United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1097 **September Term, 2017**

FILED ON: APRIL 3, 2018

XPO LOGISTICS FREIGHT, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

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

Before: HENDERSON and SRINIVASAN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

JUDGMENT

The petition for review and the cross-petition for enforcement were considered on the record and the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review is denied and the cross-petition for enforcement is granted.

XPO Logistics Freight, Inc. (XPO) petitions for review of a National Labor Relations Board (Board) order holding XPO committed an unfair labor practice by refusing to bargain with the Local Lodge 701 union. 365 NLRB No. 42 (Mar. 10, 2017). XPO admits it refused to bargain but claims that the representation election, in which Local Lodge 701 was elected to represent a unit of XPO mechanics at its Indiana facility by an 8-3 vote, should be set aside based on two alleged incidents of third-party misconduct before the election. At the least, XPO argues, the Board should have held a hearing to allow XPO to develop and present its evidence. We disagree with XPO and, accordingly, deny the petition.

The Board sets aside an election based on the misconduct of third parties only if the alleged "misconduct is 'so aggravated as to create a general atmosphere of fear and reprisal rendering a

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free election impossible.'" *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1998) (quoting *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)). The Board concluded the two alleged incidents, taken either individually or in combination, did not rise to this level. "[O]ur review of the Board's rulings regarding [an] election is extremely limited." *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (internal quotation omitted). "If the Board's decision to certify a union is consistent with its precedent and supported by substantial evidence in the record, we may not disturb it." *Id.*

The first alleged incident involved a pro-union employee who told a pro-company employee that the latter would be "alone doing most of the work" if another pro-company employee left the company and the union won the election. Joint Appendix (JA) 14. Even crediting XPO's view that the statement was a threat of job loss, it was not "serious and likely to intimidate prospective voters to cast their ballots in a particular manner." *ManorCare of Kingston PA, LLC v. NLRB*, 823 F.3d 81, 85 (D.C. Cir. 2016) (quoting *Westwood Horizons Hotel*, 270 NLRB at 803). The threat came from a third party, was directed at one person and was communicated to one other employee. The threat thus represents, at most, a "small[] contribution to an atmosphere of fear." *Downtown Bid Servs.*, 682 F.3d at 116 (denying petition to re-run close election on basis of explicit job-loss threats "only directed at and disseminated to a few individuals").

The second alleged incident involved a pro-company employee who found two screws missing and more screws loose on his forklift grille the day of the election—damage the employee attributed to unknown pro-union coworkers. An anonymous incident of property damage that is not plainly related to the election, as is the case here, falls into the "le[ast] weight[y]" category of misconduct. *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984). The "law is well settled that such minor incidents of property damage are insufficient to overturn an election." *Id.* (denying petition to re-run election after anonymous parties keyed pro-company employees' cars in company parking lot). The Board reasonably found the anonymous misconduct did not warrant re-running the election.

Even taking the two alleged instances of misconduct together, we conclude that the Board did not err. If "most or all of the incidents" are "in the least weighty categories" of misconduct, the Board "appropriately will decide not to overturn the election results." *Id.* at 1569. As already explained, the incidents taken individually posed minimal danger to a free election. The Board reasonably determined the cumulative effect of the incidents did not render a free election impossible. *See id.* at 1570 ("[W]e will not independently assess the 'totality of the circumstances' to overturn the Board's considered decisions" about re-running elections).

Finally, XPO argued that it was at least entitled to an evidentiary hearing. To merit a hearing, the party challenging the election must "supply the Board with specific evidence which prima facie would warrant setting aside the election." *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970) (internal quotation omitted); *see* 29 C.F.R. § 102.69(c)(1)(i) (authorizing Regional Director to "dispos[e] of the objections" if he "determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing" and determines "that any determinative challenges do not raise substantial and material factual issues"). As detailed *supra*, XPO's proffered evidence, even if viewed as entirely accurate, manifests the kind of misconduct that Board precedent plainly

provides does not warrant re-running an election. The Board therefore reasonably denied XPO's hearing request because the evidence did not make out a prima facie case that the misconduct was "so aggravated" that a "free election" was "impossible." *Overnite Transp. Co.*, 140 F.3d at 265 (quoting *Westwood Horizons Hotel*, 270 NLRB at 803); *see Amalgamated Clothing Workers*, 424 F.2d at 828–29 (upholding Board decision "assum[ing] the truth of the Company's proffered testimony in support of its objections," finding "as a matter of law" that "the objection was without merit" and denying evidentiary hearing because no "factual issues exist which can only be resolved [there]by").

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.

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk