UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-4594
Summary Calendar

I.M.T.C., INC.,

Petitioner
Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent
Cross-Petitioner.

. Petition for Review and Cross-petition for enforcement of an
of the National Labor Relations Board
NLRB #15CA 11472

(December 10, 1992)

Before POLITZ, Chief Judge, HIGGINBOTHAM and WIENER, Circuit Judges.

POLITZ, Chief Judge:[*]

I.M.T.C., Inc. petitions under 29 U.S.C. § 160, asking that we review and set aside a National Labor Relations Board order

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

requiring IMTC to bargain with unions certified to represent two groups of its employees. The NLRB seeks enforcement of its order. Finding no basis to reject the NLRB order, we deny review and grant enforcement.

Background

IMTC conducts a general industrial construction business in the Lake Charles, Louisiana area. In December, 1989, two unions[1] filed petitions seeking to represent units of IMTC's pipefitters (Unit A) and operating engineers (Unit B). After a consolidated proceeding before an NLRB hearing officer, the NLRB Regional Director found certification of the two separate bargaining units among the IMTC employees appropriate,[2] rejecting IMTC's contention that its employees properly comprised a single unit, and directed a representation election. The NLRB denied IMTC's request for review of the Regional Director's decision.

On February 8, 1990, in a secret ballot election, Unit A

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[1] Plumbers and Steamfitters Local 106, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of North America and Canada ("Local 106") and International Union of Operating Engineers Local 406, AFL-CIO ("Local 406").

[2] The Regional Director identified Unit A as "[a]ll pipefitters, pipewelders and pipehelpers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, sketchmen, office clerical employees, professional employees, guards and supervisors as defined by the Act." The Regional Director defined Unit B as "[a]ll operating engineers employed by the Employer at its jobsites in and around Lake Charles, Louisiana; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act."

approved union representation by a 55-30 margin and Unit B approved union representation by an 8-2 margin. The NLRB agent supervising the election, the unions, and IMTC challenged a total of 52 ballots in the Unit A election and 13 ballots in the Unit B election.[3] In addition, IMTC renewed its objection to designation of separate bargaining units and both IMTC and the unions filed objections to the conduct of the election. After a hearing ordered by the Regional Director, a hearing officer recommended opening and counting nine of the challenged ballots in Unit A and three Unit B challenged ballots,[4] and overruled IMTC's other objections. IMTC filed objections to the hearing officer's recommendations, and the Regional Director transferred the matter to the NLRB. The NLRB adopted substantially all of the hearing officer's recommendations,[5] and certified Local 106

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[3] Election results do not include challenged ballots unless and until the NLRB finds those challenges without merit. Even where such challenges fail, the NLRB does not count challenged votes unless they may alter the outcome of a representation election. See Robert A. Gorman, Basic Text on Labor Law 47 (1976).

[4] The hearing officer recommended acceptance of stipulations that ineligible employees cast 17 of the challenged ballots in Unit A and one challenged ballot in Unit B, and that an eligible employee cast one of the challenged ballots in Unit B. The hearing officer also recommended sustaining challenges to 26 ballots in Unit A and 9 ballots in Unit B.

[5] After adopting the hearing officer's recommendations as to 31 Unit A ballot challenges and 7 Unit B ballot challenges, the NLRB found that two remaining challenges in each unit no longer could affect election outcomes, and therefore declined to reach them.

and Local 406 as the exclusive collective bargaining representatives of Units A and B, respectively.

After the NLRB certification order, IMTC refused to bargain with either union. In response to this conduct, the Regional Director, on March 22, 1991, issued a complaint against IMTC, alleging unfair labor practices in violation of National Labor Relations Act sections 8(a)(1) and (5). The NLRB General Counsel moved for transfer of the case to the Board, and for summary judgment. On May 15, 1991, the Board transferred the case to itself, and issued IMTC a notice to show cause why summary judgment should not be granted. The Board, finding that with respect to representation IMTC failed to raise any issue not already litigated or to present any evidence warranting reexamination of prior decisions, granted summary judgment against IMTC, ordering it to bargain with the unions and to post an appropriate notice. IMTC and the NLRB then filed the instant petitions for review and enforcement.

Analysis

In its petition, IMTC once again claims error in the NLRB's bargaining unit determination. In the alternative, IMTC raises two challenges to the representation election. First, IMTC claims that the Board ruled erroneously on ballot challenges in both units. IMTC then asserts that the NLRB erred in finding election day campaigning by Local 106 unobjectionable. We address each of these contentions in turn.

A. NLRB Unit Determination

IMTC vigorously maintains that the NLRB should have designated a single bargaining unit including all of its employees. IMTC argues that because its employees routinely "cross craft lines," working side-by-side under similar conditions, its work force does not divide neatly into craft units. IMTC further argues that by certifying multiple craft units in the instant case, the Board deviated without explanation from its own precedents.

As we have long recognized, we conduct an "exceedingly narrow" review of NLRB bargaining unit determinations, recognizing that such actions involve a large measure of informed discretion "rarely to be disturbed."[6] We will upset a unit determination only where we find it "arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support."[7] The Board need only select an appropriate unit, rather than the most appropriate unit,[8] and the challenging employer must demonstrate that the Board made a clearly

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[6] **N.L.R.B. v. Action Automotive, Inc.**, 469 U.S. 490 (1985) (citing **Packard Motor Car Co. v. N.L.R.B.**, 330 U.S. 485, 491 (1947)); **Electronic Data Sys. Corp. v. N.L.R.B.**, 938 F.2d 570, 572-73 (5th Cir. 1991) (citation omitted).

[7] **E.g., N.L.R.B. v. J.C. Penney Co., Inc.**, 559 F.2d 373, 375 (5th Cir. 1977) (citations omitted).

[8] **E.g., American Hosp. Ass'n v. N.L.R.B.**, ___ U.S. ___, 111 S. Ct. 1539, 113 L. Ed. 2d 675 (1991); **N.L.R.B. v. Purnell's Pride, Inc.**, 609 F.2d 1153 (5th Cir. 1980).

inappropriate selection.[9]

The Board utilizes a "community of interests" test in arriving at unit determinations under section 9(b) of the Act. This test directs the Board's attention to numerous criteria including "bargaining history, operational integration, geographic proximity, common supervisor, similarity in job function, and employee interchange."[10] We have noted that similarity of work, skills, qualifications, duties and working conditions most reliably indicate community of interests.[11] The Board's discretion, however, "is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors,"[12] As the Board has long recognized, employee groups defined by commonality of craft skills or function often comprise appropriate bargaining units in

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[9] **See, e.g., J.C. Penney**, 559 F.2d at 375.

[10] **See Electronic Data Sys. Corp.**, 938 F.2d at 573 (citations omitted). The Board formulated "community of interests" analysis to prevent designation of bargaining units so large as to represent conflicting employee interests or so small as to lack effective bargaining power. See Robert A. Gorman, Basic Text on Labor Law 68-69 (1976).

[11] **See N.L.R.B. v. DMR Corp.**, 795 F.2d 472, 475 (5th Cir. 1986) (citing **Allied Chemical Alkali Workers of America, Local Union 1 v. Pittsburgh Plate Glass Co. v. N.L.R.B.**, 404 U.S. 157 (1971)).

[12] **Id.** (citation omitted).

the context of the construction industry.[13]

IMTC's employees work identical hours, receive identical benefits, and share common parking and tool room facilities. Further, IMTC deploys its workforce in crews containing members of varied expertise, and foremen at each work site oversee workers of all crafts. All employees attend regular safety meetings on a site-by-site basis. In addition the company, through an arrangement with the Associated Builders & Contractors, provides training so that interested employees can learn new crafts. IMTC and the Board, however, part company over the role which craft lines play in the IMTC organization.

IMTC insists that its workforce does not divide neatly along craft lines. The company notes that, for payroll and record-keeping purposes, it formally classifies employees generically rather than by craft.[14] Further, it claims that all employees routinely perform any tasks necessary to completion of a project, regardless of their principal areas of expertise.

The Board claims that IMTC employees work primarily at their dominant skills. Conceding that workers sometimes perform tasks outside the strict definitions of their crafts, the Board argues that these deviations do not involve journeyman-level work in

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[13] **See, e.g., N.L.R.B. v. Crockett-Bradley, Inc.**, 523 F.2d 449 (5th Cir. 1975); **Longcrier Co.**, 277 N.L.R.B. 570 (1985).

[14] For most purposes, including wage determination, IMTC classifies its employees as "Mechanic A," "Mechanic B," "Helper 1," "Helper 2," or "Laborer."

other crafts and consist primarily of tasks incidental to their dominant skills. The Board further points out that IMTC requires its employees to identify a "dominant skill" at the time of hiring, and to provide tools necessary for that craft. Finally, the board points out that IMTC "catalogues" its employees according to their dominant skills, and uses this information in making decisions about recall of laid-off employees.

The record in this case presents conflicting evidence. Where substantial evidence in the record as a whole supports the Board's findings, we must uphold the Board even though our *de novo* consideration might yield a different result.[15] We find record support here for the Board's finding that the IMTC workforce includes distinct craft groups. Accepting, as we must, the Board's findings of fact, and mindful of the Board's longstanding recognition that special circumstances in the construction industry often militate in favor of craft-based bargaining units, we cannot conclude that the unit determination in this case is arbitrary or capricious. The fact that IMTC employees occasionally work outside of their primary craft does not alter this conclusion.[16] Although IMTC may have proposed an

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[15] **See** 29 U.S.C. §§ 160(e), (f) (Board findings with respect to questions of fact conclusive if supported by substantial evidence on the record considered as a whole); **Universal Camera Corp. v. N.L.R.B.**, 340 U.S. 474, 488 (1951).

