Nos. 06-1329, 06-1349

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AGRI PROCESSOR CO., INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JULIE B. BROIDO
Supervisory Attorney

KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-0656

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
AILEEN A. ARMSTRONG
Deputy Associate General Counsel
National Labor Relations Board

TABLE OF CONTENTS

Headings **Page(s)**

Statement of jurisdiction 1

Statement of the issues presented 3

Relevant statutory provisions 4

Statement of the facts and of the case 5

I. The representation proceeding 5

II. The unfair-labor-practice proceeding 6

III. The Board's conclusions and order 6

Summary of argument 7

Standard of review 8

Argument 10

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union 10

A. Undocumented workers are statutory "employees" and their immigration status does not affect their right to participate in representation elections 11

B. The Board reasonably found the bargaining unit, which includes both legal and allegedly undocumented employees, to be appropriate 18

C. The Company has not shown that the majority of its unit employees were undocumented workers 23

Conclusion 26

TABLE OF AUTHORITIES

Cases **Page(s)**

Allentown Mack Sales & Service, Inc. v. NLRB,
522 U.S. 359 (1998) 9

Boire v. Greyhound Corporation,
376 U.S. 473 (1964) 2,11

Carpenters Local 1976 v. NLRB,
357 U.S. 93 (1958).....9

Chelsea Industries, Inc. v. NLRB,
285 F.3d 1073 (D.C. Cir. 2002).....25

**Concrete Form Walls, Inc.*,
346 NLRB No. 80, 2006 WL 1001906 (2006)..... 12,13,14,16,17,23,24

Davis Memorial Goodwill Industries, Inc. v. NLRB,
108 F.3d 406 (D.C. Cir. 1997).....20,21

De Canas v. Bica,
424 U.S. 351 (1976) 13

Duke City Lumber Company,
251 NLRB 53 (1980).....22

Evergreen America Corporation v. NLRB,
362 F.3d 827 (D.C. Cir. 2004).....8,9

Fall River Dyeing & Finishing Corporation v. NLRB,
482 U.S. 27 (1987).....8

Freund Baking Co.,
330 NLRB 17 (1999).....3

---

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

Cases--cont'd **Page(s)**

George Joseph Orchard Siding, Inc.,
325 NLRB 252 (1998) 25

Hoffman Plastic Compounds, Inc. v. NLRB,
535 U.S. 137 (2002) 9,12,13,14,15,17,22

Logan & Paxton,
55 NLRB 310 (1944) 12

Medina County Publications,
274 NLRB 873 (1985) 3

NLRB v. Action Automotive, Inc.,
469 U.S. 490 (1985) 19

NLRB v. Apollo Tire Company, Inc.,
604 F.2d 1180 (9th Cir. 1979) 12

NLRB v. Hearst Publications,
322 U.S. 111 (1944) 13

NLRB v. Jones & Laughlin Steel Corporation,
301 U.S. 1 (1937) 13

NLRB v. Kentucky River Community Care, Inc.,
532 U.S. 706 (2001) 24

**NLRB v. Kolkka Tables & Finnish-American Saunas*,
170 F.3d 937 (9th Cir. 1999) 15,16,17

Outokumpu Copper Franklin, Inc.,
334 NLRB 263 (2001) 22

Perez-Farias v. Global Horizons, Inc.,
2006 WL 2129295, *4 (E.D.Wash. July 28, 2006) 24

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

Cases--Cont'd **Page(s)**

Regal Cinemas, Inc. v. NLRB,
317 F.3d 300 (D.C. Cir. 2003).....10

Saint-Gobain Industrial Ceramics, Inc. v. NLRB,
310 F.3d 778 (D.C. Cir. 2002).....23

