United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 8, 2005

TO : B. Allan Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: C.W. Mining, d/b/a Co-Op Mine
Cases 27-CA-19399-1, 19453-1, 19481 524-0167-1000
524-8390-7900
524-8390-8100

The Region submitted these cases for advice as to whether (1) the Employer's discharge of some 30 employees for their failure to produce valid documentation to work in the United States was unlawfully motivated in violation of Section 8(a)(3) because of the employees' Union activities, and (2) if so, conditional reinstatement is an appropriate remedy. The Region also sought advice on whether the Employer violated Section 8(a)(3) because it discharged one specific employee after the Employer discovered, while investigating the immigration status of its workforce, that the employee's work authorization had expired.

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) by discharging some 30 employees after they failed to provide the Employer legal work documentation. We conclude that because there is ample evidence that the Employer had longstanding knowledge that it employed undocumented employees, the Employer's "investigation" of its employees' immigration status was unlawfully motivated to ensure the reinstatement of fewer Union supporters and the reduction of the Employer's backpay liability resulting from its settlement of unfair labor practices related to a 2003 strike. Because we conclude that the Employer's subsequent discharge of these employees was unlawful, the employees are entitled to conditional reinstatement, and their ballots should be counted in Case 27-RC-8326. Finally, the Region should argue in Case 27-CA-19481 that the discharge of an employee for having expired work authorization, discovered during the Employer's unlawful investigation, violated Section 8(a)(3).[1]

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[1] The Region intends to issue complaint in Case 27-CA-19481 alleging that the discharge of this particular employee violated Section 8(a)(3) based on a traditional union animus theory, unrelated to his immigration status. The Region submitted this case for advice only on the question

FACTS

I. Background and pertinent events

C.W. Mining (Employer) operates a mine in Huntington, Utah. In 2003, the United Mine Workers of America (Union) began an organizing drive among a group of approximately 80 employees, all of whom were Mexican Nationals. The miners had long been represented by the independent, Board-certified, International Association of United Workers Union (IAUWU) and were subject to a collective-bargaining agreement between the Employer and the IAUWU.

In September 2003, the Employer discharged approximately 80 employees who had struck to protest the suspension and discharge of a fellow employee. The Union filed a charge alleging, in part, that the discharges violated Section 8(a)(3). In agreement with the Region, Advice authorized complaint proceedings on the discharges.[2] The strikers remained on strike until summer 2004.[3]

Meanwhile, on May 19, during the open window period of the soon-to-expire contract between the Employer and the IAUWU, the Union filed a representation petition in Case 27-RC-8326 to represent the miners currently represented by the IAUWU.

On May 29, the Employer received a "no match" letter from the Social Security Administration (SSA), listing the social security numbers of employees that did not match its records. The Employer had also received "no match" letters in 2001 and 2002.[4] In those years, the Employer placed a letter in Spanish into the paycheck of the affected employees, stating that there was a problem with his/her social security numbers and that the employee should

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of whether to include an additional theory of violation based on the Employer's alleged unlawfully motivated investigation of work documentation. If the Region prevails on either theory, the employee, who has since obtained documented work authorization, would be entitled to reinstatement.

[2] See C.W. Mining, d/b/a Co-Op Mine, Case 27-CA-18764-1, Advice Memorandum dated April 26, 2004.

[3] All dates are in 2004 unless noted.

[4] The Employer cannot find a record of having received a "no match" letter in 2003, but does not deny having received one in that year.

contact SSA to correct the discrepancy, and took no further action.

On June 29, the Employer entered into an informal Settlement Agreement remedying the alleged unlawful discharges of the 80 strikers, which provided for reinstatement and backpay. However, the Settlement Agreement preserved the Employer's right to an administrative hearing limited to determining backpay amounts.

Also on June 29, mine manager Charles Reynolds called SSA and asked what action the Employer should take in response to having received the 2004 "no match" letter.[5] SSA advised Reynolds to notify the affected employees and tell them to resolve the discrepancy. Reynolds specifically asked whether the Employer should not allow returning strikers who were on the list to return to work. The SSA officer said that that was not her instruction, but that the employees needed to get the discrepancies resolved.

Pursuant to his conversation with SSA, Reynolds individually contacted the affected employees who were not on strike, verified that the Employer had their correct addresses, and told them to contact the SSA office to resolve the inconsistency referenced on the "no match" letter. Reynolds read to these employees the portion of the 2004 SSA letter, in Spanish, that informed them of what actions the Employer could or could not take as the result of receiving the letter, and what the employees needed to do. On July 7 or 8, Reynolds held a meeting to explain the "no match" letter to employees, who allegedly were afraid of being discharged because of the discrepancies with their social security numbers, and explained how they could correct any inconsistencies. Reynolds also met with returning strikers on July 12-13 in order to explain the "no match" letter to them. The Employer took no further action regarding the "no match" letter at this time.

The representation hearing for the Union's representation petition was held on July 20-21. A major issue at the representation hearing was whether a large majority of the miners, who are related by blood or

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[5] Reynolds was a mine engineer in 2001 and 2002, and had not been involved in personnel matters at that time.

marriage to the owners of the Employer, should be included in the bargaining unit.[6]

In October, Reynolds participated in an unrelated, internal grievance hearing of an employee's discharge. During the hearing, the grievant speculated that one of the Employer's supervisors humiliated employees because they were "illegal." Reynolds responded by stating that employees are required to provide work authorization when they are hired, and said that he did not think that "illegal" employees were allowed to work. Reynolds then asked the grievant whether he was "illegal." The employee responded (in Spanish), "you know I am." Reynolds then addressed the translator used in the proceeding:

> When I talked to him (grievant) about a bad social security number, I wasn't saying he was illegal. This is an event not pertaining to this case. It happened with quite a few employees. The Social Security Administration notified the company there was a problem with their social security number, and the company was obligated to instruct them to go to the Social Security office and try to get that taken care of. And that is why I contacted some of the employees, over that issue. [Grievant] was one of them. Right there, it didn't indicate he is illegal or he's not illegal, it simply said there is a problem with his social security number and have him come to the social security office to correct the situation.

In early November, after the grievance hearing, Reynolds asked a unit employee who was familiar with immigration issues through his involvement with the local sheriff's office, whether he knew if other employees at the mine were undocumented. This employee told Reynolds of at least one other undocumented employee. On November 9 or 10, Reynolds also learned that a different employee was undocumented when the employee failed to arrive for work because of his detention by Citizen and Immigration Services (CIS).

On November 9, Reynolds wrote a letter to CIS, asking what action the Employer should take in light of the fact

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[6] The Employer is a Utah corporation that owns and operates the Co-Op Mine in Huntington, Utah. Although the Employer's actual ownership is unclear, it is reported to be among the holdings of the "Kingston Clan," a large, quasi-religious group comprised of members and close relatives of the Kingston family.

that the Employer had learned that at least a few of its employees were undocumented.

The Employer received the Region's proposed backpay amounts from the June Settlement Agreement on November 10.

On November 17, Reynolds attended the arbitration proceeding for the discharge of the grievant. At the hearing, the arbitrator asked the grievant if he understood the SSA "no match" letter and the grievant responded that he did. The grievant then stated, through a translator:

> Translator: He [grievant] says that sheet [SSA "no match" letter] has never been presented to him, and as far as legal or illegal status goes, they know that all of the Mexicans that work here are illegal anyway, so what's the difference. He says he's been working here for six years and that's always been known. He says that he's a step further than some of the other people that are working here. He's at least got his paperwork in with immigration and it's in process. But it is a timely process.
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> Translator: What he's trying to say is that … this is not a fact that just barely come out of the box. This is something that's been known for a while.

On the next day, November 18, the Decision and Direction of Election (DDE) in the representation case issued, excluding from the unit all employees related by blood or marriage to the Kingston family. Out of approximately 220 miners, only 64 were included in the unit. As of that date, Reynolds had still not received a response to his November 9 letter to CIS; he telephoned CIS and again asked what action the Employer should take with regard to the undocumented employees. CIS told Reynolds that the Employer could not employ the grievant after he admitted being undocumented, but that the Employer should not take action against other employees without verifying their lack of documentation. CIS told Reynolds to give the affected employees a reasonable deadline to take care of the discrepancy with their social security numbers.

The day after speaking with CIS, Reynolds called the nearest SSA office on November 19 and asked how long it should take for an employee to resolve a discrepancy. The SSA office told Reynolds that employees could have the problem corrected within two weeks of visiting the office.

On November 22, the Employer gave letters to 30 of the employees whose social security numbers appeared on the May

29 "no match" letter.[7] The letters stated that employees had until December 9 to submit proper work authorization papers to the Employer, and that failure to do so would result in termination. In the letter, Reynolds noted the testimony from the October grievance proceeding, the discovery of another employee's undocumented status, and the employees' failure to provide the Employer their valid social security numbers, per the May "no match" letter, as the underlying reasons for the Employer's action.[8] The Employer also hired an outside company to conduct a background check of all employees, including supervisors and managers.

The Employer discharged the 30 affected employees on December 9.[9] An additional employee was also discharged because the Employer's own review of its paperwork revealed that although his social security number did not appear on the "no match" letter, the employee's temporary work authorization had expired.

On November 26, the Employer objected to the Region's backpay calculations resulting from the settlement of the Employer's discharges of the 2003 strikers, based on Hoffman Plastics.[10]

On December 17, the Board conducted the representation election in Case 27-RC-8326. The election resulted in two votes cast for the Union, five votes cast for the IAUWU, and 27 challenged ballots. Of the 27 challenged ballots, 24 belong to employees who were discharged on December 9 for failing to provide the Employer with proper work authorization.

II. Evidence of prior Employer knowledge of employees' undocumented status

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[7] The "no match" letter listed approximately 125 numbers. Although it is not clear to whom the remaining numbers belong, there is no contention or evidence that the Employer discriminatorily selected the 30 employees for threatened discharge while retaining other employees with similar discrepancies.

[8] The Employer's letter did not identify the employees to whom it was referring.

[9] Twenty-three of the 30 employees had participated in the 2003 strike.

[10] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

Because the Employer's knowledge of its employees' asserted undocumented status was relevant to its potential unfair labor practice liability for discriminatorily requiring employees to provide proof of work authorization, we authorized the Region to investigate assertions that the Employer had prior knowledge of and had long tolerated its employees' undocumented status.[11] The investigation disclosed that, prior to the October grievance proceeding, the Employer was aware that some employees lacked proper work authorization. Thus, several employees have testified that various Employer officials paid for, or loaned money to, employees for their transport from Mexico to the Employer's mine. One employee testified that Employer officials had, in the past, asked some employees how much they had paid for their transport from Mexico, and/or for their work authorization documentation.

Testimony from the October grievance proceeding also revealed that an Employer official had threatened employees with calling INS. Several employees testified that they gave the Employer their new social security numbers after they had obtained legal authorization to work. In this regard, one employee testified that Reynolds was present when the employee attempted to update his employment records to reflect his newly obtained legal number, but that Reynolds only laughed and said that the employee's current employment records were adequate.[12] Most of the employees verified that the Employer required them to submit work authorization upon hire, except two employees testified that they were not asked to submit proper documentation when they began employment, and that they were paid in cash at that time. In addition, it appears that many employees had long-term and repeated employment at the mine despite extended absences while in Mexico, in many cases for years at a time.

Based on this evidence, the Union alleges that the Employer had longstanding knowledge of its employees' undocumented status, and seized on the recent "no match" letter and/or grievance testimony to discharge the 30 employees and interfere with the representation election.

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[11] See C.W. Mining, d/b/a Co-Op Mine, Cases 27-CA-19399, 27-CA-19453, Advice Memorandum dated February 14, 2005.

