Final Brief Oral Argument Not Yet Scheduled

No. 20-1027

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

LOCAL 400, UNITED FOOD AND COMMERCIAL WORKERS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of a Decision and Order of
the National Labor Relations Board

BRIEF OF PETITIONER LOCAL 400, UNITED FOOD AND COMMERCIAL WORKERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. Local 400, United Food and Commercial Workers was the Charging Party in the proceedings before the National Labor Relations Board (NLRB) and is the Petitioner in this Court. For purposes of the disclosure statement required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Local 400 is a labor union chartered by the State of Maryland as a nonprofit organization. Local 400 has no parent companies and no publicly-held company has a 10% or greater ownership interest in Local 400.

The NLRB is the Respondent in this Court. Kroger Limited Partnership I Mid-Atlantic was the Respondent in the proceedings before the NLRB and is the Intervenor in this Court. There were no amici in the proceedings before the NLRB and there are no amici in this Court.

B. Rulings Under Review. The NLRB's Decision and Order in *Kroger Limited Partnership I Mid-Atlantic*, Case 05-CA-155160, was published on September 6, 2019, and reported at 368 NLRB No. 64.

C. Related Cases. This case has not previously been before this Court or any other court. Counsel for Petitioner is not aware of any related case currently pending in this Court or any other court.

/s/ Carey R. Butsavage
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GLOSSARY

"ALJ"……Administrative Law Judge

"Kroger"……Kroger Limited Partnership I Mid-Atlantic

"Local 400"…Local 400, United Food and Commercial Workers Union

"NLRA" or "the Act"……National Labor Relations Act

"NLRB" or "the Board"……National Labor Relations Board

"Store 538"……Kroger Store 538 in Portsmouth, Virginia

BRIEF OF PETITIONER LOCAL 400, UNITED FOOD AND COMMERCIAL WORKERS

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Local 400 of the United Food and Commercial Workers, AFL-CIO ("Local 400" or "Union") to review a Decision and Order of the National Labor Relations Board ("Board" or "NLRB") issued on September 6, 2019 and reported at 368 NLRB No. 64 (2019). The Charging Party before the Board was Local 400 ("Petitioner"). The Charged Party was Kroger Limited Partnership I ("Kroger").

The NLRB had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act. 29 U.S.C. § 160(a). The Board's Decision and Order is final with respect to all parties. The Court has jurisdiction over this proceeding pursuant to Sections 10(e) and (f) of the Act. 29 U.S.C. § 160(e) & (f). This petition for review was timely filed on February 4, 2020.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the NLRB erred in ignoring evidence that Kroger's actions in preventing a union representative from appealing for customer support in a shopping center parking lot was motivated by

antiunion animus in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA).

STATUTES AND REGULATIONS

Section 7 of the National Labor Relations Act states as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U.S.C. § 157.

Section 8(a)(1) of the National Labor Relations Act states as follows:

> "It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . . " 29 U.S.C. § 158(a)(1).

STATEMENT OF THE CASE

Petitioner Local 400 represents a bargaining unit that included employees at Kroger Store 538, located in a retail shopping center in Portsmouth, Virginia. Kroger's lease with the shopping center contained a "no-solicitation/no loitering" rule. The terms of the lease provided that "all soliciting, loitering, handbilling and picketing for any cause or purpose whatsoever shall be prohibited" in the parking lot in front of Store 538. D&O 2 [JA6].[1] Despite the no-solicitation/no loitering rule in the lease, Kroger tolerated a range of nonemployee groups engaging in solicitation and distribution on its property, including representatives of the Girl Scouts, Salvation Army, Lions Club, American Red Cross, veterans' groups, firefighters, a breast cancer awareness group, a church group called Victory, local dance club promoters, college students selling sets of encyclopedias, and other shopping center tenants (including a Chinese restaurant and a chiropractor). *Id.* at 3 & 29-30 [JA7 & 33-34].

[1] Citations to "D&O" refer to the NLRB's Decision and Order in *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64 (Sep. 6, 2019).

