United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1118 **September Term, 2019**

FILED ON: FEBRUARY 21, 2020

DILLON COMPANIES, INC., D/B/A KING SOOPERS,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 7,
INTERVENOR

Consolidated with 19-1131

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

Before: GARLAND, PILLARD, and KATSAS, *Circuit Judges*.

J U D G M E N T

The court considered this petition for review and cross-application for enforcement on the record from the National Labor Relations Board (Board) and on 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 they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is hereby

ORDERED AND ADJUDGED that the petition for review be **DENIED** and the Board's cross-application for enforcement be **GRANTED**.

King Soopers, a Colorado-based grocery chain operating in the Mountain West, refused to bargain in order to challenge the Board's authorization of an *Armour-Globe* "self-determination"

election for deli employees at Store 89 in Broomfield, Colorado. An *Armour-Globe* election, by which unrepresented employees may seek to join an existing collective bargaining unit, is appropriate where the unrepresented employees (1) "share a community of interest with unit employees," and (2) "constitute an identifiable, distinct segment." *Warner-Lambert Co.*, 298 N.L.R.B. 993, 995 (1990); *see also Armour & Co.*, 40 N.L.R.B. 1333, 1336 (1942); *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294, 299-300 (1937). In the election challenged here, twelve deli employees voted to join an existing unit of meat department employees at Store 89 and two other stores in Broomfield. For the following reasons, we conclude that the Board's authorization was proper and reject King Soopers' three arguments to the contrary.

First, King Soopers claims that the Board "significantly departs" from its precedents in *PCC Structurals, Inc.*, 365 N.L.R.B. No. 160 (2017), and *Boeing Co.*, 368 N.L.R.B. No. 67 (2019), in approving what King Soopers views as an unacceptable "micro-unit." King Soopers Br. 35. But those Board decisions did not involve situations, as here, where employees sought to join an adequate-sized existing unit. Instead, they addressed the different question whether the "smallest appropriate unit must include employees excluded from the petitioned-for unit." *PCC Structurals*, 365 N.L.R.B. No. 160 at 7; *see also Boeing Co.*, 368 N.L.R.B. No. 67 at 2 (similar). The preexisting unit here is indisputably of appropriate size and will continue to be so with the new members. In any event, King Soopers did not argue that the proposed deli and meat unit should include other unrepresented employees who were excluded. And, contrary to King Soopers' assertion, *see* King Soopers' Br. 37, 45, the Board fulfills its statutory obligation to determine unit appropriateness "in each case," 29 U.S.C. § 159(b), by applying the *Warner-Lambert* standard to the facts in each *Armour-Globe* self-determination representation proceeding.

Second, King Soopers argues that the Board "misapplied" the *Warner-Lambert* standard. King Soopers Br. 44. Given the "especially wide degree of discretion on questions of representation" we accord the Board, *Rush Univ. Med. Ctr. v. NLRB*, 833 F.3d 202, 206 (D.C. Cir. 2016) (internal quotation marks omitted), there is no basis to disturb its findings here. Substantial evidence supports the Regional Director's finding with respect to the *Warner-Lambert* requirement of a community of interest. As the Regional Director noted—and the record amply supports—the deli and meat employees "have regular contact" with one another, "are in close proximity, have the same hours, require additional food handling training than other employees, and perform some similar functions" to one another. J.A. 1107. In response, King Soopers emphasizes differences with respect to health insurance and other benefits, wage scales, seniority rights, and shift practices, *see* King Soopers Br. 29-30, but such differences between unit members' rights under a labor contract and the rights of workers seeking to join the unit "may reasonably be expected in the *Armour-Globe* context," *Pub. Serv. Co. of Colo.*, 365 N.L.R.B. No. 104, at 1 n.4 (2017), and, accordingly, do not bear on the first *Warner-Lambert* inquiry. And King Soopers does not challenge the Board's application of the requirement that the workers to be added comprise "an identifiable, distinct segment." J.A. 1552 n.1 (internal quotation marks omitted).

Finally, King Soopers argues that the Board "unlawfully refused to consider the parties'

bargaining history and unlawfully altered the parties' collective bargaining agreement." King Soopers Br. 48. But the Regional Director gave appropriate weight to the parties' bargaining history, discussing the immediate bargaining history between the employer and employees in the petition, *see* J.A. 1105, and finding that, even were the "overall bargaining history between these parties concerning deli and meat units . . . relevant to the determination," that history would also support directing a self-determination election, J.A. 1105 n.20. As for the existing collective bargaining agreement, the fact that this agreement does not already cover deli employees makes no difference unless the agreement reflects an express promise by the union not to represent those employees. *See, e.g.*, *UMass Mem'l Med. Ctr.*, 349 N.L.R.B. 369, 369-70 (2007). Because no such provision is included in the existing agreement, the Board has not impermissibly altered its terms.

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(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk