

No. 20-1031

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

THE AMERICAN BOTTLING COMPANY d/b/a KEURIG DR PEPPER,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

AND

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 727,
Intervenor,

**PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT
OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD
[Not Yet Scheduled for Oral Argument]**

PETITIONER/CROSS-RESPONDENT'S REPLY BRIEF

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GLOSSARY

NLRB or the Board – National Labor Relations Board

NLRA or the Act – National Labor Relations Act

INTRODUCTION

Neither the Board nor the Union could direct the Court to any evidence that supports the Regional Director's Decision and Director of Election ("Decision") because there is none. The evidence establishes Petitioner completed all tasks necessary for the July 21, 2019¹ Re-Route; it just needed to wait for that date to implement. The Board and the Union's vain attempts to prop up the flawed Decision either misconstrue the evidence or flat out ignore it.

The facts speak for themselves. The undisputed facts establish Petitioner postponed the Re-Route a single time after it had been scheduled. After one postponement, Petitioner rescheduled the Re-Route on the first date possible. At the time of hearing, it was undisputed that Petitioner had taken every step necessary to implement the Re-Route on July 21. The Re-Route was both certain and definite. Neither the Board nor the Union can identify any evidence that disputes or rebuts the evidence proffered by Petitioner. The Decision was not based on competent, substantial evidence. Instead, it was arbitrary and capricious.

¹ All dates in 2019 unless otherwise noted.

ARGUMENT

I. THE UNDISPUTED EVIDENCE DEMONSTRATES THAT THE RE-ROUTE WOULD OCCUR ON JULY 21, 2019, DATE CERTAIN.

A. A SINGLE, PRIOR POSTPONEMENT DOES NOT CHANGE THE CERTAINTY WITH WHICH PETITIONER'S RE-ROUTE WAS GOING TO OCCUR ON JULY 21.

The Board devoted much of its brief to parsing each instance in which it believes Petitioner delayed implementation of the Re-Route. In so doing, the Board concludes that the Regional Director “drew reasonable inference from the evidence that the Company’s July plans were not definite and imminent.” (NLRB at 15-17, 21.) According to the Board, the Regional Director determined that evidence “reveal[ed] a pattern of announcing implementation dates that pass without fruition.” (DDE at 7.) Upon this determination rests the Regional Director’s conclusion that Petitioner failed to satisfy “its burden to show definite evidence of a contracting unit.” *Id.* But the Regional Director and the Board are wrong. Petitioner never maintained or announced a firm implementation date for the Re-Route prior to April 1. (Pet. at 6-10.) Lacking any evidentiary support, the Decision cannot stand.

April 1 was the first date on which the Re-Route was scheduled. *Id.* While Petitioner may have been engaged in tasks necessary to effectuate the Re-Route and provided generalized time periods for implementation (*i.e.*, “spring of 2018” (Tr. 37:9-13) [A. 37], “January of 2019 or...right after Super Bowl, the beginning of

February,” (Tr. 39:20-25, 40:1) [A. 39-40]), Petitioner did not have a date certain during those times. The Regional Director’s conclusion that Petitioner allowed proposed implementation dates to “pass without fruition,” (DDE at 7) is, therefore, wrong. The Regional Director’s evaluation of the evidence was incorrect and the Board’s reliance upon same is flawed.

The record does not support the Board’s argument that Petitioner “repeatedly delayed plans” (NLRB at 23) – the Re-Route was not “locked set in stone” until April 1. (Tr. 41:8-14.) [A. 41.] A single postponement is irreconcilable with the Regional Director’s conclusion that a “pattern” existed. (DDE at 7.) Given the absence of competent, substantial evidence to support the Regional Director’s conclusion, it is plain that the Decision is arbitrary and capricious.

The Board and the Union also incorrectly conflated the reason for the April 1 Re-Route postponement and its rescheduling to further the demonstrably false narrative that Petitioner “repeatedly delayed its plans.” (NLRB at 24, U. at 5.) Contrary to their assertions, Mr. Troutman did not testify that the “Company’s need for its ‘master data’” or “issues that a major customer voiced regarding an April 1 implementation date”² contributed to the postponement. (NLRB at 20.) Instead, the

² This error is pronounced by the fact that on March 18, Jewel Foods announced that the Re-Route would go into effect on April 1. (Pet. at 8.)

evidence demonstrates that labor relations issues with the Union were the sole reason for Petitioner's good-faith postponement. (Pet. at 20.) Before Petitioner was able to set a new date for the Re-Route, Jewel Foods requested that Petitioner delay the Re-Route until after July 4 if it could not implement by May 1. (Pet. at 10.) By the time Petitioner concluded its collective bargaining negotiations with the Union, there was not enough time to implement the Re-Route before May 1. (Tr. 73:16-25, 74:1-4.) [A. 73-74.] Mr. Troutman attributed this lack of time to the fact that the Re-Route was a "major change," not that Petitioner did not have the "master data" necessary for implementation. *Id.* Petitioner already had the master data for implementation for whenever the Re-Route was rescheduled. (Tr. 84:16-25, 85:1.) [A. 84-85.] These events simply impacted the date ultimately selected for Re-Route implementation. They are not contributing factors to the postponement, as the Board and the Union claim. (NLRB at 24, U. at 5.)

The facts are not elastic; the Board's claims that Petitioner "repeatedly delayed its plans" (NLRB at 24) and Petitioner "repeatedly missed its target dates for the Reroute" (NLRB at 25) are demonstrably wrong. *M.B Kahn Construction Company*, 210 NLRB 1050 (1974) is not distinguishable on this point. (NLRB at 24-25.) The evidence demonstrates that Petitioner postponed the Re-Route once, and rescheduled on the first available date. (Pet. at 11.) That the Regional Director failed to reach the same conclusion notwithstanding the unrebutted evidence compels the

conclusion that the Decision, and the Board's subsequent affirmance, is not based on competent, substantial evidence.

B. THE EVIDENCE DEMONSTRATES THAT THE ONLY THING PETITIONER HAD TO DO WAS WAIT FOR JULY 21 TO IMPLEMENT THE RE-ROUTE.

The Regional Director and the Board claim “[t]here is no record evidence that the Reroute could have been accomplished by July 21.” (DDE at 4, NLRB at 17.) The Board parrots the determination that “there is less to show the Reroute w[ould] definitely take place on July 21, 2019 than there was when [Petitioner] previously announced an April 1 implementation date.” (DDE at 6, NLRB at 20.) The Board is wrong.

Petitioner needed to do nothing to effectuate the Re-Route except to wait until July 21. (Tr. 34:12-16; 84:16-25; 85:1.) [A. 34, 84-85.] Mr. Troutman's testimony on this point less than four weeks prior to implementation stands undisputed and un rebutted. Lacking a scintilla of evidence to contradict Mr. Troutman's testimony, the Board and the Union disingenuously target the method by which Petitioner communicated with its employees and customers. By the Board and the Union's strained logic, the apparent absence of written communication about the July 21 implementation date negates all of the undisputed evidence Petitioner offered regarding the Re-Route's implementation. The Board and the Union's argument falls flat upon cursory examination.

First, the Board took broad liberties with the Regional Director's findings regarding Mr. Allbee's June 4 email (NLRB at 17, DDE at 4) wherein Mr. Allbee described the Re-Route to Petitioner's Senior Vice President of Human Resources. (Tr. 89:18-25, 90:1-4; Er. Ex. 11.) [A. 89-90; 170.] The Regional Director only found that the record did not reflect any further communication amongst Petitioner's senior officials in response or relating to Mr. Allbee's email; that is all. (DDE at 4.) The Board's claim that "[t]here is no evidence that the Reroute could have been accomplished by July 21" (NLRB at 17) stretches well beyond the facts. The record belies the Board's arguments.

The undisputed evidence demonstrates that on June 14, Mr. Troutman met with the Sales Service Representatives to inform them of the July 21 implementation date. (Tr. 32:12-19, Er. Ex. 12.) [A. 32; 171.] The Board downplays this meeting, stating that it was a "verbal announcement to some, but not all, of the SSRs." (NLRB at 20.) This fundamentally misconstrues Mr. Troutman's testimony. While he could not definitively state all Sales Service Representatives attended the June 14 meeting, Mr. Troutman testified that he "gave [his District Managers] the direction to inform **everyone**" about the July 21 implementation date. (Tr. 42:24-25, 43:1-3, 62:2-19.) [A. 42-43, 62.] (emphasis supplied.) The Board also selectively ignores the un rebutted evidence that Petitioner believed re-issuance of the March letters was unnecessary since the only thing that changed was the implementation date. (Tr.

59:18-25, 60:1-8, 83:1-16.) [A. 59-60, 83.] Again, the Board criticizes how Petitioner chose to communicate, not the substance of its communication, that the Re-Route would be implemented on July 21. Finally, whether Petitioner informed its customers of the July 21 implementation date is inapposite. (NLRB at 20, DDE at 6.) The issue before the Court is whether Petitioner's Re-Route was definite and imminent, not whether, how, and/or to what extent Petitioner informed its customers of details.