On March 25, 2014, Kroger's landlord sent a letter to Kroger's real estate manager for the mid-Atlantic marketing area. *Id.* at 2 [JA6 & 143-44]. In testimony credited by the administrative law judge, a former manager of Kroger's Store 538 explained that the 2014 letter was issued in response to union solicitation at the shopping center. *Id.* at 32 [JA36]. In relevant part, the letter provided that

> [T]o facilitate a prompt response to situations which may arise in connection with any protesting, demonstrating, picketing, hand billing or related disruptive activities on the premises, the undersigned Landlord for the above referenced location(s) hereby states that, to the maximum extent permitted by law, no person or organization (whether or not involving a labor union) shall be permitted to engage in such activities within the property limits owned by us, including that portion on which your store currently operates its business under the terms of our Lease, and any such person or organization shall be dealt with as a trespasser and removed from the property owned by us and/or leased by your organization. Landlord further agrees that should any person or organization engage in such activities on our property Landlord gives Kroger Limited Partnership I the authority to have police or other authorities, to the extent permitted by law, remove the trespassers from the property referenced.

Ibid. [JA6 & 143-44].

Unlike the lease, which contained a more general prohibition on solicitation and loitering, the letter specifically identified "protesting" and "disruptive activities," including those "involving a labor union." In addition, it explicitly empowered Kroger "to have police or other

authorities" remove individuals engaged in those activities. The only explanation for the issuance of the letter was the testimony by a former Kroger store manager that it came in response to union activity at the shopping center. *Id.* at 32 [JA36].

Prior to the incident at issue in this case, Kroger had never invoked the 2014 letter or called the police to exclude members of any of the other nonemployee groups that engaged in solicitation and distribution activities on its premises. Specifically, Kroger 538 Manager Donati High testified that while he remembered asking a church group to leave repeatedly, he never called the police or invoked the 2014 letter in attempting to exclude that group from the premises. In addition, former Manager Timothy Lynch testified that he recalled seeing college students selling encyclopedias several times, but he only remembered telling them to leave on one occasion. *Id.* at 30 [JA34].

In April 2015, a nonemployee union representative accessed Kroger's property to solicit customers' signatures on a petition concerning the upcoming closure of Store 538. The petition criticized Kroger's unwillingness to offer opportunities for Store 538 employees to transfer to Kroger's new, nonunion store locations, which were located

nearer to the employees' homes. Store 538 Manager High and District Human Resources Coordinator Diego Duran contacted Duran's district manager seeking advice regarding how to handle the solicitation. The District Manager advised them to locate the 2014 letter and follow its instructions. High and Duran confronted the union representative with the letter. Consistent with the district manager's further instruction, High and Duran then called the police and asked them to stop the union from engaging in further solicitation. When the police arrived and asked the representative to leave the premises, the representative departed from the parking lot. *Id.* at 3-4 [JA7-8].

The administrative law judge ("ALJ") found that Kroger engaged in antiunion discrimination and violated Section 8(a)(1) of the NLRA by excluding the union representative from its premises. In support of this finding, the ALJ noted that the terms of the 2014 letter were "not so neutral" and instead "clearly targeted unions and other groups that wanted or tried to protest, demonstrate, picket, handbill, or otherwise engage in what was considered to be 'related disruptive activities on the premises.'" *Id.* at 32 [JA36]. The ALJ found that by invoking this access restriction when excluding the union representative from its

premises and by engaging in the "unprecedented act of calling the police" when removing the union representative, Kroger discriminated against the union and interfered with activities protected by Section 7 of the Act. As a result, the ALJ found that Kroger violated Section 8(a)(1) of the Act. *Ibid.* [JA36]. Kroger filed exceptions to the administrative law judge's decision.

