B. June 21, 2018). But we need not decide that issue in this case. The Director considered whether Hager's comment would warrant setting aside the election if not for the *Ideal Electric* rule and concluded it would not because Hager's comment "did not reasonably tend to interfere with employees' free and uncoerced choice in the election." Given that a single ambiguous comment is at issue, the Board did not abuse its discretion in reaching that conclusion. We thus deny Rockwell's petition for review and grant the Board's cross-application 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 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/
Daniel J. Reidy
Deputy Clerk