United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1127 **September Term, 2019**

FILED ON: February 28, 2020

TROUTBROOK COMPANY LLC D/B/A BROOKLYN 181 HOSPITALITY LLC,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

NEW YORK HOTEL AND MOTEL TRADES COUNCIL, AFL-CIO
INTERVENOR

Consolidated with 19-1132

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

Before: GRIFFITH and RAO, *Circuit Judges*, and EDWARDS, *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 (NLRB or the "Board") and the briefs of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons set out below, it is

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

Troutbrook Company LLC operates a hotel in New York City. In early 2018, Warehouse Production Sales & Allied Service Employees Union Local 811, AFL-CIO ("Local 811") petitioned the NLRB to represent a unit of employees at the hotel. New York Hotel and Motel

Trades Council, AFL-CIO ("HTC"), a larger union, sought to represent the same unit of employees. A majority of hotel employees voted for representation by HTC in June 2018.

Troutbrook sought to set aside the election and filed twelve objections, many of which alleged that HTC had engaged in pre-election misconduct. *See, e.g.*, Objections to Conduct Affecting the Results of the Election at 1 (July 3, 2018), J.A. 49 (alleging that HTC "threatened and intimidated bargaining unit employees"). Troutbrook's final objection alleged that a Board administrative error caused Troutbrook to post an inaccurate Notice of Election in the workplace. An NLRB Regional Director sustained the final objection, set aside the election, and ordered a second election. Having set aside the election because of the administrative error, the Regional Director declined to address Troutbrook's remaining objections. *See* Decision on Objections at 4 (Aug. 3, 2018), J.A. 126. On his own initiative, the Regional Director ordered that the new Notice of Election include a *Lufkin Rule* statement, which is a brief description of the reason the election was set aside. *See id.* at 5, J.A. 127. Local 811 withdrew from the representation proceeding before the second election was held.

At the second election, the hotel employees again voted in favor of representation by HTC. Troutbrook filed objections to the second election that were nearly identical to those it filed after the first election. The Regional Director overruled the objections. Under longstanding NLRB precedent, the "critical period" for a second election—that is, the period the Board will examine when it decides whether to order a new election—runs from the date of the first election to the date of the second election. *See Singer Co.*, 161 NLRB 956, 956 n.2 (1966). Because each of Troutbrook's objections concerned events that occurred before or during the first election, Troutbrook alleged no misconduct that occurred during the critical period for the second election. The Regional Director certified HTC as the hotel employees' representative.

Troutbrook requested Board review of the Regional Director's decision, arguing that HTC's "uninvestigated and unremedied misconduct" before the first election "continued to interfere with employee free choice" during the critical period for the second election. Request for Review at 7, 10 (Oct. 9, 2018), J.A. 207, 210. Troutbrook also alleged that the *Lufkin Rule* statement in the second Notice of Election was defective because it described only an NLRB administrative error, not union misconduct. *See id.* at 10, J.A. 210. In a brief order, the Board denied Troutbrook's request for review. *See Troutbrook Co.*, 367 NLRB No. 56 (Dec. 13, 2018), J.A. 219.

To obtain appellate review of the NLRB's decision to certify HTC as the employees' representative, Troutbrook refused to bargain with the union. *See Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC v. NLRB*, 736 F.2d 1559, 1561 (D.C. Cir. 1984). In its order directing Troutbrook to bargain with HTC, the NLRB explicitly rejected Troutbrook's "continuing impact" theory as unsupported by evidence. *See Troutbrook Co.*, 367 NLRB No. 139 n.2 (June 3, 2019), J.A. 459. Troutbrook then filed a petition for review (No. 19-1127), the Board cross-applied for enforcement of its order (No. 19-1132), and we consolidated the cases. We have jurisdiction under 29 U.S.C. § 160(e)-(f).