The Board determined that Kroger lawfully excluded the union representative pursuant to its no-solicitation/no-loitering rules. In so doing, the Board acknowledged that application of such rules would be unlawful if the evidence supports an inference that the employer acted for a discriminatory motive. *Id.* at 2 & fn. 5 [JA6]. However, the Board ignored evidence that the 2014 letter was issued for the purpose of allowing Kroger to halt protected union solicitation. In addition, the Board ignored evidence that the letter had never been invoked to exclude any other nonemployee group that had engaged in solicitation and distribution on Kroger's premises. *Id.* at 11-12 [JA15-16]. Instead, the Board found that Kroger validly excluded the union representative from its premises on the basis of neutral access restrictions and dismissed the complaint.

SUMMARY OF ARGUMENT

Under Supreme Court and NLRB precedent, an employer unlawfully interferes with activity protected by Section 7 of the NLRA when it singles out protected activity for disfavored treatment. Although an employer may lawfully exclude nonemployees from its property, if an employer treats nonemployee union representatives differently than other nonemployees because they are on the employer's property to disseminate a protected message, it thereby interferes with protected activity in violation of Section 8(a)(1) of the NLRA.

Because there is seldom direct evidence that an employer's decision to treat union representatives differently than other nonemployees is rooted in animus toward the union's protected message, the Board, with Court approval, has historically considered circumstantial evidence of the employer's motive. When there is sufficient circumstantial evidence to infer that the employer intended to single out for different treatment activity that is protected by Section 7, such discriminatory treatment violates Section 8(a)(1). Such an inference is especially appropriate in the absence of any other explanation for the employer's disparate treatment.

The Board ignored significant circumstantial evidence showing that Kroger had a discriminatory motive for excluding the union representative from its parking lot. Kroger relied on a 2014 letter from its landlord that was designed to empower Kroger to halt union activity. On its face, the letter targeted protected activity, and it explicitly singled out labor unions. And while Kroger never invoked the 2014 letter when other nonemployee groups engaged in solicitation and distribution in Kroger's parking lot, when the union representative engaged in solicitation, Kroger confronted the representative with the 2014 letter and called the police. Finally, Kroger presented no evidence suggesting it had any other motive for excluding the union representative apart from its animus toward the union's protected message. Because the Board's decision ignored persuasive circumstantial evidence that Kroger exercised its authority to exclude the union representative from its property in a manner that revealed its motive to discriminate against activity protected by Section 7, the Board's decision was premised on factual findings that are not supported by substantial evidence. Accordingly, its order must be vacated.

STANDARD OF REVIEW

This Court will uphold a decision of the Board with respect to a question of fact "if it is supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

STANDING

Local 400 has standing to bring this petition for review because it is a "person aggrieved by a final order of the Board . . . denying in whole . . . the relief sought" before the Board. 29 U.S.C. § 160(f). Local 400 was the Charging Party in the proceedings before the NLRB in which the Board dismissed in its entirety the complaint brought by the NLRB General Counsel on Local 400's behalf.

ARGUMENT

I. An employer violates Section 8(a)(1) of the Act when it has an antiunion motive for its disparate treatment of protected activity.

Section 7 of the NLRA protects employees' rights "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. And, Section 8(a)(1) makes it an unfair

labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7. 29 U.S.C. § 158(a)(1).

The Supreme Court has held that "an employer may validly post his property against nonemployee distribution of union literature" but only so long as "the employer's notice or order does not discriminate against the union by allowing other distribution." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The Court's interpretation of Section 8(a)(1) as prohibiting antiunion discrimination was announced in *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949).

In *Stowe Spinning Co.*, 70 NLRB 614, 621 (1949), the Board found that the employer violated Section 8(a)(1) by denying a union use of a hall on the employer's property that had been used "for community and employee meetings." *Ibid.* A lack of "evidence that any other organization, except the union, was ever refused use of the hall" led the Board to infer that the "sole purpose" of the employer's denial of the union's request was to "impede, prevent, and discourage self-organization and collective bargaining by the [company's] employees within the meaning of Section 7 of the Act." *Id.* at 621-22. It followed

that denial of union access to the hall "constituted unlawful disparity of treatment and discrimination against the union." *Id.* at 624. The Supreme Court expressly agreed with this analysis. 336 U.S. at 228-29.

