Case No. 16-60106

United States Court of Appeals
For The Fifth Circuit

REMINGTON LODGING & HOSPITALITY, LLC,
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/ Cross-Petitioner.

On Petitions for Review and Cross-Application for Enforcement of
an Order of the National Labor Relations Board
Case No. 29-CA-093850 & 29-CA-095876

REPLY BRIEF BY PETITIONER REMINGTON LODGING & HOSPITALITY, LLC, d/b/a HYATT REGENCY LONG ISLAND HOTEL

Respectfully submitted,

Karl M. Terrell
STOKES WAGNER, ALC
One Atlantic Center, Suite 2400
1201 W. Peachtree Street
Atlanta, Georgia 30309
(404) 766-0076 (Telephone)
(404) 766-8823 (Facsimile)

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INTRODUCTION

This petition for review focuses on only two issues: (a) the outsourcing by Remington on June 28, 2012, of the staffing of the housekeeping department (while retaining joint-employer supervision and management over that department); and (b) the employment separation of probationary employee Margaret Loiacono, who vocally declared herself not a supporter of the Union. [1]

The Board, in its answering brief, asserts that "uncontested violations do not disappear simply because a party has not challenged them," and then cites a handful of appellate decisions for the proposition that such violations "remain in the case, 'lending their aroma to the context in which the [remaining] issues are considered'." [Board brief, p. 24, citing, *inter alia*, and quoting, *NLRB v. Clark Manor Nursing Home,* 671 F.2d 657, 660 (1st Cir 1982)].

While this statement, as far as it goes, is no doubt correct, it does not change the need for this Court's examination of "the record as a whole," in determining whether "substantial evidence" supports the Board's decision on those issues which are presented for review. *Tri-State Health Services, Inc. v. NLRB,* 374 F.3d 205, 207

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[1] A bulk of the issues not presented for review, particularly the 8(a)(1) allegations related to interrogations and so-called threats, were decided almost entirely by credibility determinations of the administrative law judge. This Petitioner made a realistic assessment that many of these issues were not appropriate for appellate review.

(5th Cir. 2004). This Court does not grant itself greater latitude to ignore its rule that it may not "mere[ly] rubber stamp" the decision, on the challenged issues, simply because there are other issues left unchallenged. *Asarco, Inc. v. NLRB,* 86 F.3d 1401, 1406 (5th Cir. 1996). Instead, upon examining the record as a whole, this Court should consider whether the *un*challenged violations have any bearing in the determination of substantial evidence.

A. This Court Should Deny Enforcement of the Board's Order Finding an 8(a)(3) Violation Related to the Outsourcing of the Staffing of the Housekeeping Department, Notwithstanding the Arguments Raised by the Board in its Answering Brief.

The great majority of the uncontested violations occurred in August and September, most of them after the organizing campaign went 'public' with the filing of the election petition, on August 20. *See,* as listed in the Board's brief, pp. 21-23. These alleged violations occurred well after the decision to outsource had been made, on June 28.

Moreover, the evidence does not substantially support the 2-1 Board finding that hotel management had knowledge, prior to June 28, of employee involvement in union organizing. The dissent found the evidence insufficient, and indeed, the Board's majority merely determined that Remington possessed only "a *suspicion* that employees were engaging in union activity." (ROA 24, fn. 7; emphasis added); *see also*, the dissent's distinction of the case relied upon by the majority, in relying

only on suspicion, *Kajima Constr.,* 331 NLRB 1604 (2000), pointing out the Board in that case had found the employer "already knew that its employees had engaged in union activity." (ROA 26, fn. 13). Given the minimalist, under-cover efforts of the union's organizer, Jose Vega, it is not surprising that the company's management who made the June 28 decision, based in Dallas and Jacksonville, were unaware of any employee engagement in union activity. In fact, there was no material evidence of *any* actual employee engagement before June 28. Vega's first meeting with employees did not take place until July 4, when the first four (4) union-authorization cards were signed. By July 11, only seven (7) more had been obtained, (ROA 6, 13), and there were not enough signatures to file the petition for an election until August 20, the day before the staffing company began its contract. (ROA 1511; 917).

Remington respectfully asks this Court to reject the Board's 2-1 decision on this issue, resting as it does on no more than mere suspicion, and that this Court approve the better-reasoned dissent by Board member Phillip A. Miscimarra: "[E]ven assuming Remington suspected employee union activity . . . the evidence does not support a finding that the subcontracting decision was motivated by antiunion considerations." (ROA 6).

The dissent correctly balanced the overwhelming counter-weight of evidence that supports the legitimacy of the company's June 28 business decision to utilize HHS. This evidence shows (a) Remington's reasonable belief HHS could deliver the

staffing needed, in order to (b) quell an unremitting decline in the guest-satisfaction scores tied to housekeeping, that had been holding the hotel between next-to-last and fourth worst among the 142 hotels in the Hyatt chain (when a company in this situation, the dissent stated, is "confronted with ongoing low customer satisfaction scores . . . more evidence is not needed to establish credible justification for taking action, including the subcontracting implemented by Remington here") (ROA 27, fn. 15).