Seattle Opera v. NLRB,
292 F.3d 757 (D.C. Cir. 2002).....11

Southern S.S. Co. v. NLRB,
316 U.S. 31 (1942).....9

**Speedrack Products Group, Ltd.*,
325 NLRB 609 (1998).....19,20

**Speedrack Products Group, Ltd. v. NLRB*,
114 F.3d 1276 (D.C. Cir. 1997).....9,19

Superior Truss & Panel, Inc.,
334 NLRB 916 (2001).....12

**Sure-Tan, Inc. v. NLRB*,
467 U.S. 883 (1984) 11,12,13,14,18,20

Sutter Roseville Medical Center,
348 NLRB No. 29, 2006 WL 2826427 (2006).....25

Tualatin Electric, Inc. v. NLRB,
253 F.3d 714 (D.C. Cir. 2001).....8

Tuv Taam Corp.,
340 NLRB 756 (2003).....12

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 8,9

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

Statutes

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 2(3)(29 U.S.C. § 152(3) 4,11,14,17
Section 7 (29 U.S.C. § 157) 4,7,14
Section 8(a)(1)(29 U.S.C. § 158(a)(1)) 3,4,6,10
Section 8(a)(5)(29 U.S.C. § 158(a)(5)) 3,4,6,10
Section 9(c)(29 U.S.C. § 159(c)) 2,3
Section 9(d)(29 U.S.C. § 159(d)) 2
Section 10(a)(29 U.S.C. § 160(a)) 1
Section 10(e)(29 U.S.C. § 160(e)) 2,8
Section 10(f)(29 U.S.C. § 160(f)) 2

Other

*Social Security Administration,
Employer Reporting Instructions & Information,
http://www.ssa.gov/employer/ssnvrestrict.htm 24

House Judiciary Report on the IRCA,
H.R. Rep. No. 682(I), 99th Cong. 2d Sess. 58 (1986),
reprinted in 1986 USCCAN 5649 13,14

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 06-1329, 06-1349

AGRI PROCESSOR CO., INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Agri Processors Co., Inc. ("the Company") to review, and the cross-application of the National Labor Relations Board to enforce, a Board order against the Company. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)). The Decision and Order, issued on August 31, 2006, and reported at 347 NLRB No. 107, is a

final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Company petitioned for review of the Board's order on September 20, 2006, and the Board cross-applied for enforcement of the order on October 17. The Court has jurisdiction over the Company's petition and the Board's cross-application pursuant to Section 10(e) and (f) of the Act. Both were timely filed, as the Act imposes no time limit for such filings.

The Board's unfair-labor-practice order is based, in part, on findings made in an underlying representation proceeding, *Agri Processor, Inc.*, Board Case No. 29-RC-11242. (A 112.)[1] Pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d), the record before this Court therefore includes the record in that proceeding.[2] Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair-labor-practice] order of the Board . . . ," but does not give the Court general authority over the representation proceeding. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29

[1] "A" refers to the Joint Appendix. Where applicable, references preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

[2] *See also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964).

U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair-labor-practice case.[3]

STATEMENT OF THE ISSUES PRESENTED

The ultimate issue in this case is whether the Company violated Section 8(a)(5) and (1) by refusing to bargain with its employees' duly certified representative, the Union. Because the Company asserts in its defense that the Board's certification was invalid due to the allegedly undocumented status of a number of unit employees, the Court must determine whether the Board reasonably found that: undocumented workers are "employees" under the Act, any undocumented workers were appropriately in the bargaining unit and eligible to vote, and the Company failed to demonstrate that the employees in question are undocumented.

[3] *See, e.g.*, *Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

RELEVANT STATUTORY PROVISIONS

Section 2(3) of the Act, 29 U.S.C. § 152(3):
The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . ., or by any other person who is not an employer as herein defined.

Section 7 of the Act, 29 U.S.C. § 157:
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. . . .

Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5):
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 [Section 7] of this title.

(5) to refuse to bargain collectively with the representatives of his employees. . . .

STATEMENT OF THE FACTS AND OF THE CASE

I. THE REPRESENTATION PROCEEDING

In August 2005, the Union petitioned for an election to represent a unit of the Company's employees. Early the next month, the parties signed a Stipulated Election Agreement, consenting to a unit definition[4] and scheduling the election for September 23, 2005. (A 111-12; 7-9.) The Union won the election but the Company filed timely objections to conduct affecting the election. (A 112; 10-14.)

The Board's Regional Director overruled some of the Company's objections outright and the Board adopted his conclusions respecting those objections on December 21, 2005. (A 112; 42-44, 58-59.) The Regional Director referred the remaining objections to a hearing before an administrative law judge, who overruled them in a December 16, 2005 Decision on Objections. (A 112; 42-44, 55-57.) The Company filed exceptions to the judge's decision but the Board's Associate Executive Secretary dismissed those exceptions as untimely. (A 112; 60-62, 67.) On January 23, 2006, the Board certified the Union as the collective-bargaining representative of the Company's unit employees. (A 112; 72-73.)

