

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1200

September Term, 2017

FILED ON: MAY 22, 2018

GARDA CL ATLANTIC, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 17-1214

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

Before: TATEL, KAVANAUGH, and PILLARD, *Circuit Judges*.

J U D G M E N T

This petition for review and 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)(1). The Court has afforded 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 stated below, it is hereby

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

Garda CL Atlantic, Inc. (“Garda”), petitions for review of a Board order holding that it committed an unfair labor practice in violation of the National Labor Relations Act (the “Act”), 29 U.S.C. §§ 151–169, by refusing to bargain with the United Federation of Special Police & Security Officers, Inc. (the “Union”). *Garda CL Atlantic, Inc.*, 365 NLRB No. 108 (July 24, 2017). Acknowledging its refusal to bargain, Garda argues that the Board-certified election in which a

unit of employees at the company's Edison, New Jersey, facility voted in favor of Union representation should be set aside due to alleged misconduct by the Board agent who oversaw the election.

Garda focuses on brief exchanges between the Board agent and two workers who showed up to vote but had their eligibility challenged by a Union observer. The unit the Union sought to represent was limited to employees "performing guard duties as defined in . . . the [Act]," NLRB, Stipulated Election Agreement, *Garda CL Atlantic, Inc.*, No. 22-RC170477 (Mar. 4, 2016), Joint Appendix (J.A.) 65, and the Union observer claimed that the two would-be voters fell outside this category. In response to these challenges, the Board agent asked each of the two whether he carried a gun for work and asked at least one of them whether he worked as a guard. Receiving negative replies, the Board agent informed the two that non-guards were ineligible for Union representation and then extended an opportunity to cast a challenged ballot that would be sealed and set aside pending resolution of the eligibility challenge. Neither worker chose to cast a ballot.

After the Union eked out a narrow victory, Garda asked the Board's Regional Director to set aside the election results, arguing that the Board agent had improperly dissuaded the two challenged voters from casting ballots. Because two additional votes could have tipped the election's outcome, Garda contended that the Board agent's conduct "raise[d] a reasonable doubt as to the fairness and validity of the election" and so satisfied the Board's standard for invalidating the results. *Durham School Services, LP v. NLRB*, 821 F.3d 52, 54 (D.C. Cir. 2016) (alteration in original) (quoting *Durham School Services, LP*, 360 NLRB 851, 853 (2014)). Following a hearing, the Regional Director overruled Garda's objections and certified the election results. The Board denied Garda's request for review, and the Regional Director's certification decision thereupon became final. See 29 C.F.R. § 102.69(c)(2).

Garda argues here that the Board abused its discretion in certifying the election. See *Randell Warehouse of Arizona, Inc. v. NLRB*, 252 F.3d 445, 448 (D.C. Cir. 2001) (reviewing certification decision for abuse of discretion). The Board enjoys a "wide degree of discretion" in matters of election certification, and in reviewing a certification decision, we ask only "whether the Board 'has followed appropriate and fair procedures, and has reached a rational conclusion' in addressing any objections to the election." *Durham School Services*, 821 F.3d at 58 (quoting *Service Corp. International v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007)). Although elections decided, as here, by a narrow margin of victory "deserve[] especially careful scrutiny by the Board," we will uphold the Board's decision as long as the agency "could reasonably have drawn its conclusions from the record before it." *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 884 (D.C. Cir. 1988).

Garda has failed to demonstrate that the Board overstepped its wide discretion by deeming the Board agent's conduct insufficient to raise a reasonable doubt as to the election's fairness.

As for the questions the Board agent posed to the employees, the Board has long held that asking a few eligibility-related questions of a challenged voter is an "appropriate step[]," *H.E.*

Fletcher Co., 121 NLRB 826, 830 (1958), that helps to weed out “challenges which are frivolous, inadvertent, or interposed solely to obstruct orderly election procedure,” *Fulton Bag & Products Co.*, 121 NLRB 268, 270 n.5 (1958). In this case, the Regional Director reasonably concluded that the Board agent’s two “innocuous questions” served this function “efficiently.” NLRB, Decision and Certification of Representative, *Garda CL Atlantic, Inc.*, No. 22-RC-170477, at 6 (Dec. 14, 2016), J.A. 131. To be sure, as Garda points out, the challenged workers may have been eligible to vote notwithstanding the fact that neither one held the formal job title of “guard” or carried a gun for work. But the Board agent’s questions were nonetheless relevant: learning that an employee was a guard or *did* carry a gun may have been sufficient grounds for rejecting an eligibility challenge. Indeed, the Union observer withdrew his challenge to another employee’s eligibility after learning that the employee carried a gun for work. *See id.* at 4, J.A. 129.

As for the Board agent’s statement that non-guards were ineligible for Union representation, the Regional Director recognized that it may have created “ambiguity,” given that some employees with job titles other than “guard” performed guard duties within the meaning of the Act and so were eligible to vote. *Id.* at 5, J.A. 130. The Regional Director, however, reasonably concluded that any such ambiguity was insufficient to compromise electoral fairness in light of the fact that the Board agent “at no time . . . [told] a prospective voter that they could not vote” and, to the contrary, offered the two employees the opportunity to cast a challenged ballot. *Id.*; *see also Regency Hyatt House*, 180 NLRB 489, 490 n.7 (1969) (holding that a Board agent commits “no failure of duty” toward a potentially eligible voter by suggesting that he may be ineligible, provided that the agent “proffer[s] [the voter] a challenged ballot”), *overruled in part on other grounds by Alco Iron & Metal Co.*, 269 NLRB 590 (1984).

Unable to show that the Board acted unreasonably when it concluded that the opportunity to cast a challenged ballot sufficiently mitigated any confusion the Board agent’s comments may have caused the two employees, Garda speculates that those employees may have communicated their uncertainty to others, who may in turn have been discouraged from showing up to vote. Garda, however, presented the Board with no evidence that this occurred, and the Board has consistently required “more than mere speculative harm” arising from Board-agent conduct “to overturn an election.” *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679, 680 (2008) (quoting *J.C. Brock Corp.*, 318 NLRB 403, 404 (1995)). Of course, the Board will sometimes invalidate an election where an “election irregularity” has “*possibly* disenfranchised” a potentially dispositive number of voters. *Garda World Security Corp.*, 356 NLRB 594, 594 (2011) (emphasis added). The Board, though, has typically employed this “potential disenfranchisement” standard, *id.*, only where an irregularity essentially bars employees’ physical access to the polling place, *see id.* (Board agent improperly closed polls early); *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996) (Board agent improperly effected an “unscheduled closing of the polls”). In any event, we need not decide whether this standard should be read to extend beyond this limited subset of irregularities because Garda has failed to establish that the Board acted arbitrarily in determining that the Board agent here, in asking two permissible eligibility-related questions and making one accurate eligibility-related statement, created no electoral irregularity at all.

Because the Board acted within its discretion in certifying the election results, it properly concluded that Garda committed an unfair labor practice by refusing to bargain with the Union. Accordingly, the petition for review is denied and the cross-application for enforcement is granted.

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.

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk