NLRB memo emphasizes protecting rights of immigrant workers

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ELI M. KANTOR
Email: eli@elikantorlaw.com

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In the Nov. 8 memo, Abruzzo details case-handling procedures that will allow the board to more effectively serve the unique needs of immigrant communities and ensure that the NLRB is not only accessible to all workers who seek the NLRB's assistance, but also a safe place where they are treated with dignity -- without regard to immigration status or work authorization.

"In order for all workers to be able to exercise their rights under the [National Labor Relations] Act, we must zealously serve the unique needs of immigrant workers to be free of immigration-related intimidation tactics that seek to silence employees, denigrate their right to act together to seek improved wages and working conditions, and thwart their willingness to report statutory violations," said Abruzzo. "I am resolved to hold fully accountable those entities that, by targeting immigrant workers and their workplaces, undermine the policies of the NLRA and the nation's immigration laws."

The memo also instructs regions to seek full and immediate remedies regarding immigration-related threats and retaliatory conduct at every stage of an unfair labor practice case, including seeking NLRA Section 10(j) injunctive relief.

In a significant departure from past policies, Abruzzo stated that she will continue to pursue interagency collaboration with the Department of Homeland Security and its subagencies to strengthen deconfliction procedures and support the provision of relief for witnesses and victims of unfair labor practices. Upon request by a charging party or witness, the board will seek deferred action, parole, U- or T-visa status, a stay of removal, or other immigration relief as available and appropriate.

Previously, the NLRB's policy in protecting the rights of undocumented workers was set forth in the U.S. Supreme Court's decision in *Sure-Tan, Inc. v. National Labor Board*, 467 U.S. 883 (1984). The high court held that undocumented workers have a right under the NLRA to vote in a union representation election and that their deportation after the election did not invalidate the results.

In *Sure-Tan*, the Chicago Leather Workers' Union sought certification as a bargaining representative of two small firms that constituted a single integrated employer for the purposes of the NLRA. An election was held, and the CLWU won. The employer complained to the NLRB that six of the seven voters were undocumented workers, claiming that these circumstances conflicted with the Immigration and Naturalization Act.

The employer eventually notified the INS; and five workers were deported, causing the CLWU to file unfair labor practice charges. The NLRB ruled that the employer committed an unfair labor practice when he requested the INS investigation solely because the employees supported the union.

One of the important legal ramifications of *Sure-Tan* was the Supreme Court's recognition of undocumented workers as "employees" within the meaning of NLRA Section 2(3). The court held that "the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." The court also declared that there is no conflict between the application of the NLRA to undocumented workers and the mandate of the INA.

The Supreme Court affirmed the Court of Appeals' decision that the employer committed an unfair labor practice under Section 8(a)(3) of the NLRA by constructively discharging its undocumented workers through its practice of reporting the employees to the INS in retaliation for their participation in union activities.

While the *Sure-Tan* decision protects undocumented workers' rights to organize, it does not provide for their reinstatement, since they would be "unavailable" for work, because they lacked work authorization in the United States. Thus, the NLRA does not protect undocumented workers' rights to live and work in the U.S.

On a personal note, more than 40 years ago, when I was an NLRB trial attorney, I was involved in a union organization campaign at a Japanese restaurant, Restaurant Horikawa, in *GTA Enterprises, Inc. d/b/a "Restaurant Horikawa" and Hotel and Restaurant Employee and Bartenders Union, Local 11, AFL-C10*, 260 NLRB No.29. The employer allegedly called Immigration on its own employees, who were arrested in the middle of a union organization campaign, shortly before my unfair labor practices trial. Several key witnesses who were unlawfully present in the U.S. from El Salvador and Japan were arrested. I went into court to prevent my witness from being deported prior to the trial. The judge said: "I don't understand what's going on, we have one branch of the government, the INS asking me to deport these people, while another branch of the government, the NLRB, is asking me to let them stay." Ultimately, I was able to persuade the judge to grant my witnesses "extended voluntary departure" to allow them to testify at the trial. However, they had to leave the U.S. after testifying.

Today, 40 years later General Counsel Abruzzo will help those undocumented workers stay in the U.S. through seeking deferred action, parole, U- or T-visa status, a stay of removal, or other immigration relief as available and appropriate. □