---

[4] The unit included "[a]ll full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers, and forklift operators employed" at the Company's Brooklyn, New York facility, and excluded "[a]ll managers, office and clerical employees, salesmen, truck drivers, guards and [statutory] supervisors."

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

After the certification, the Company refused to comply with the Union's bargaining demands. (A 112; 13, 15.) On March 21, 2006, pursuant to a charge filed by the Union, the Board's General Counsel issued a complaint, which alleged that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 111; 74, 80-83.) The Company asserted in its defense that the representation election was invalid because a majority of the voting employees were illegal aliens who could not legally work in the United States. (A 111; 91-94.) In his May 12, 2006 decision, the administrative law judge rejected the Company's defenses and recommended that the Board find the violation charged. The Company filed timely exceptions to the judge's decision before the Board. (A 110, 112.)

III. THE BOARD'S CONCLUSIONS AND ORDER

In an August 31, 2006 Decision and Order, the Board (Chairman Battista, Members Liebman and Kirsanow) found, in agreement with the judge, that the Company's refusal to bargain constituted an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act. Like the judge, it rejected the Company's reliance on the unit employees' immigration status as well as the Company's evidence for establishing their status. (A 110.)

To remedy that unfair labor practice, the Board's order requires the Union to cease and desist from failing and refusing to bargain collectively with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 159). Affirmatively, the Board's order requires the Company to bargain with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. The order also requires that the Company post a remedial notice. (A 110-11.)

SUMMARY OF ARGUMENT

After stipulating to a representation election for a unit of its employees and unsuccessfully pursuing a number of challenges to the Union's victory in that election, the Company suddenly decided to look into whether its employees are authorized to work in the United States. When its initial inquiry identified potential problems with several employees' social-security numbers, the Company admittedly refused to recognize the Union as its employees' representative and bargain with the Union. It now claims that the Board's certification of the Union is invalid because those employees are purportedly undocumented, and therefore not "employees" under the Act, and therefore ineligible to vote in representation elections.

The Company's arguments are without merit, both legally and factually. According to longstanding Board and court precedent, undocumented workers are statutory employees, and immigration status is irrelevant to determining voting eligibility under the Act. Moreover, the Company's evidence of non-matching social-security numbers is – according to the Social Security Administration itself – insufficient to prove the immigration status of the employees at issue. In sum, the Company has no excuse for refusing to bargain with the duly certified representative of its employees, and this Court should enforce the Board's order requiring it to do so.

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law."[5] The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole.[6] Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a

---

[5] *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted).

[6] 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Evergreen America Corp. v. NLRB*, 362 F.3d 827, 837 (D.C. Cir. 2004).

conclusion."[7] Thus, the Board's reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*.[8] Further, although the Board is entitled to no particular deference when it interprets federal immigration law,[9] it is not compelled to "abandon an independent inquiry into the requirements of its own statute" simply because another federal statute may be implicated.[10] Finally, this Court accords particular deference to the Board's unit determinations.[11]

---

[7] *Universal Camera*, 340 U.S. at 477; *see also Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) ("Put differently, [the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board's conclusion.").

[8] *See Universal Camera*, 340 U.S. at 488. *Accord Evergreen America*, 362 F.3d at 837 ("[T]he court will uphold the Board's decision upon substantial evidence even if we would reach a different result upon *de novo* review.").

[9] *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

[10] *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 111 (1958)(interpreting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

[11] *Speedrack Prods. Gr., Ltd. v. NLRB*, 114 F.3d 1276, 1278 (D.C. Cir. 1997).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

An employer's refusal to bargain with its employees' duly certified representative violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).[12] Here, the Board certified the Union as the bargaining representative of a unit of the Company's employees, following the Union's representation-election victory. (A 72-73.) Nonetheless, the Company admittedly (Br 19, A 13 & 15) refused to bargain with the Union. In defense of its refusal, the Employer makes several arguments based on its claim that, at the time of the election, the majority of the relevant unit employees were undocumented workers, not authorized to work legally in the United States. Unless those arguments prevail – and the following discussion will demonstrate that the Board reasonably rejected each of them – the Employer's refusal to bargain is unlawful.[13]

---

[12] *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 (D.C. Cir. 2003). A Section 8(a)(5) refusal-to-bargain unfair labor practice results in a "derivative violation" of Section 8(a)(1). *See Regal*, 317 F.3d at 309 n.5.