[12] Reynolds specifically denies that he was present during this conversation. Although the employee testified that the Employer did not accept his legal social security number at that time, the Employer did eventually change the employee's employment records to reflect his new number.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) by discharging some 30 employees for their failure to provide the Employer legal work documentation. We agree with the Region that, contrary to Employer assertions, there is ample evidence that the Employer had longstanding knowledge that it employed undocumented employees. Therefore, we conclude that the Employer's investigation of its employees' immigration status was motivated by an effort to limit its backpay liability from the 2003 strike and to ensure that fewer Union supporters were reinstated, which further discriminated against the strikers and interfered with their right to seek Union representation.

First, we agree with the Region that there is evidence that the Employer had longstanding knowledge that some of its employees were undocumented. This knowledge, though denied by the Employer, is based on the fact that Employer officials provided financial assistance to many employees to travel from Mexico to work at the mine.[13] In addition, an employee testified that an Employer official threatened employees with calling the INS. Employees also testified that Employer officials openly asked how much employees paid for their transport north and/or their work authorization papers. Furthermore, although Reynolds denied being present (and acting unconcerned) when an employee sought to change his social security number to reflect his newly-obtained legal information, several other employees testified that they successfully submitted to the Employer their new social security numbers after they obtained legal authorization to work. Finally, there is evidence that two employees were not asked for work authorization when they were hired, and that they were paid in cash at that time.

Despite the Employer's longstanding knowledge of its employees' undocumented status, however, the Employer challenged that status only when it entered into a Settlement Agreement resolving the Employer's Section 8(a)(3) discharges of the 2003 strikers. First, although the Employer signed the Settlement Agreement on June 29,

[13] We note that while several employees testified that the Employer provided them financial support to travel from Mexico, none of the employees claimed that the Employer knew the money was used to pay for "coyotes" (i.e., smugglers of undocumented immigrants).

the Agreement specifically preserved the Employer's right to contest the backpay amounts owed the discharged strikers. The same day that the Employer signed the Settlement Agreement, Reynolds called the SSA and specifically asked whether the Employer should not allow returning strikers to return to work. This is in contrast to the Employer's previous actions when it received "no match" letters. In those cases, the Employer did not call SSA, but only told employees to correct the discrepancies.

These actions establish that the Employer, having longstanding knowledge that at least some of the strikers were undocumented, knew when it entered into the Settlement Agreement that its reinstatement and backpay obligations could ultimately be reduced.[14] Second, the Employer called CIS and SSA in mid-November, after receiving on November 10 the Region's backpay figures for the discharged strikers, pursuant to the Settlement Agreement. Although the Employer initially wrote CIS on November 9, it began an unprecedented and hurried investigation of employees' immigration status after November 10, the day the Employer received the Region's backpay calculations for the 2003 strikers.[15] Thus, the Employer called CIS on November 18, the day the DDE issued in Case 27-RC-8326, which drastically reduced the size of the unit.[16] The Employer then called SSA on November 19, issued its letter to employees on November 22, and discharged the undocumented employees on December 9.

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[14] We conclude, therefore, that the Employer's claim that it only became aware that some of its employees were undocumented after the October-November grievance/arbitration is belied by the clear evidence that the Employer has known for years that many of its employees lacked work authorization.

[15] See Nortech Waste, 336 NLRB 554, 555 (2001) (employer discharged undocumented employees in violation of 8(a)(3) where employer departed from past practice and conducted "unprecedented" review of personnel files after union victory; employer not merely trying to comply with immigration laws); Regal Recycling, Inc., 329 NLRB 355, 356 (1999) (employer's attempt at strict compliance with immigration law by discharging union supporters was "contrary to its practice both before and after these discharges, as well as to its contemporaneous treatment of employees who did not support [the union]").

[16] It is not clear whether Reynolds first received the DDE and then made the phone call, or vice versa.

The Employer's course of conduct thus establishes that its "investigation" of its employees' immigration status was motivated not by an effort to comply with IRCA, but rather by an intent to use IRCA as a convenient means of escaping its remedial obligations stemming from its unlawful discharge of the 2003 strikers.[17] Indeed, by entering into the June 29 Settlement Agreement with the knowledge that some of the strikers were undocumented, the Employer ensured that fewer Union supporters would return to its workforce, as well as a less expensive backpay obligation. In these circumstances, the Employer's investigation of employees' immigration status and subsequent discharge of those undocumented employees further discriminated against the strikers, and further interfered with their right to seek Union representation and engage in protected, concerted activity.[18]

[*FOIA Exemptions* 2 and 5
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[17] See Regal Recycling, 329 NLRB at 357 n.10 ("[l]ike the Board in Victor's Café [321 NLRB 504 (1996)], we find that this case does not involve an employer's good-faith effort to come into compliance with its statutory obligations under IRCA without regard to its employees' union activities").

[18] Because the Employer's investigation of its employee's immigration status was unlawfully motivated, we agree with the Region that the Employer's discharge of an employee for having expired work documentation, discovered by the Employer during its unlawful investigation, also violated Section 8(a)(3), because of the clear nexus between the Employer's unlawful investigation and the employee's subsequent discharge. Compare Tocco, Inc., 323 NLRB 480, 480 n.1 (1997) and Great Western Produce, 299 NLRB 1004, 1006-1007 (1990) (make-whole remedy warranted for employees who were discharged pursuant to unlawfully instituted or changed work rules) with Anheuser-Busch, Inc., 342 NLRB No. 49, slip op. at 2 (July 22, 2004), remanded in relevant part sub nom. Brewers and Maltsters Local 6 v. NLRB, 2005 WL 1560399 (D.C. Cir. July 5, 2005) (insufficient nexus between employer's unlawful installation of camera and employees' misconduct observed on camera to warrant make-whole remedy) and Taracorp, Inc., 273 NLRB 221, 221-24 (1984) (insufficient nexus between unlawful interview of employee and statements made in interview used to discharge employee).

[19] [*FOIA Exemptions* 2 and 5
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[*FOIA Exemptions* 2 and 5, cont'd.

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[*FOIA Exemptions* 2 and 5, cont'd.

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[20] [*FOIA Exemptions* 2 and 5
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[21] [*FOIA Exemptions* 2 and 5.]

[22] [*FOIA Exemptions* 2 and 5.]

[23] [*FOIA Exemptions* 2 and 5.]

[24] [*FOIA Exemptions* 2 and 5

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[25] [*FOIA Exemptions* 2 and 5.]

[*FOIA Exemptions* 2 and 5, cont'd.

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Finally, under current Board law, the discriminatees are entitled to have their ballots counted in Case 27-RC-8326. In County Window Cleaning Company,[27] the Board overruled a challenge to the ballot of an undocumented employee who was discharged by the employer because of his union activity. The Board held that because the employee would have otherwise been employed at the time of the election, but for the employer's unlawful discharge, the employee was entitled to have his vote counted in the election.[28] As in County Window, the approximately 30 discriminatees would have been working at the mine on the day of the election but for the Employer's unlawful conduct. As such, the Employer's challenges to the 24 discriminatees who voted in the election should be overruled and the employees' ballots should be counted.[29]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) by investigating employees' immigration status and subsequently discharging its undocumented employees. [*FOIA Exemptions* 2 and 5 .] In addition, the Region should issue complaint, absent settlement, in Case 27-CA-19481, alleging, in addition to a traditional union animus theory, that the Employer violated Section 8(a)(3) by discharging an employee after discovering, during the Employer's unlawful investigation, that the employee's work authorization had expired. [*FOIA Exemptions* 2 and 5 .]

B.J.K.

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[26] [*FOIA Exemptions* 2 and 5 .]

[27] 328 NLRB 190 (1999).

[28] 328 NLRB at 190 n.2.

[29] Ibid. Member Hurtgen, though concurring in the result, would have applied a community of interest analysis to determine voter eligibility. See id. at 192.