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

REPLY BRIEF OF PETITIONER LOCAL 400, UNITED FOOD AND COMMERCIAL WORKERS

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*Authorities upon which we chiefly rely are marked with asterisks.

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National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....1, 2, 4

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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

SUMMARY OF ARGUMENT

Nothing in the briefs submitted by the National Labor Relations Board ("NLRB" or "Board") or Kroger Limited Partnership I Mid-Atlantic ("Kroger") successfully challenges the showing by Local 400, United Food and Commercial Workers ("Local 400" or "Union") that the Board failed to perform an adequate discrimination analysis when it ignored evidence that Kroger's decision to exclude a union organizer from its premises was motivated by antiunion animus.

The NLRB's argument rests on the premise that there are two analytically distinct kinds of discrimination cases under Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act"): those that involve employer animus toward union activity, and those that do not. This attempted distinction fails. There is only one kind of discrimination case under Section 8(a)(1). The Board's objective in all cases alleging discrimination under Section 8(a)(1) is to determine if an employer, by its disparate treatment of union activity, "interfere[s] with, restrain[s], or coerce[s] employees" in the exercise of their Section 7 rights. Section 8(a)(1) forbids an employer from treating union activity in a disparate manner based on the protected content of the

union's message, because it is this kind of disparate treatment that "interfere[s]" with Section 7 rights.

It is at times difficult to ascertain whether an employer's disparate treatment of union activity is based on the protected content of the union's message. Sometimes, there is no evidence that illuminates whether the employer's reason for treating the union in a disparate manner was to suppress protected speech, and the Board must engage in a more searching analysis to determine if the disparate treatment was unlawful. But where there is evidence showing that the employer's disparate treatment was rooted in antiunion animus and an intent to suppress the union's message, the Board's analysis is more straightforward. See *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).

As the NLRB and Kroger observed in their briefs, the Union expresses no opinion regarding *Sandusky Mall*, 329 NLRB 618 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001) and its progeny. The Union submits that the Board should have exercised similar forbearance in the underlying Decision and Order, because this case can be resolved on the

more straightforward basis that Kroger's decision to invoke the 2014 letter demonstrated its antiunion animus and intent to interfere with Section 7 activity. The record contains evidence that Kroger "selectively and disparately," GC Exh. 1(c) [JA124-25],[1] excluded the union organizer in an effort to suppress the dissemination of the union's message. Because the Board failed to consider this evidence, its decision was not supported by substantial evidence and must be vacated.

ARGUMENT

In this case, the NLRB General Counsel alleged that Kroger, by "selectively and disparately" enforcing access restrictions to exclude a union organizer from its premises, interfered with Section 7 activity and thereby violated Section 8(a)(1). GC Exh. 1(c) [JA124-25]. The General Counsel and the Union identified Kroger's use of the 2014

[1] Citations are as follows: "NLRB Br." refers to the Brief of the NLRB; "Kroger Br." refers to the Brief of Intervenor Kroger; "Pet. Br." refers to the Brief of Petitioner Local 400, United Food and Commercial Workers; "D&O" refers to the NLRB's Decision and Order in *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64 (Sep. 6, 2019); "GC Br." refers to the NLRB General Counsel's brief to the administrative law judge; "GC Ans. Br." refers to the NLRB General Counsel's answering brief to Kroger's exceptions; and "GC Exh." refers to the NLRB General Counsel's hearing exhibits.

letter as evidence of Kroger's unlawful disparate enforcement of its access restrictions both before the administrative law judge and the Board. As we demonstrated in our opening brief and elaborate further below, by failing to consider Kroger's unprecedented invocation of the 2014 letter as circumstantial evidence of Kroger's antiunion motive for excluding the union organizer, the Board failed to perform an adequate discrimination analysis.

I. The key inquiry in all cases alleging Section 8(a)(1) discrimination is whether an employer has singled out union activity for disfavored treatment on the basis of the union's protected message.

As set forth more fully in our opening brief, Section 8(a)(1) prohibits an employer from "affirmatively interfer[ing] with organization," *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), by "singling out . . . only the union" for disparate treatment, *Gallup American Coal Co.*, 32 NLRB 823, 829 & 829 fn. 4 (1941). The *Babcock* discrimination exception prohibits an employer from excluding a union representative from its premises on the basis of the union's Section 7-protected message.