[13] *See Boire*, 376 U.S. at 476-77 (explaining that employers can challenge the Board's union-certification determinations only through an unfair-labor-practice proceeding, typically the sort of technical refusal-to-bargain case at issue here).

A. UNDOCUMENTED WORKERS ARE STATUTORY "EMPLOYEES" AND THEIR IMMIGRATION STATUS DOES NOT AFFECT THEIR RIGHT TO PARTICIPATE IN REPRESENTATION ELECTIONS

As the Supreme Court has noted, the breadth of the statutory definition of "employee" is "striking."[14] Specifically, Section 2(3) of the Act defines the term to "include any employee" not expressly excluded.[15] And the statute's express exclusions are limited to agricultural laborers, domestic servants of a family or person at his home, individuals employed by a parent or spouse, independent contractors, supervisors, or persons employed by employers subject to the Railway Labor Act.[16]

The Company does not even claim that undocumented workers fall into any of those excluded categories. Still, it urges this Court (Br 23, 25-26) to find that they are not "employees," principally based on alleged conflicts with the Immigration Reform and Control Act of 1986 ("IRCA") (8 U.S.C. § 1324a, et seq.). Such a finding, however, would both run counter to the relevant statutory language and contradict well-established Board and court precedent, not to mention congressional intent.

---

[14] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984). *Accord Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002)(quoting *Sure-Tan*).

[15] 29 U.S.C. § 152(3).

[16] *See Id; Sure-Tan*, 467 U.S. at 891.

The Board, with court approval, has consistently found that undocumented workers enjoy statutory employee status and are entitled to the protection of the Act, including the right to vote in representation elections.[17] The Supreme Court confirmed this longstanding principle of labor law in *Sure-Tan, Inc. v. NLRB*, explaining that "[s]ince undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'"[18] The Court further held that "the Board's categorization of undocumented aliens as protected employees furthers the purposes of the [Act]," reiterating its own longstanding position that the inclusion of undocumented workers in the Act's scope of protection advances the rights of

---

[17] *See, e.g., Concrete Form Walls, Inc.*, 346 NLRB No. 80, 2006 WL 1001906, *4 & n.15 (2006)("[W]e reject the Respondent's argument that undocumented workers are not statutory employees."), *application for enforcement pending* (11th Cir. Nos. 06-13845-GG & 06-14997-GG); *Logan & Paxton*, 55 NLRB 310, 315 n.12 (1944) ("The Act does not differentiate between citizens and non-citizens."). *Accord NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1182-83 (9th Cir. 1979) (upholding Board determination that undocumented workers are statutory employees, and citing additional Board cases); *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003)(holding *Hoffman* does not change Board policy that worker's immigration status is typically irrelevant to employer's unfair-labor-practice liability under the Act, and relevant only to constructing an appropriate remedy); *Superior Truss & Panel, Inc.*, 334 NLRB 916, 918 (2001)("The Board has . . . clearly and uniformly applied the principle that individuals who are employed during the eligibility period before and on the date of a representation election are 'employees' under the Act and . . . eligible to vote.").

[18] 467 U.S. at 892.

all workers, both documented and undocumented – and that their exclusion could undermine working conditions for all.[19]

As the Board noted (A 112) here, and more fully explained in *Concrete Form Walls, Inc.*,[20] the Supreme Court's more recent decision in *Hoffman Plastic Compounds, Inc. v. NLRB,*[21] does not call into question *Sure-Tan*'s holding that undocumented workers have "employee" status. Indeed, the *Hoffman* decision, which focuses on the Board's *remedial* powers, did not revisit that coverage issue.[22] The Court did find that the 1986 enactment of IRCA, subsequent to *Sure-Tan*, limited the Board's authority to order backpay for undocumented workers.[23] But its decision did not even involve non-remedial issues such as the voting eligibility at issue here, much less disturb settled Board precedent that employees' immigration status is irrelevant to their eligibility to vote in representation

---

[19] *Sure-Tan*, 467 NLRB at 891 (quoting *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976), and citing *NLRB v. Hearst Publs.*, 322 U.S. 111, 126 (1944) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937)). *Accord Concrete*, 2006 WL 1001906, *5 (quoting House Judiciary Report on the IRCA, H.R. Rep. No. 682(I), 99th Cong. 2d Sess. 58 (1986), *reprinted in* 1986 USCCAN 5649, 5662 (quoting *Sure-Tan*)).