The Board and the Union also went to great lengths to assert that the Regional Director was correct in his conclusion that “the record contains no e-mails or other notifications or confirmations showing the master data updates necessary to implement the Reroute have been completed.” (NLRB at 21, U. at 4-5, DDE at 7.) The Board finds this “telling[.]”, while the Union uses this conclusion to assert that the Regional Director considered the evidence and rejected Petitioner's conclusion. (NLRB at 21, U. at 4-5.) That is, without the “master data” information, they argue that Petitioner could not possibly implement the Re-Route on July 21. This misguided notion is incorrect. Petitioner already had this information. The undisputed and un rebutted evidence established that as of that as of June 25, the master data transfer was “done,” and had been “done” since at least April 1. (Tr. 84:16-25, 85:1.) [A. 84-85.] The undisputed evidence proved that as of June 25, there was nothing else Petitioner needed to do as a business to implement the Re-Route

but wait until July 21. *Id.* The Regional Director selectively ignored Mr. Troutman's testimony, underscoring the arbitrary and capricious nature of the Decision. The undisputed and un rebutted evidence establishes that Petitioner's decision to implement the Re-Route on July 21 was both definite and imminent. The Re-Route changed Petitioner's operations, rendering Sales Service Representatives obsolete. As before, the Board is incorrect that *M.B Kahn Construction Company*, 210 NLRB 1050 (1974) is distinguishable on this point. (NLRB at 24-25.) Petitioner's reliance thereupon is well-taken. The Regional Director was not free to simply ignore the record evidence proving that the Re-Route was definite and imminent.

C. THE REGIONAL DIRECTOR FAILED TO FIND THE RE-ROUTE WAS A FUNDAMENTAL CHANGE TO PETITIONER'S BUSINESS MODEL.

The Board asserts that Petitioner did not raise the argument below that the Re-Route fundamentally changed its business model. (NLRB at 26.) This is incorrect. Mr. Troutman testified that prior to the Re-Route, Petitioner's method of selling and servicing product in Chicago was exclusive to that market. (Tr. 83:22-25, 84:1-3.) [A. 83-84.] This method of selling was "very unique" to this market. (Tr. 21:1-15.) [A. 21.] It is *sui generis* that the wholesale elimination of the job classification (Tr. 32:6-9) [A. 32] responsible for selling products to Petitioner's single largest customer in the Chicago market would have a profound financial impact. (Tr. 21:1-15; 66:22-25; 67:1-21). [A. 21, 66-67.] The Regional Director erred when he failed

to analyze whether Petitioner's undisputed evidence about the elimination of Sales Service Representatives resulted from a "fundamental change" Petitioner's business. Moreover, while he may not have used the "magic" word "fundamental" to satisfy the Regional Director, Mr. Troutman testified the Re-Route constituted a "major change" for Petitioner. (Tr. 73:16-25, 74:1-4.) [A. 73-74.] Instead of analyzing this evidence, the Regional Director merely included a conclusory footnote. (DDE 6 note 14.) Had he occasioned to do so, the Regional Director would have concluded that *MJM Studios*, 336 NLRB 1255, 1256-7 (2001) was distinguishable, and that the Re-Route reflected a fundamental change to Petitioner's business. The Regional Director's unjustifiable failure to conduct this analysis exemplifies the arbitrary and capricious nature of the Decision.

II. PETITIONER DOES NOT RELY UPON EXTRA-RECORD MATERIAL AS EVIDENCE SUPPORTING ITS POSITION.

The Board claims Petitioner relies upon "as evidence of a definite and imminent unit contraction" the Regional Director's dismissals of unfair labor charges. (NLRB at 27-30.) In those dismissals, the Regional Director determined Petitioner did not violate the Act when it implemented the Re-Route and eliminated the Sales Service Representative position. (Pet. at 32-33.) The Board is incorrect.

Petitioner cited unpublished determinations of the Regional Director and the Board's Office of Appeals, and analyzed those determinations in light of the

Decision. *Id.* These determinations further illustrate the incongruity of the Regional Director's rationale. Petitioner's discussion thereof is no different than citing to a case published in a reporter and discussing its impact on the instant matter. At no time has Petitioner asserted the dismissals constitute record evidence, either. Instead, these dismissals show the Regional Director has exercised his discretion inconsistently when presented with the same facts in complimentary cases – conduct that compels the conclusion that the Decision was arbitrary and capricious.

III. THE BOARD AGENT SHOULD HAVE FOLLOWED THE BOARD'S CHALLENGED BALLOT PROCEDURE.

The Board's claim that Petitioner "does not seriously dispute the Board's findings that it failed to establish any changed circumstances," (NLRB at 33) misrepresents Petitioner's position. At the end of the election, the Board Agent had notice of the Decision's holding that Sales Service Representatives were ineligible to vote because the elimination of that position was not, in the Regional Director's misguided view, definite or imminent. (Pet. at 14.) Yet, prior to the election and in light of the Decision, Petitioner confirmed that it would eliminate the Sales Service Representative position nine days after the election. *Id.* Consistent with its representation at the pre-hearing conference, Petitioner challenged the 30 votes cast by Sales Service Representatives. (Pet. at 14-15.)