In a challenge to an NLRB union certification decision, we afford the Board "an especially wide degree of discretion," engage in "extremely limited" review, and overturn the Board "in only the rarest of circumstances." *800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 385-86 (D.C. Cir. 2017) (internal quotation marks and citations omitted). This is not one of those rare cases. Troutbrook offers no persuasive argument that the NLRB erred in applying its well-settled critical period rule.

First, Troutbrook says it would have been "reasonable [for the NLRB] to conclude that" alleged union and Board misconduct that occurred before the first election "would tend to coerce and interfere with employee free choice through the date of the [Second] Election." Troutbrook Br. 28. However reasonable such a conclusion might have been, Troutbrook gets the critical period rule backwards. The whole point of the rule is to provide "a convenient device to limit the [NLRB's] inquiry to the period near the election when improper acts are most likely to affect the employees' freedom of choice." *Amalgamated Clothing*, 736 F.2d at 1567. The inevitable consequence of the rule is to exclude conduct that could reasonably affect an election. *See Catholic Med. Ctr. of Brooklyn & Queens, Inc. v. NLRB*, 589 F.2d 1166, 1172 (2d Cir. 1978) (Friendly, J.) ("[T]he harm bound to be inflicted by [the critical period rule] include[s] the disagreeable task of saying that misconduct which in fact would have influenced an election must be disregarded . . . if the misconduct occurred prior to the [critical period].").

Second, Troutbrook argues that it "indeed presented evidence that employee free choice was impacted" during the critical period, because Local 811 withdrew after the first election. Troutbrook Br. 28. But mention of Local 811's withdrawal appears nowhere in Troutbrook's objections and offer of proof. And Troutbrook never offered evidence of *why* Local 811 withdrew, other than the vague and conclusory assertion that Local 811 did so "after being forced to endure . . . the prejudicial actions" of HTC and the NLRB. Request for Review at 5, J.A. 205. We agree with the Board that Troutbrook failed to offer evidence in support of its "continuing impact" theory. *See* 367 NLRB No. 139 n.2, J.A. 459.

Third, Troutbrook argues that its case is analogous to four NLRB decisions that applied an exception to the critical period rule. *See* Troutbrook Br. 27-28 (citing *Gibson's Discount Ctr.*, 214 NLRB 221 (1974); *Lyon's Restaurants*, 234 NLRB 178 (1978); *Royal Packaging Corp.*, 284 NLRB 317 (1987); *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004)). But those decisions bear little resemblance to the case at bar. In each, the Board contemplated ordering a second election on the basis of misconduct that occurred before the critical period for the first election. As far as we know, though, the Board has *never* ordered a third election on the basis of misconduct that occurred before a first election, even though the critical period rule has existed for more than fifty years. *See Singer Co.*, 161 NLRB at 956 n.2. Troutbrook suggests the four decisions it cites resemble the instant case because they too involve conduct "likely to interfere with employee free choice," Troutbrook Br. 27, but the same could be said of any case involving misconduct before the critical period. That generic statement aside, Troutbrook offers no argument that its case resembles any of the small class of NLRB decisions that apply a "narrow exception" to the critical period rule. *Harborside Healthcare, Inc.*, 343 NLRB at 912; *see also Amalgamated Clothing*, 736 F.2d at 1567 (stating that the rule applies "[a]bsent extremely unusual circumstances").

Last, we reject Troutbrook's objection to the *Lufkin Rule* statement in the second Notice of Election. Troutbrook now objects to language it never requested the NLRB include in the first place, that the NLRB need not include even upon request, *see* NLRB Case Handling Manual ¶ 11452.3, 2015 WL 7392299, and that was factually accurate. We reject Troutbrook's suggestion that the Board, having found one valid reason to redo an election, should render a decision on every other objection for the sole purpose of adding a single sentence to a Notice of Election. *See Lufkin Rule Co.*, 147 NLRB 341, 342 n.2 (1964) (stating that the notice should not "detail[] the specific conduct involved"). That approach would needlessly burden the NLRB and has no basis in any authority cited by Troutbrook.

For the foregoing reasons, we deny the petition for review and grant the 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 rehearing en banc. *See* FED. R. APP. P. 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