[20] 2006 WL 1001906, *4.

[21] 535 U.S. 137 (2002).

[22] *Id.* at 150 n.4. *See Concrete*, 2006 WL 1001906, *4.

[23] *Id.* at 147-49.

elections. Moreover, as the Board noted in *Concrete*, the Court implicitly accepted the premise that undocumented workers are entitled to protection under the Act when it noted that the Board retained other "significant" remedial options for addressing unfair labor practices perpetrated against such workers.[24]

Likewise, the legislative history of IRCA suggests that Congress intended to leave *Sure-Tan*'s coverage finding undisturbed. As the Board pointed out in *Concrete*, Congress explicitly found that "the employer sanctions provisions [of IRCA] *are not intended to limit in any way* the scope of the term 'employee' in Section 2(3) of [the Act] or of the rights and protections stated in Sections 7 and 8 of that Act."[25] The Company's failure to identify any case expanding *Hoffman*'s holding to exclude undocumented workers from these statutory protections further demonstrates the futility of its arguments.

In fact, regarding the issue in the instant case, the Board has, with court approval (albeit in a pre-*Hoffman* decision), specifically explained why IRCA does not impact undocumented workers' eligibility to vote in representation elections or enable employers to refuse to bargain with their employees' unions just because some employees are undocumented. In *Kolkka Tables and Finnish-American*

---

[24] *Id.* at 152; *Concrete*, 2006 WL 1001906, *4.

[25] 2006 WL 1001906, *5 (quoting House Judiciary Report on the IRCA, H.R. Rep. No. 682(I), 99th Cong. 2d Sess. 58 (1986) (emphasis added)).

Saunas, the employer and union, like the Company and Union here, entered into a stipulated election agreement defining a voting unit of "full-time and regular part-time" employees.[26] As in this case, the Board conducted an election pursuant to the parties' agreement, and the union won. And, like the Company, the employer subsequently protested the validity of the union's certification based on the alleged undocumented status of certain unit employees.[27]

The Board in *Kolkka* rejected the employer's arguments, holding that the relevant inquiry for voting eligibility is whether a worker is a statutory employee at the time of the election in question, not whether that worker may legally have been subject to termination at that time.[28] As the court pointed out in enforcing the Board's order, accepting the employer's argument would enable employers "to avoid [their] obligations under both [the Act and IRCA]." It explained that "[a]n employer would be rewarded for violating the IRCA through the hiring and continued employment of unauthorized aliens because their participation in any union election would defeat that election, even if it was otherwise valid under the [Act]. Employers with undocumented alien employees could manipulate election

---

[26] *NLRB v. Kolkka Tables & Finnish-American Saunas*, 170 F.3d 937, 939 (9th Cir. 1999)(describing underlying, unpublished representation decision).

[27] *See id.*

[28] *Id.* at 940.

results" by modifying the composition of the voting unit or by threatening illegal employees into voting against the union.[29] Those same considerations mitigate against adopting the Company's arguments here.

Together, *Concrete* and *Kolkka* bely the Company's assertion (Br 33) that the Board's position on undocumented workers ignores the effects of IRCA. And the Company does not respond in any meaningful way to the Board's analysis in *Concrete*, although the Board here (A 110 & n.1, 112) specifically referenced and relied on that decision. Instead, the Company makes a single, unavailing effort (Br 31) to distinguish *Concrete*, noting that the Board did not require the employer in that case to reinstate undocumented strikers. But, contrary to the Company's suggestion (Br 31), the Board did not require any such action here either, or even so much as comment on the fate of the Company's striking employees. The issue of the striking employees is not part of this case, which is confined to a determination that the Company must bargain with its employees' duly certified representative. In any event, a discussion of the strikers' rights would not particularly distinguish this case from *Concrete*, which, in addition to rejecting the employer's argument that undocumented workers were ineligible to vote,