Petitioner's confirmation of the elimination of the Sales Service

Representative position, the undisputed record evidence, and Decision's holding should have triggered the Board Agent to understand that she should apply the Board's challenged ballot procedure pursuant to Section 11338.7 of the Case Handling Manual. Assuming *arguendo*, albeit incorrectly, that the Re-Route's implementation was not "definite and imminent" as of the date of the Decision's publication, Petitioner's confirmation of its "definite and imminent" intent to implement the Re-Route on July 21 – just days after the election - should have constituted changed circumstances justifying application of the challenged ballot procedure.

The Board Agent's arbitrary failure to recognize these changed circumstances, coupled with her failure to adhere to the Board's well-established challenged ballot procedure warrants a new election. Her failure to follow basic Board procedures in light of Petitioner's confirmation that it would eliminate the Sales Service Representative position in a mere nine days should have caused the Regional Director to apply procedures developed to ensure Petitioner's right to a fair and valid election. Instead, he doubled-down on a Decision that rests upon a deeply-flawed and factually unsupported interpretation of the unrebutted evidence Petitioner offered at the hearing. The Regional Director's rejection of Petitioner's objections, therefore, reflects further error and is unsupported by substantial evidence.

The Board also claims Petitioner failed to “identify what specific actions (e.g., updating “master data”) had been completed that would now allow it to implement the Reroute, eliminating the SSR position, when it had not done so in the past...” such that Petitioner could demonstrate “changed circumstances” (NLRB at 33-34) triggering the Board’s challenged ballot procedure. As explained above, this is incorrect. The record and undisputed testimony of Mr. Troutman indicates no master data needed to be “updated” since Petitioner was using the April 1 data. (Tr. 84:16-25, 85:1.) [A. 84-85.] Contrary to the Board’s claim, all specific actions had been completed to allow Petitioner to implement the Re-Route on July 21. The Court, therefore, should reject this argument.

The Union contends that even if the challenged ballot procedure was followed, the challenges would not have been outcome determinative. (U. at 9-10.) The Union asserts that because seven Sales Services Representatives were going to transition to Account Manager, Petitioner’s challenges would only apply to 28 of the 35 Sales Service Representatives remaining in the bargaining unit. *Id.* This argument, however, is only made with the benefit of hindsight and, therefore, impermissible. Indeed, Petitioner identified 35 Sales Service Representatives to be excluded from petitioned-for unit. [A. 54.] Stated another way, at the time it asserted that that the petitioned-for unit was contracting, Petitioner sought to exclude all 35 Sales Service Representatives. Thirty Sales Service Representatives cast ballots

which, had the Board Agent adhered to the Board's well-established challenged ballot procedure, were outcome determinative. At that time, the Board Agent could have dealt with Petitioner's challenges and solicited responses from the Union. While the Union asserts that at least two of these challenges would have been resolved in its favor, this is pure speculation. The only way to know how these outcome-determinative challenges would have been resolved was for the Board Agent to employ the challenged ballot procedure. She did not; so there is no way for the Parties to know the true results of the underlying representation election. Accordingly, the Board Agent's behavior warrants setting aside the election.

IV. PETITIONER'S CHARACTERIZATION OF THE EVIDENCE IS CORRECT.

The Union contends that Petitioner mischaracterizes the record evidence arguing that Petitioner was partially responsible for the delay as the "master data" list would not be available by May 1. (U. 4-5.) This is wrong. As addressed above, Petitioner postponed the April 1 implementation date due to labor relations issues with the Union. Petitioner already had the "master data" on April 1. The Union then argues "contrary to [Petitioner's] characterization," the Regional Director "credited and considered" the evidence before finding that Petitioner failed to satisfy its burden. (U. at 5.) This is incorrect. Again, the record evidence shows the July 21 Re-

Route was both definite and imminent, and that the Regional Director arbitrarily and capriciously rejected that controverted evidence.

Next, the Union asserts Petitioner failed to acknowledge its burden of proof. (U. at 6-8.) This argument lacks any merit. Petitioner never argued anyone other than Petitioner holds the burden to present evidence of a contracting unit, nor has it cited to *NLRB v. Ray Smith Transportation Company*, 193 F.2d 142 (5th Cir. 1951) for such a proposition. (Pet. 22-23, 30.) Petitioner's reliance on *Ray Smith* rests squarely, and correctly, on the proposition that the Regional Director had no right to refuse Mr. Troutman's unrebutted testimony that the Re-Route was going to occur on July 21, a date certain. (Pet. 30.) Accordingly, the Court should reject this argument.

CONCLUSION

For all of the foregoing reasons, Petitioner's Petition for Review should be granted, the Board's cross-application for enforcement denied, and the Regional Director's Decision and Direction of Election in Case No. 13-RC-243320 set aside.

Dated: September 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this principal brief contains 3,231 words, excluding the parts of the briefs exempted Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 with Times New Roman 14 point font.

Dated: September 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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