The issue comes down to the question of whether the National Labor Relations Board may hold an employer in violation of sections 8(a)(1) and (3) on such slim evidence – amounting to only "suspicion" – when to do so undermines the instruction of the Supreme Court, in *American Shipbuilding Co. v. NLRB,* 380 U.S. 300, 311 (1965), stating that it has "consistently construed [8(a)(3)] to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership"). Cited and discussed by the dissent, at ROA 5.

B. This Court Should Deny Enforcement of the Board's Order Finding an 8(a)(3) Violation Related to the Termination of Margaret Loiacono's Employment, Notwithstanding the Arguments Raised by the Board in its Answering Brief.

The Board in its answering brief, at p. 50, asserts "there is no evidence, other than the Company's bald assertion, that Loiacono broke any work rule."

This is simply incorrect. The evidence concerning the incident that resulted in her termination is undisputed. (Tr. 353-55 [Loiacono] and 734-36 [hotel general manager Rostek]; *and see*, disciplinary documentation, Exhibit GC-8).

On a Sunday morning at 11:30 am, a heavy checkout time, Loiacono was away from her work station in the lobby. As the "lobby ambassador" – her job title – she was to be in the lobby to greet and wish departing guests well, soliciting their good will and addressing any complaints they might have had concerning their stay. She admitted, also, the following, concerning her excuse for stepping away (to inquire with housekeeping as to whether a refrigerator had been delivered to a guest); she admitted: (a) that this could have been handled by radio or phone (she claimed she couldn't get through); and (b) that when she went down in person, she was immediately informed the refrigerator had in fact been delivered, but then engaged for an admitted "ten minutes or so" in a discussion concerning inaccuracies she saw in the informational "real wage" pie chart the hotel had issued in conjunction with the union campaign that was then pending (her criticism related only to its accuracy, not to the hotel's position on the campaign, nor was she critical of management per se). As such, she was responsible for being away from her work station without proper excuse. This is not a violation that requires the citing of employee-handbook chapter & verse.

In addition, this was not the first work-rule infraction committed by her during her 120-day tenure of employment – all as a probationary employee under the company's 120-day probationary rule. She had been previously reprimanded for displaying a negative attitude toward a guest – which she fully admitted, as a legitimate discipline (ROA 42). This is a cardinal sin in the hospitality industry, particularly for an employee whose "lobby ambassador" job description calls for her to be a "lead cheerleader" for the hotel. (Exhibit R-5).

Lastly, the evidence showed that her termination was consistent with previous discipline for similar conduct, by others similarly situated. The Board, in its answering brief, declares that those "other lobby ambassadors" were engaged in conduct of a different nature. The brief states the "other lobby ambassadors" were "ignoring guests while engaged in a sports discussion," compared to Loiacono, who "*simply* left her work station for ten minutes." (Board brief, pp. 50-51; emphasis added) – to which, the reply can only be . . . *"simply"?* If one is not at their work station, there is not even the *opportunity* 'to ignore.' The hotel was dealing, instead, with an employee wholly absent any attendance to her duties.

Also, as noted in Remington's opening brief, the Board majority agreed that Loiacono did not engage in protected concerted activity, when speaking to a supervisor about the pie-chart. For the reasons stated in the opening brief, and addressed also in the better-reasoned analysis of the dissenting Board member, this

Court should find, under the facts and authority cited, that Remington did not violate sections 8(a)(1) and (3) when discharging Loiacono's probationary-term employment.

CONCLUSION

For the reasons stated above, and in Remington's opening brief, and upon the authority cited, Remington respectfully asks that this Court deny enforcement of the Board-majority's Decision and Order, with respect to the two findings addressed.

Dated: September 12, 2016

Respectfully Submitted,

/s/ Karl M. Terrell

Karl M. Terrell
Stokes Wagner, ALC
One Atlantic Center
Suite 2400
1201 W. Peachtree Street
Atlanta, Georgia 30309
(404) 766-0076 (Telephone)
(404) 766-8823 (Facsimile)
kterrell@stokeswagner.com

Attorneys for Petitioner/Cross-Respondent Remington Lodging & Hospitality, LLC

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 12th day of September, 2016, I caused this Reply Brief of Petitioner Remington Lodging & Hospitality, LLC to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Linda Dreeben, Deputy Associate General Counsel
NLRB - National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

David Casserly
National Labor Relations Board
Appellate & Supreme Court Litigation Branch
4156A
1015 Half Street, S.E.
Washington, DC 20570

Richard F. Griffin, Jr.
National Labor Relations Board
Appellate & Supreme Court Litigation Branch
1015 Half Street, S.E.
Washington, DC 20570

Elizabeth Ann Heaney, Esq.
National Labor Relations Board
Appellate & Supreme Court Litigation Branch
1015 Half Street, S.E.
Washington, DC 20570

James G. Paulsen
National Labor Relations Board
Regional Office
5th Floor
100 Myrtle Avenue
2 Metro Tech Center
Brooklyn, NY 11201-4201

/s/ Karl M. Terrell
Counsel for Petitioner/Cross-Respondent

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Dated: September 12, 2016

/s/Karl M. Terrell
Counsel for Petitioner/Cross-Respondent