UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Traction Wholesale Center Co., Inc. v. National Labor Relations Board

216 F.3d 92 (D.C. Cir. 2000) · No. No. 99-1336 · Decided June 30, 2000

SUMMARY

The D.C. Circuit reviewed the National Labor Relations Board's findings that Traction Wholesale Center committed unfair labor practices during a union-organizing campaign, including retaliatory discharge, policy changes, denial of a raise, and coercive statements. The court upheld most of the findings and the bargaining order, but remanded the remedy requiring rescission of the company's van-use policy because the Board had not explained its disagreement with the administrative law judge regarding possible insurance limitations.

CASE DETAILS

COURT	United States Court of Appeals for the District of Columbia Circuit
WRITING FOR THE COURT	Circuit Judge Tatel; Randolph; Tatel; Garland
JURISDICTION	Federal
DECIDED	June 30, 2000
DOCKET	No. 99-1336
DISPOSITION	remanded
PROCEDURAL POSTURE	Traction petitioned for review of a National Labor Relations Board order finding multiple unfair labor practices and imposing a bargaining order. The NLRB cross-petitioned for enforcement of its order.
STANDARD OF REVIEW	The court reviews NLRB factual findings for substantial evidence, accepts the ALJ's credibility determinations unless patently insupportable, gives heightened deference to findings concerning discriminatory motive, and reviews the Board's remedy to ensure that it considered relevant factors, selected a remedial rather than punitive course, and effectuated the purposes of the Act.
PRECEDENTIAL VALUE	Published federal appellate decision; precedential within the D.C. Circuit.
PARTIES	Traction Wholesale Center Co., Inc. v. National Labor Relations Board

TOPICS

unfair labor practices · union organizing · labor law · judicial review of agency action · remedies

PRACTICE AREAS

labor law · unfair labor practices · administrative law · appellate procedure · remedies

QUESTIONS PRESENTED

1. Whether substantial evidence supported the Board's findings that Traction committed unfair labor practices by discharging Schiavone, changing the van policy, denying Tryon's raise, and making coercive statements during the organizing campaign.
2. Whether the Board adequately explained its order requiring Traction to rescind the change in its personal-use van policy despite the ALJ's contrary remedy recommendation.
3. Whether the Board's bargaining order was supported by substantial evidence and adequately justified under the D.C. Circuit's requirements for Gissel bargaining orders.
4. Whether the Board properly counted disputed union authorization cards in determining that the union had majority support.
5. Whether the court could consider Traction's argument concerning employee turnover when Traction failed to raise that issue before the Board.

HOLDINGS

1. Substantial evidence supported the Board's finding that Traction discharged Schiavone because of his union activity and thereby violated sections 8(a)(1) and 8(a)(3) of the NLRA.
2. Substantial evidence supported the Board's finding that Traction changed enforcement of its personal-use van policy in retaliation for employees' union activity, in violation of sections 8(a)(1) and 8(a)(3) of the NLRA.
3. The Board's order requiring rescission of the van-policy change could not be enforced because the Board failed to explain why it rejected the ALJ's conclusion that rescission might be improper in light of the company's insurance coverage.
4. Substantial evidence supported the Board's finding that Traction unlawfully denied Tryon's promised raise because of the union campaign.
5. The Board reasonably found that Cohen's solicitation of employee grievances during the union campaign, together with statements that management could help and offer more than the union, constituted an implicit promise to correct grievances and therefore violated section 8(a)(1).
6. The Board's bargaining order was supported by substantial evidence and adequately justified under the applicable Gissel and D.C. Circuit standards.
7. The Board properly authenticated Michener's authorization card by comparing its signature with signatures on authentic employment records, including a W-4, and properly counted the card in determining majority support.

8. The court would not consider Traction's employee-turnover challenge because Traction failed to present that issue to the Board and showed no extraordinary circumstance excusing the failure.