[29] *Id.* at 941.

determined that the employer had unlawfully discharged undocumented workers in violation of the Act.[30]

Essentially, the Company's argument boils down to a request that this Court take the radical steps of rejecting the plain language of Section 2(3) and upending longstanding Board and Court precedent to find that undocumented workers are not protected by the Act. Such a request is patently without merit, particularly given that the Board has in no way failed, as the Company suggests, to account for both IRCA and *Hoffman* in constructing its policy in this area of law. And, of course, labor-law policy is the Board's province in the first instance. Insofar as the Company asks this Court to alter Board policy regarding undocumented workers, the Court must consider that request in the context of its obligation to uphold "any interpretation [of the term "employee" in the Act] that is reasonably defensible."[31] As the Company has failed to bring the Board's interpretation of the Act into question, the Court should have no trouble rejecting its position.

B. THE BOARD REASONABLY FOUND THE BARGAINING UNIT, WHICH INCLUDES BOTH LEGAL AND UNDOCUMENTED EMPLOYEES, TO BE APPROPRIATE

The Company pursues a series of additional challenges to the Union's certification that are based on the undocumented status of many of the unit

---

[30] *Id.* at *4 & n.15.

[31] *Sure-Tan*, 467 U.S. at 891.

employees, but ostensibly independent of its argument that the Act does not protect such employees. Those challenges all basically rehash its insistence that a worker's lack of legal employment authorization deprives that worker of all rights under the Act, giving employers who take advantage of undocumented labor carte blanche to ignore the Act. They should, therefore, all fail alongside the Company's misguided insistence that undocumented workers are not statutory employees.

In any event, the Company's insistence that the Board erred in certifying the Union because the represented unit is inappropriate does not hold water. The Company contends that undocumented workers are comparable to retired or temporary workers, and thus either are not statutory employees (Br 26) or lack the necessary "community of interest" with regular, legal employees to be part of the same bargaining unit (Br 29).[32] The preceding section of this brief refutes the statutory-employee argument, and the following discussion will explain why the unit-composition argument is equally meritless.

---

[32] *See generally NLRB v. Action Automotive, Inc.*, 469 U.S.490, 494 (The Board focuses on whether employees share a community of interest when defining appropriate bargaining units.); *Speedrack Prods. Gr., Ltd. v. NLRB*, 114 F.3d 1276, 1278 (D.C. Cir. 1997)("An employee is eligible to vote in a representation election if she shares 'a community of interest' with the other employees in the unit.").

In exercising its considerable discretion to determine appropriate bargaining (and voting) units,[33] the Board examines whether employees in a proposed unit share a community of interest. As the Board (guided by this Court) clarified in *Speedrack Products Group, Ltd.*, community of interest stems from shared working conditions, not parallel non-work lives or similar non-work status.[34] For example, the Board in that case, discussing a potential unit combining prisoners on work release ("WR") and their non-prisoner coworkers, explained that it would determine community of interest based "solely on the status of the WR employees while in the employee relationship and not on what ultimate control the WR employees may be subjected to by prison authorities at other times."[35]

The Company here presents no evidence that the at-work interests of its allegedly undocumented and its legal workers fail to align, much less that they conflict, as it claims (Br 33-35). It merely cites the difference in immigration status and compares undocumented workers to retired or temporary workers. With

---

[33] *See* above, **page 9 & note 11**.

[34] 325 NLRB 609, 609 (1998). *See also Speedrack*, 114 F.3d at 1280 (finding "the focus of the community of interests test is on the interests of employees *as employees*, not their interests more generally," and citing cases for proposition that community of interests stems from similar treatment of employees "when on the job").

[35] 325 NLRB at 609 (finding community of interest where WR employees were integrated into workforce, with same wages, hours, supervision, and benefits as other employees).

respect to immigration status, the Supreme Court in *Sure-Tan* implicitly rejected the argument that undocumented and legal workers have completely divergent interests, finding instead that protecting undocumented workers furthers the interest of all employees.[36] With respect to the community-of-interest argument, both retired and temporary employees (as defined by the Company) are materially distinguishable from the allegedly undocumented workers employed as regular employees in this case.

Retired employees, most obviously, do not share working conditions with regular workers, as they do not work at all. The type of temporary workers that the Company invokes with its citation to this Court's *Davis Memorial Goodwill Industries, Inc. v. NLRB* may work with regular employees under similar conditions but do so with the knowledge that the employer will end their future employment after a specific contract period.[37] For those employees, "the prospect of termination [is] sufficiently finite on the [voting] eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired."[38] In *Davis*, for example, each temporary employee signed a statement when he was hired, acknowledging that he was "strictly in a ninety-day

---

[36] *See* above, **pages 12-13 & note 19**.

[37] 108 F.3d 406, 412-13 (D.C. Cir. 1997).

[38] *Id.* (quotation omitted).

temporary position, unless otherwise stated by my supervisor or granted an extension."[39] Such explicitly temporary employees' knowledge that they have no stake in the future of the shared workplace might prevent them from having a community of interest with regular workers, as the Company asserts (Br 28-29). Conversely, undocumented workers' fear of detection and termination does not prevent them from sharing a community of interest with their coworkers. That fear is counterbalanced by a hope of continuing their employment indefinitely, giving them a similar expectation of future employment as "regular" at-will employees who hold their jobs at the whim of their employers.

More fundamentally, expected tenure is not necessarily dispositive of the community-of-interest inquiry. Indeed, the Board has specifically evaluated the issue of undocumented workers' community of interest with legal coworkers, as well as that of temporary with regular coworkers, and has found mixed units appropriate in both cases where shared working conditions create common interests.[40] Moreover, this Court has recognized and approved the Board's

---

[39] *Id.* at 413.

[40] *See, e.g., Outokumpu Copper Franklin, Inc.*, 334 NLRB 263, 264 (2001)(holding temporary contract workers had sufficient community of interest with regular employees that they must be in appropriate unit; they shared most working conditions, including job duties, supervision, and hours); *Duke City Lumber Co.*, 251 NLRB 53, 53 (1980)(pre-*Hoffman* case dismissing union's petition to represent unit "excluding undocumented persons" because no evidence that employer treated any group of employees differently with respect to terms and

longstanding rule that employment in the represented unit during the eligibility period and on the date of the election is sufficient to ensure voter eligibility. This is true, contrary to the Company's suggestion (Br 35), even for an employee who intends to quit his employment after the election and in fact does so.[41] Certainly, an undocumented worker who may fear dismissal pursuant to immigration laws is no less invested in his job than an employee who plans to quit his job following the election.

As the above analysis demonstrates, the Company's contention that the voting employees at issue here had no continued expectation of employment once it found out they were undocumented is legally inapposite. Immigration status is irrelevant to voting eligibility and a limited expectation of future employment does not necessarily destroy community of interest. In addition, the Company's argument is factually unsupported. After all, the Company did not obtain its evidence of the employees' purported illegality – much less notify the employees in question of its suspicions – until after the election. (Br 21-22, A 143-62, 340.) Accordingly, their expectation of indefinite job tenure remained unaffected at the time of the vote.

---

conditions of employment; undocumented workers, if any, would share community of interest with legal employees).

[41] *See, e.g., Saint-Gobain Industrial Ceramics, Inc. v. NLRB*, 310 F.3d 778, 782-83 (D.C. Cir. 2002).

C. THE COMPANY HAS NOT SHOWN THAT THE MAJORITY OF ITS UNIT EMPLOYEES WERE UNDOCUMENTED WORKERS

As explained above, the immigration status of the Company's unit employees is immaterial to their voting eligibility. The Company's arguments (Br 36-39) regarding the adequacy of its proof of work authorization, therefore, have no effect on the ultimate outcome of this case. Nonetheless, the Board reasonably held (A 112) that the evidence described in the Company's offer of proof would be inadequate to demonstrate that the employees were undocumented. That holding is consistent with the Board's precedent and announced procedures.