[16] **See N.L.R.B. v. Crockett-Bradley, Inc.**, 523 F.2d 449 (5th Cir. 1975) (in construction industry, separate bargaining unit of truck drivers appropriate although drivers in question also performed occasional construction work); **Dick Kelchner Excavating Co.**, 236 N.L.R.B. 1414 (1978).

appropriate unit, it has failed to show that the Board designated clearly inappropriate units.[17]

B. Resolution of Ballot Challenges

IMTC also assigns as error the Board's resolution of challenges to 24 employee ballots. The company claims that the Board incorrectly concluded that the duties of 22 employees placed them outside of Unit A. Similarly, IMTC claims that the Board erroneously sustained challenges to ballots by three employees in Unit B.[18]

In raising this issue, IMTC in essence asks us to review NLRB determinations whether the employees casting challenged ballots share the community of interests defining the unit in which IMTC seeks to include them.[19] The substantial discretion

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[17] We find no merit in IMTC's suggestion that the Board's order in this case represents an insufficiently explained deviation from precedent set in **A.C. Pavement Stripping Co.**, 296 N.L.R.B. No. 38 (1989); **Longcrier Co.**, 277 N.L.R.B. 570 (1985); **Atlanta Div. of S.J. Groves & Sons Co.**, 267 N.L.R.B. 175 (1983); and **Brown & Root, Inc.**, 258 N.L.R.B. 1002 (1981). The instant case is factually distinguishable from those cited by IMTC.

[18] The Board incorrectly suggests that we need consider none of the ballot challenges because even if we resolve them all favorably to IMTC, the election results will not change. No party disputes the Board's finding that three challenged ballots in Unit B and nine in Unit A should be counted. Considering these as yet uncounted ballots, Local 106 could have prevailed in Unit A by as few as 16 votes and Local 406 by as few as three votes in Unit B. Thus, our resolution of these challenges could affect the election results.

[19] **See Dick Kelchner Excavating Co.**, 236 N.L.R.B. 1414 (1978) (employee excluded from unit lacked interests in common with other members).

which the Board enjoys when answering the community of interests question in the context of unit determinations is akin to that it enjoys when determining the unit membership of individual employees. We will not upset such individual determinations where there exists in the record substantial supporting evidence.[20]

Board opinions considering craft unit membership of individual employees have focused on the extent to which craft-related activities predominate among the duties of the employee in question.[21] In addition, the Board has looked to other community of interests factors in determining the unit membership of individual employees.[22]

In the instant case, the Board sustained challenges to ballots of 19 employees in Unit A, based on findings that these employees were predominantly skilled at carpentry and spent the lion's share of their time performing carpentry work. The Board further sustained challenges to the ballots of employee A.J. Reeves in both Unit A and Unit B, finding that although Reeves

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[20] **Cf. N.L.R.B. v. Dickerson-Chapman, Inc.**, 964 F.2d 493 (5th Cir. 1992) (Board determination as to employee's supervisory status upset only if not supported by substantial evidence in record).

[21] **See W.P. Butler Co.**, 214 N.L.R.B. 1039 (1974).

[22] **See Dick Kelchner Excavating Co.**, 236 N.L.R.B. 1414 (1978).

was primarily skilled as a pipefitter he spend the bulk of his time working as an expediter -- a job classification which the parties agree does not fall within either unit. Our review of the record indicates that substantial evidence in the record supports these findings, and we decline to upset them.[23]

C. Conduct of the Election

IMTC finally contends that improper election day campaigning staged by representatives of Local 106 requires invalidation of the election. The Board adopted the hearing officer's finding that Local 106 engaged in no objectionable activity. The NLRB prohibits campaigning at or near the polls in order to prevent interference with employee exercise of free choice in representation elections.[24] Objectionable activity vitiates an election only if "when considered as a whole, [it] either tended to or did influence the outcome of the election." We have long recognized the NLRB's broad discretion in determining whether misconduct tainted an election, and will disturb a Board resolution of that issue only if no substantial evidence in the record supports it.[25]

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[23] Because we have found adequate support for the Board's decision to exclude 20 of the challenged ballots in Unit A and one challenged ballot in Unit B, resolution of the remaining challenges to two ballots in Unit A and two ballots in Unit B cannot affect the election results. We therefore decline to consider these remaining challenges.

[24] See **Claussen Baking Co.**, 134 N.L.R.B. 111 (1961).

[25] **N.L.R.B. v. Golden Age Beverage Co.**, 415 F.2d 26 (5th Cir. 1969).

In this case, no party contends that representatives of Local 106 did anything other than carry and post signs at the side of the road leading to the polling place. Further, IMTC concedes that this activity did not take place closer than one-third of a mile from the polling place. The record reflects that this activity took place along one of several routes to the polling place, and violated no instruction of the supervising Board Agent. There is no record evidence that this activity involved direct contact with people enroute to the polls or in line waiting to vote or that IMTC complained at the time of the election to the supervising Board Agent. We conclude that the record supports the Board's ruling that this activity imposed no objectionable influence on the election.[26]

Conclusion

For the foregoing reasons, we DENY the petition for review and GRANT the NLRB's petition for enforcement of its order.

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[26] See **Boston Insulated Wire & Cable Sys., Inc. v. N.L.R.B.**, 703 F.2d 876 (5th Cir. 1983) (electioneering activity just outside polling place entrance did not require NLRB to set aside election where closed doors separated campaigners from employees waiting in line to cast their ballots and campaigners had no conversations with such employees).