The Board's earliest discrimination cases, cited approvingly in *Stowe Spinning Co.*, 70 NLRB 614 (1949),[2] the source of the *Babcock* discrimination exception, confirm this view. In *Gallup American Coal*, 32 NLRB at 829 & fn. 4, the Board explained that the employer's "interference" with protected activity "consisted in the singling out of only the union signs for obliteration" even as it tolerated "other signs painted on similar boulders." And, in *Weyerhaeuser Timber Co.*, 31 NLRB 258, 267 (1941), the Board held that an employer's refusal to grant a union access to its property was unlawful discrimination. The Board emphasized that the employer failed to justify its disparate treatment of the union and that, as a result, "[t]he only reasonable explanation for this discrimination is that the [employer] is seeking to isolate the employees from contact with outside representatives" because of its "hostility to the right of employees to organize and act collectively."

Contrary to the Board's argument, NLRB Br. 43, the analysis in these cases centered on the employers' disparate treatment of the

[2] The Supreme Court affirmed the Board's analysis. *See NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949).

union, not on the inaccessibility of the employers' facilities. In keeping with this analysis, the Supreme Court articulated separate discrimination and inaccessibility exceptions in *Babcock* and cited *Stowe Spinning* as the basis for the discrimination exception. 351 U.S. at 112.

In brief, because the content of a union's message is protected by federal labor law, the content of the message is not a basis for discrimination "the law deems relevant or permissible as grounds of action." *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995). *Accord Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (the First Amendment prohibits the government from "singl[ing] out a particular idea for suppression because it [i]s dangerous or disfavored"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic" that the sort of "regulat[ion] of speech based on its substantive content or the message it conveys" constitutes unconstitutional discrimination).

Because there is rarely direct evidence that an employer's decision to exclude a union representative from its premises is based on the union's protected message, the Board, with court approval, has

historically considered relevant circumstantial evidence that bears on the employer's motive. *See Four B Corp. v. NLRB*, 163 F.3d 1177, 1184 (10th Cir. 1998) ("An employer's antiunion motivation often may be proven only by circumstantial evidence."). Such circumstantial evidence can be especially probative in the absence of any other explanation for an employer's disparate treatment of protected activity.

The Board's brief attempts to characterize the Union's argument as an enlargement of the General Counsel's theory of the case. *See* NLRB Br. 34. As described above, this argument rests on a faulty effort to draw distinctions between categories of discrimination cases. The Union's argument on review is wholly consistent with the complaint allegation and the theory the General Counsel advanced both before the administrative law judge and the Board. Put simply, the Union's argument is that, as alleged in the "singular issue" presented in the General Counsel's complaint, NLRB Br. 36, Kroger, by "selectively and disparately," GC Exh. 1(c) [JA124-25], enforcing the antiunion 2014 letter to exclude a union organizer, singled out the union for disfavored treatment because of the union's protected message and thereby violated Section 8(a)(1).

In the General Counsel's brief to the administrative law judge, the General Counsel argued that the *Babcock* discrimination exception applied because Kroger "respond[ed] to the union's solicitation in an unprecedented manner" by invoking the 2014 letter and calling the police to exclude the union organizer from its premises. GC Br. 15 [JA162]. The General Counsel further argued that "[t]he evidence is clear that [Kroger] had never shown the March 25, 2014 letter to any other group" and that "[t]he difference in [Kroger]'s response highlights the discriminatory nature of its selective enforcement of the [access restrictions] with respect to the union." GC Br. 20-21 [JA167-68].

Consistent with the General Counsel's theory of the case, the administrative law judge found that Kroger violated Section 8(a)(1) of the Act by excluding the union organizer from the premises. The administrative law judge reasoned that the terms of the 2014 letter were "not so neutral" and instead "clearly targeted" protected activity. D&O 32 [JA36]. The judge agreed with the General Counsel's argument that Kroger's conduct constituted unlawful discrimination, finding that Kroger's use of the 2014 letter and "unprecedented act of

calling the police" revealed its intent to interfere with activities protected by Section 7. *Ibid.* [JA36].