Earlier decisions the Board relied upon in *Stowe Spinning* elaborate the NLRA Section 8(a)(1) antidiscrimination rule. In *Gallup American Coal Co.*, 32 NLRB 823, 828-29 (1941), the Board found that an employer violated Section 8(a)(1) when it stopped a union representative from painting a sign on a boulder on the employer's property and then painted over the union representative's message. From the fact that the employer had tolerated other nonemployee entities painting "advertising" and "religious" messages on the boulders and "did not obliterate the other signs painted on similar boulders" the Board inferred that "the [employer] desired to prevent the union's message from reaching its employees rather than to protect its rights to exclusive possession of its property." *Id.* at 829. The Board emphasized that "[t]he interference . . . consisted in the singling out of only the union signs for obliteration." *Id.* at 829 fn. 4.

Similarly, in *Weyerhaeuser Timber Co.*, 31 NLRB 258, 267 (1941), the Board found that where an employer granted access "permits to a

wide variety of persons who are not engaged in assisting union activity," its decision to "withhold [permits] from union agents" constituted unlawful discrimination in violation of Section 8(a)(1). The employer's inability to justify its disparate treatment led the Board to infer that "[t]he only reasonable explanation for this discrimination is that the [employer] is seeking to isolate the employees from contact with outside representatives." *Ibid.* This manifest "hostility to the right of employees to organize and act collectively" constituted unlawful interference in violation of Section 8(a)(1). *Ibid.*

The long and the short of the matter is that where an employer's exclusion of union activity from its premises is "motivated by an anti-union animus," the employer has "violated Section 8(a)(1) by discriminating in its application of its no-solicitation policy." *Four B Corp. v. NLRB*, 163 F.3d 1177, 1184 (10th Cir. 1998). *Accord Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 587, 590-91 (D.C. Cir. 1996).

II. The Board erred in refusing to consider relevant circumstantial evidence of Kroger's discriminatory motive.

Because there is rarely direct evidence that an employer's action to restrict is motivated by antiunion animus, "[a]n employer's antiunion

motivation often may be proven only by circumstantial evidence." *Four B Corp.,* 163 F.3d at 1184 (citation and quotation marks omitted). In this case, the Board expressly refused to consider very strong circumstantial evidence of antiunion motivation.

In excluding the union representative from the shopping center parking lot, Kroger relied solely on the letter from its landlord dated March 25, 2014. This is significant because the 2014 letter is expressly directed at union activity. In addition, undisputed testimony establishes that the letter was written in direct response to union activity. The letter singled out "protesting" and "disruptive" activities and explicitly referred to "labor unions." And, Kroger's decision to invoke the letter only once, when confronted with union solicitation, but not on any other occasions when confronted with nonunion solicitation, reveals that it understood the letter to be a tool for halting the dissemination of union messages. Kroger never offered evidence that it used the letter to exclude any other group.

As set forth above, Kroger's lease provided that "all soliciting, loitering, handbilling and picketing for any cause or purpose whatsoever shall be prohibited." D&O 2 [JA6]. However, that broad

prohibition was never enforced. In fact, the record shows that Kroger permitted every sort of soliciting, handbilling, and other communicative activity other than the union activity at issue in this case. This included solicitation and distribution by the Girl Scouts, Salvation Army, Lions Club, American Red Cross, veterans' groups, firefighters, a breast cancer awareness group, a church group called Victory, local dance club promoters, college students selling sets of encyclopedias, and other shopping center tenants (including a Chinese restaurant and a chiropractor). *Id.* at 3 & 29-30 [JA7 & 33-34].

In March 2014, the landlord responded to planned union activity on shopping center premises by promulgating a letter directed at "protesting" and "related disruptive activities on the premises." As former Store 538 Manager Timothy Lynch testified, the letter was provided to Kroger to empower it to respond to planned union solicitation. The letter stated that "no person or organization . . . shall be permitted to engage in such activities within the property limits," and to make the point clear the letter specified that the prohibition would apply to "a labor union." The letter added a new express permission to "have police . . . remove [violators] from the property."

