

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1358

September Term, 2016

FILED ON: FEBRUARY 3, 2017

BENJAMIN H. REALTY CORP.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 15-1431

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

Before: TATEL and MILLETT, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

These causes came to be heard on petition for review and cross-application for enforcement of an order of the National Labor Relations Board. This action was considered on the record from the Board and on the briefs and oral arguments of the parties. The court has afforded the issues full consideration and has determined that they do not presently 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 cross-application of the Board for enforcement be granted.

Benjamin H. Realty Corporation (“Company”) refused to bargain with the Residential Construction and General Service Workers, Laborers Local 55 (“Union”) after the Company’s employees voted by the narrowest of margins—a seven to six vote—in favor of the Union. One of those votes in favor of unionization was cast by Justo Pastor Perea, who the Company claimed was ineligible to vote because he was a statutory supervisor, *see* 29 U.S.C. § 152(11). The Board found that the Company’s refusal to bargain violated the National Labor Relations Act, 29 U.S.C. § 158(a)(5) & (1), and ordered the Company to recognize and bargain with the Union. *See Benjamin H. Realty Corp.*, 362 N.L.R.B. No. 181 (Aug. 25, 2015).

The Company argues that we should overturn the Board's judgment for two reasons, neither of which succeeds.

First, the Company contends that the Board erred in placing the burden of proof on the Company to prove that Perea was a statutory supervisor at the time of the election. It is well-established, though, that the party seeking to assert supervisory status bears the burden of proof. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001). The Company argues that this case merits an exception from the general rule because here the parties agreed that Perea served as a supervisor until the hiring of Moshe Weiss in February of 2012, nine months prior to the union election. But the Company has not explained how Perea's preexisting supervisory status changes the reasons for the burden allocation identified by the Supreme Court in *Kentucky River*, 532 U.S. at 711, nor has it even identified any sound basis on which this court could devise a case-specific exception to the burden of proof, *see id.* (approving Board's placement of burden of proof on the party asserting supervisory status because it is easier to prove the existence of authority to exercise one of the twelve functions of supervisory status than to prove the absence of "authority to exercise any of those functions").¹

With respect to the Board's factual determination that Perea lost his supervisory status months before the election, that determination is supported by substantial evidence, *see Jochims v. NLRB*, 480 F.3d 1161, 1167 (D.C. Cir. 2007). The Hearing Officer's conclusion that the hiring of Moshe Weiss occasioned significant changes in Perea's job duties was adequately supported by (i) testimony from three other employees indicating that Weiss, not Perea, supervised them, and (ii) Perea's testimony that he ceased making payroll and salary determinations, stopped providing meaningful direction to workers, and was spending more than 90% of his time on manual labor such as plumbing repairs.

Second, the Company argues that the Board abused its discretion in refusing to reopen the record, *see Point Park Univ. v. NLRB*, 457 F.3d 42, 51 (D.C. Cir. 2006). Specifically, the Company argues that the Board should have reopened the record to consider a New Jersey state court civil complaint filed by Perea against the Company alleging that Perea was demoted two months after the election. We hold that the Board did not abuse its discretion. The Company has not shown that the civil complaint's vague and unverified allegation referencing a demotion from an unidentified prior status would compel a different outcome, given all of the other evidence of material changes in Perea's previously supervisory job duties. *See Manhattan Center Studios*, 357 N.L.R.B. 1677, 1679 (2011) (holding that a party seeking to reopen the record must prove, among other things, that "the evidence would have changed the result of the proceeding").

¹ The Company did not present on appeal any argument that the Board failed to take sufficient evidentiary account of Perea's prior supervisory role. Nor did it argue that, separate from the burden of proof issue, the question of continuing supervisory status should be analyzed differently than supervisory status *vel non*. Those issues accordingly are not before us.

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 the disposition of any timely petition for rehearing or 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