As the Board explained when presented with evidence of non-matching social-security numbers in *Concrete*, even an official "no match" letter from the Social Security Administration is not sufficient to prove an employee's immigration status.[42] Accordingly, the Board' reasonably concluded (A 112), consistent with both its own precedent and the Social Security Administration's guidance, that evidence showing that employees' social-security numbers do not

---

[42] 2006 WL 1001906, *6 & n.20 (citing IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK § 6:53 (West 2004). *Accord Perez-Farias v. Global Horizons, Inc.*, 2006 WL 2129295, *4 (E.D.Wash. July 28, 2006) ("'A mismatch [of social security numbers] does not make any statement about an employee's immigration status. . . .'") (quoting Social Security Administration, *Employer Reporting Instructions & Information*, http://www.ssa.gov/employer/ssnvrestrict.htm (last visited May 15, 2007)).

match the social-security database is insufficient to demonstrate that those employees are not authorized to work in the United States.

The Company errs in asserting (Br 36-39) that it was the employees', the Union's, or the Board's burden to prove that the employees possessed proper work authorization. Once again, the immigration issue is irrelevant to the voting eligibility at issue here. But, to the extent the Company persists in claiming that the employees' purported undocumented status removes them from the Act's protection, it is well-settled that the party asserting an exemption from statutory protection bears the burden of demonstrating it.[43]

Finally, contrary to the Company's assertions (Br 37-39), General Counsel Memorandum 02-06 – which, in any event, is not binding on the Board[44] – does not suggest that the Board follow a burden-shifting procedure in cases like this one. In fact, the memorandum twice explicitly states that "[i]f a party raises the

---

[43] *See NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001) (noting "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits") (quotation omitted).

[44] *See Sutter Roseville Medical Ctr.*, 348 NLRB No. 29, 2006 WL 2826427, *14 (2006)("The views of the General Counsel are those of the prosecutor and do not bind the Board."); *George Joseph Orchard Siding, Inc.*, 325 NLRB 252, 255 (1998)("[T]he General Counsel's memoranda, or indeed other communications or positions of the General Counsel, like the positions of the counsel for the General Counsel made at trial, are but the position of a party to the complaint litigation. As such the General Counsel's positions-as opposed to joint General Counsel-Board

issue of an employee's immigration status at a representation case hearing, the Hearing Officer should not permit evidence to be adduced, but rather should allow the party to present a brief offer of proof" (p. 2 n.4, p.6). The language that the Company quotes from the memorandum (Br 37), like the cases it cites for the proposition that an employee must prove his documentation (Br 38), applies only where the employee is potentially eligible for a backpay and reinstatement remedy. Accordingly, the judge appropriately rebuffed the Company's efforts to submit evidence regarding immigration status in the context of a challenge to a representation election.

CONCLUSION

In sum, the Board reasonably held, according to its court-approved precedent, that undocumented workers are statutory employees under the Act. It further reasonably held, consistent with its longstanding policy, that an employee's immigration status is irrelevant to his voting eligibility for a representation election. Neither the Company's direct nor its oblique attacks succeed in undermining those fundamental labor-law principles, and its evidentiary arguments are both irrelevant and without merit.

---

determinations or provisions-are not binding on the Board or its judges and are effective only to the extent they are persuasive.").

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

_____
JULIE B. BROIDO
Supervisory Attorney

_____
KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
(202) 273-2996
(202) 273-0656

RONALD E. MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
AILEEN A ARMSTRONG
Deputy Associate General Counsel
National Labor Relations Board
May 22, 2007
g:/acbcom/agri-final brief-jbkv

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AGRI PROCESSOR CO., INC	:	
	:	
Petitioner/Cross-Respondent	:	Nos.06-1329, 06-1349
	:	
v.	:	
	:	Board Case No.
	:	29-CA-27396
NATIONAL LABOR RELATIONS BOARD	:	
	:	
Respondent/Cross-Petitioner	:	
	:	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,804 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC
this 22rd day of March 2007

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AGRI PROCESSOR CO., INC.	:	
	:	
Petitioner/Cross-Respondent	:	Nos.06-1329, 06-1349
	:	
v.	:	
	:	
NATIONAL LABOR RELATIONS BOARD	:	
	:	Board Case No.
Respondent/Cross-Petitioner	:	29-CA-27396
	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address[es] listed below:

Carmelo Grimaldi, Esq.
Kaufman, Schneider & Voluck Bianco, LLP
135 Crossways Park Dr., Suite 201
Woodbury, NY 11797

_____

Aileen A. Armstrong
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 22rd day of May, 2007