D&O 2 [JA6]. There was no evidence of any "protesting" or "disruptive" activities having ever occurred in the parking lot.

When the union representative engaged in solicitation in the store parking lot on April 2, 2015, Store 538 Manager High and District Human Resources Coordinator Duran contacted Duran's district manager for advice about how to respond. The district manager instructed High and Duran to locate the 2014 letter and follow its instructions. It was this letter that Kroger expressly invoked when it ordered the union representative to leave the shopping center parking lot. And it was this letter that granted Kroger authority to take the unprecedented action of calling the police in support of its effort to exclude the union representative.

Everything about the March 2014 letter indicates that it was intended to be used for the purpose excluding union activity from the shopping center. A former Kroger store manager testified that the letter was issued in direct response to union activity, and no other explanation for its issuance has been offered. The prohibition in the letter was targeted at the sort of activity a union might be expected to engage in and, indeed, the letter explicitly referred to "labor union[s]"

as a target. The letter had never been applied to any other outside group accessing the shopping center. And, when the current store managers asked higher management what to do about the union activity, they were told to apply the letter.

On its face, the 2014 letter singles out activities protected by Section 7 for disparate treatment. Kroger's understanding that its purpose was to limit disfavored protest activities is confirmed by the fact that it only used the letter to target union solicitation. Remarkably, the Board expressly treated the obvious antiunion nature of the letter as irrelevant to Kroger's motive in using it to exclude the union representative.

The Board justified ignoring the nature of the letter on the grounds that the complaint did not allege that Kroger "violated Section 8(a)(1) of the Act by promulgating uniformly applied access restrictions with an anti-union motive" and thus that the "question of whether the [employer] promulgated access restrictions in response to union activity is not before us." *Id.* at 12 [JA16]. That is a non sequitur. The issue framed by the complaint is whether Kroger engaged in unlawful discrimination by singling out the union activity for an illegal reason.

The fact that the letter was designed for just that application and that Kroger knew of that illegal purpose is obviously relevant to Kroger's motive in invoking the letter. Simply put, an employer's decision to invoke a facially antiunion rule presents the strongest evidence of an antiunion motivation.

"[A]n employer may not affirmatively interfere with organization," *Babcock*, 351 U.S. at 112, by "singling out . . . only the union," *Gallup American Coal Co.*, 32 NLRB 823, 829 & 829 fn. 4 (1941).[2] See also *Chrysler Corp.*, 232 NLRB 466, 477-78 (1977) (employee unlawfully interfered with union activity by "singling out [a union supporter] and [his] literature for proscription from its premises]"). Under Court and Board discrimination precedent, the Board should have taken the wording of the letter, the circumstances of its issuance, and the history of its use by Kroger into account when analyzing whether Kroger singled out the union and its message for disfavored treatment. By expressly declining to consider the genesis of the 2014 letter, its facially discriminatory language, Kroger's history of never invoking the letter

[2] Accord *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (By the same token, for the government to "single out a particular idea for suppression because it is disfavored" violates the First Amendment.).

against other nonemployee entities, and Kroger's unprecedented use of the 2014 letter to have the police remove the union representative, the Board failed to perform an adequate discrimination analysis.

Accordingly, the Board's determination that Kroger lawfully excluded the union representative from its property ignored strong circumstantial evidence demonstrating its discriminatory motive. As a result, the Board's decision was based upon a factual finding that is not supported by substantial evidence. *See United Food & Commercial Workers Int'l Union Local 400 v. NLRB*, 222 F.3d 1030, 1033 (D.C. Cir. 2000) ("In its eagerness to address the *Lechmere* issue, however, the Board's majority conjured a factual situation as to which there is no substantial evidence.").

CONCLUSION

The decision and order of the National Labor Relations Board should be vacated and remanded to the Board for consideration of all the relevant evidence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b) because this petition contains 3647 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point type in a Century font style.

/s/ Carey R. Butsavage
Carey R. Butsavage

Date: September 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, the foregoing Final Brief of Petitioner Local 400, United Food and Commercial Workers was served on all parties or their counsel of record through the CM/ECF system.

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