KEY QUOTATIONS

> *“Absent "outrageous and pervasive ULP's," the Board may issue a bargaining order only if it has substantial evidence that (1) "the Union, at some time, ...had majority support within the bargaining unit"; (2) "the employer's unfair practices ... had the tendency to undermine majority strength and impede the election process";and (3) "the Board [has] determine[d] that the possibility of erasing the effects of past practices and of ensuring a fair rerun election by the use of traditional remedies is slight and that employee sentiment once expressed in favor of the Union would be better protected by a bargaining order."”* (¶ 33)

> *“Surely evidence that the signed documents came from Traction's business files and that the company relied on one of them to hire Michener and another to withhold federal income taxes is "sufficient to support a finding" that the signature appearing on them--James P. Michener--is in fact Michener's.”* (¶ 44)

> *“With the exception of that portion of the order requiring Traction to allow personal use of company vans, Traction's petition for review is denied and the Board's cross-petition for enforcement is granted.”* (¶ 59)

FACTUAL BACKGROUND

During a union organizing campaign at Traction, eleven of twenty drivers and warehouse employees signed authorization cards and the union demanded recognition. After learning of the organizing effort, a manager interrogated employees, threatened closure or subcontracting, discharged union supporter Charles Schiavone, denied Kevin Tryon's anticipated raise, changed the personal-use van and lunch time-clock policies, and made statements implying that management could address employee grievances without a union. The union lost the ensuing election overwhelmingly, with sixteen votes against and two votes for the union, but the ALJ and Board found that Traction's unfair labor practices had undermined the election and warranted a bargaining order.

PROCEDURAL HISTORY

After a union lost an NLRB-ordered election, an administrative law judge found that Traction violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act through anti-union threats, interrogation, discharge, denial of a raise, changes to the company van and time-clock policies, and solicitation of grievances accompanied by implicit promises. The Board adopted the findings and imposed a bargaining order, but also ordered rescission of the van-policy change without explaining its disagreement with the ALJ's contrary remedy recommendation. The D.C. Circuit upheld the unfair-labor-practice findings and bargaining order, enforced the remainder of the Board's order, and remanded the van-policy remedy for further explanation.

DISPOSITION

remanded

REMAND INSTRUCTIONS

Remand to the National Labor Relations Board to explain why rescission of the personal-use van-policy change is appropriate despite the ALJ's concern that the company's insurance policy prohibited personal use. The remainder of Traction's petition for review was denied and the Board's cross-petition for enforcement was granted.

CASES CITED

- Avecor, Inc. v. NLRB, 931 F.2d 924 (D.C. Cir. 1991)
- Frazier Indus. Co., Inc. v. NLRB, 213 F.3d 750 (D.C. Cir. 2000)
- Vincent Ind. Plastics, Inc. v. NLRB, 209 F.3d 727 (D.C. Cir. 2000)
- Power Inc. v. NLRB, 40 F.3d 409 (D.C. Cir. 1994)
- Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C. Cir. 1994)
- Harter Tomato Prods. Co. v. NLRB, 133 F.3d 934 (D.C. Cir. 1998)
- Perdue Farms, Inc., Cookin' Good Div. v. NLRB, 144 F.3d 830 (D.C. Cir. 1998)
- Reliance Electric Co., 191 N.L.R.B. 44 (1971), enforced, 457 F.2d 503 (6th Cir. 1972)
- NLRB v. Gissel Packing Co., Inc., 395 U.S. 575 (1969)
- Caterair Int'l v. NLRB, 22 F.3d 1114 (D.C. Cir. 1994)
- Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980)
- Mathews Readymix, Inc. v. NLRB, 165 F.3d 74 (D.C. Cir. 1999)
- United Food & Commercial Workers Int'l Union, Local 152 v. NLRB, 768 F.2d 1463 (D.C. Cir. 1985)
- Chicago Local No. 458-3M v. NLRB, 206 F.3d 22 (D.C. Cir. 2000)
- Oil, Chemical & Atomic Workers Int'l Union v. NLRB, 46 F.3d 82 (D.C. Cir. 1995)
- Skyline Distributors, Inc. v. NLRB, 99 F.3d 403 (D.C. Cir. 1996)
- Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162 (D.C. Cir. 1993)
- Charlotte Amphitheater Corp. v. NLRB, 82 F.3d 1074 (D.C. Cir. 1996)
- Be-Lo Stores v. NLRB, 126 F.3d 268 (4th Cir. 1997)
- Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166 (D.C. Cir. 1998)
- Aero Corp., 149 N.L.R.B. 1283 (1964), enforced, 363 F.2d 702 (D.C. Cir. 1966)
- Heck's, Inc., 166 N.L.R.B. 186 (1967)
- Local 702, Int'l B'hood of Elec. Workers, AFL-CIO v. NLRB, 2000 WL 520950 (D.C. Cir. 2000)