In its answering brief to Kroger's exceptions to the administrative law judge's decision, the General Counsel reiterated that the Kroger's unprecedented invocation of the 2014 letter and decision to call the police "served as evidence of its discriminatory conduct." GC Ans. Br. 22 [JA198]. In addition, the General Counsel explained that the administrative law judge's finding of unlawful discrimination was based in significant part on this evidence, which showed that Kroger's "response to the Union's solicitation was notably different from its response to other unwanted solicitation." *See id.* at 24 [JA200].

The Board's decision acknowledged that an employer's application of no-solicitation and no-loitering rules is unlawful if the evidence supports an inference that the employer acted with a discriminatory motive. D&O 2 & fn. 5 [JA6]. However, the Board dismissed the significance of Kroger's unprecedented decision to invoke the 2014 letter, reasoning that the complaint did not allege that Kroger unlawfully promulgated the letter and that the letter was in any event

not persuasive evidence of Kroger's motive for excluding the union organizer. *Id.* at 12 & fn. 23 [JA16].

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court." 29 U.S.C. § 160(e). The relevance of the 2014 letter was "urged before the Board," and the Board had adequate notice of the argument the Union is advancing on review and rejected the argument. *Id.*; *see Am. Postal Workers Union v. NLRB*, 370 F.3d 25, 28 (D.C. Cir. 2004) ("Section 10(e) does not deprive the court of jurisdiction if the Union gave the Board 'adequate notice' of the argument it seeks to advance on review,' and while 'the Union also could have sought reconsideration of the Board's decision . . . . it is not out of court for want of having done so, because the Board had before it the precise issue the union raises in its petition for review[.]") (quoting *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999)). Accordingly, the Union's argument on review is preserved for appeal and properly before this Court.

II. The Board erred by ignoring Kroger's invocation of the 2014 letter as evidence of its intent to suppress the union's protected message.

As the Board acknowledged in its Decision and Order, an employer's enforcement of access restrictions is unlawful if the evidence supports an inference that the employer acted with a discriminatory motive. D&O 2 fn. 5 [JA6]. However, the Board failed to assess persuasive circumstantial evidence that Kroger's decision to exclude the union organizer was rooted in antiunion animus. Instead, the Board overlooked that evidence in favor of engaging in a more searching analysis than the facts required and issuing a broader pronouncement on access principles.

The Board should have considered evidence regarding the 2014 letter, the circumstances of its issuance, and Kroger's unprecedented decision to use it to exclude the union organizer, because that evidence supports an inference that Kroger's selective and disparate enforcement of its access restrictions was based on a desire to suppress the union's message. As detailed in our opening brief, Pet. Br. 16-19, a former Kroger store manager testified that the 2014 letter issued in direct response to planned union solicitation. While the Board and Kroger attempt to diminish the significance of this evidence, NLRB Br. 41 and Kroger Br. 7-10, it is the sole explanation for the issuance of the letter

in the record, and Lynch's testimony was not disputed by any other witness. On its face, the letter singled out union activity, and it identified protest activities for disfavored treatment. The fact that Kroger never used the letter or called the police to exclude any other groups engaging in solicitation confirms that Kroger understood that the purpose of the letter was to empower it to suppress the union's message. Finally, Kroger failed to justify its disparate treatment as motivated by anything other than antiunion animus.

The Board's failure to consider this strong circumstantial evidence of Kroger's motivation for excluding the union from its premises requires this Court to remand the case to the Board. Where there is evidence of antiunion animus, the Board need look no further before concluding that an employer's disparate treatment of union activity is unlawful. By ignoring the obvious antiunion nature of the 2014 letter and Kroger's unprecedented decision to use it to exclude the union organizer, the Board overlooked a more straightforward approach to resolving the case. As a result, the Board issued a decision that was 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).

CONCLUSION

The Court should grant the petition for review, vacate the Board's order, and remand this case to the Board.

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 brief contains 2340 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
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Date: September 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, the foregoing Final Reply 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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