

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

# Advice Memorandum

DATE: March 17, 1994

TO : Alvin P. Blyer, Regional Director  
Region 29

FROM : Robert E. Allen, Associate General Counsel     Remedies Chron  
Division of Advice                                     133-3900  
   625-3317-0900

SUBJECT: A.P.R.A. Fuel Oil Buyers Group, Inc.,         625-3317-9400  
Prudential Transportation, Inc., and             625-3350-1500  
Amer-National Heating Service, Inc.             625-4467-9800  
Cases 29-CA-15517, et al.

This case was submitted for advice as to what the remedy should be for the unlawful discharge of undocumented aliens.

### **FACTS**

A more complete discussion of the facts can be found in the Advice Memorandum in the instant matter dated September 3, 1993, as well as the Board decision in A.P.R.A. Fuel Oil Buyers, Inc. et al.<sup>1</sup> In the A.P.R.A. decision, the Board held that the Employer (1) discharged six employees, including Victor Benavides and Alberto Guzman, because they supported Local 553 of the International Brotherhood of Teamsters ("the Union"); (2) unlawfully failed to recognize and bargain with the Union; and (3) committed various Section 8(a)(1) infractions.

It is uncontroverted that both Benavides and Guzman have been and remain undocumented aliens at all relevant times, and further that the Employer knew of their undocumented status upon their hire and throughout their period of employment.

As remedy, the Board issued a bargaining order as well as a broad cease and desist order. The Board also affirmed the ALJ's recommended order that the Employer offer all discharged employees, including Guzman and Benavides, reinstatement to their previous positions as well as backpay during their interim period of unemployment.<sup>2</sup> In affirming this aspect of the ALJD, the Board stated that,

---

<sup>1</sup> 309 NLRB 480 (1992).

<sup>2</sup> Id., 309 NLRB at 499-500. The ALJ did not discuss the discriminatees' status as undocumented aliens when ordering reinstatement with backpay.

Chairman Stephens and Member Devaney agree that Board precedent dictates rejection of the Respondent's exceptions regarding the effect of the alleged unlawful alien status of employees Victor Benavides and Alberto Guzman on their reinstatement rights. Because this case involves a Gissel bargaining order and is subject to an outstanding 10(j) injunction, they would leave to another case any reconsideration of the Board's law in this area.<sup>3</sup>

Upon further consideration, by order dated July 28, 1993, the Board severed the order reinstating and making Guzman and Benavides whole from the rest of the A.P.R.A. decision. The Board announced its intention to reconsider that aspect of the remedy.

By our September 3 memo in the instant matter, we concluded that the Region should argue in a brief to the Board that the Employer must (1) offer Victor Benavides and Alberto Guzman reinstatement to their previous or substantially similar positions conditioned upon their ability to establish lawful eligibility to work in this country under the Immigration Reform and Control Act ("IRCA"); and (2) pay both men backpay until they are offered conditional reinstatement. By this memorandum, we reconsider this remedy.

#### ACTION

We conclude that the Region should file with the Board a Motion to File a Supplemental Brief stating that possible remedies to the unlawful discharges of the undocumented aliens in the instant case could include orders directing the Employer to do the following: (1) reinstate the discriminatees conditioned upon their ability to establish that they are lawfully eligible to work in this country; (2) hire an applicant selected by the Union, should the discriminatees be unable to establish their lawful work eligibility within a reasonable period; and (3) pay backpay to the discriminatees from the date of their discharge until the earliest of the following events: the discriminatees' reinstatement (if they can lawfully accept reinstatement); the date the Employer hires the Union-applicant; the discriminatees fail within a reasonable time to seek approval from INS to work; the INS rejects the discriminatees' request for permission to work; or the failure of the Union to submit an applicant for hire within 14 calendar days of the date the Employer requests the Union

---

<sup>3</sup> Id., 309 NLRB at 480 n.4.

to supply an applicant. And where the Union has referred an applicant the backpay period will continue to run until the applicant is hired.

While not specifically endorsing the above remedy concerning the Union-referred applicant, the Region should develop in the Motion the underlying theory of the remedy as set forth below. The Region should state that this remedy might be necessary in the instant matter because the probability is low that the discriminatees will be able to file a Form I-9, demonstrating lawful ability to accept reinstatement. This remedy may also be appropriate in other, analogous situations in which an employer could defeat traditional remedies under the Act by offering conditional reinstatement to undocumented (and thus unreinstatable) aliens immediately after discharge. The Motion should also provide that if the Board wishes to consider such a remedy it should invite all parties to fully brief this issue. The Motion should explicitly note that submission of this proposed remedy was authorized by Acting General Counsel Daniel Silverman.

### **1. Conditional Reinstatement of the Discriminatees**

As set forth in our previous memorandum, the Region should argue to the Board that the Employer must offer reinstatement to Benavides and Guzman, conditioned upon their ability to establish under IRCA that they are eligible to work in the United States. Typically, their eligibility would be established upon satisfactory completion of an INS Form I-9. The Employer must keep the conditional offer of reinstatement open for a reasonable period of time so that the discriminatees may have an opportunity to complete a valid I-9 or make other arrangements with the Immigration and Naturalization Service to start work.<sup>4</sup> As set forth in our previous memorandum, backpay would be tolled as of the date the discriminatees are reinstated.

### **2. Reinstatement of Union-Applicants**

Under a traditional reinstatement remedy, the Employer satisfies its legal obligations by offering reinstatement even if the discriminatee is unable to assume or waives

---

<sup>4</sup> The Board's traditional law concerning a "reasonable period" would thus apply. For a discussion of factors leading to the determination of a reasonable period, see, e.g., L. A. Water Treatment, 263 NLRB 244, 246 (1982), and cases cited therein at n.17. See generally NLRB Casehandling Manual (Compliance), §10529.4.

reinstatement to his previous position. In the instant matter, there is a substantial possibility that the discriminatees will be unable to satisfactorily complete a valid Form I-9 or otherwise become eligible for lawful reinstatement. The Employer would thereby enjoy a windfall by not having to reinstate a Union supporter, particularly where the Employer knowingly hired the illegal aliens who are effectively unreinstatable. In order to prevent such a windfall for the Employer and to protect the Section 7 rights of the employees and the Section 9(a) status of the Union, we conclude that the Region should argue to the Board that should either discriminatee be unable to establish his eligibility to work lawfully in this country, the Employer must hire an applicant whose name the Union submits in the discriminatee's place.<sup>5</sup>

Authority for this remedy can be gleaned from similar remedies in affirmative action proceedings under Title VII of the Civil Rights Act of 1964.<sup>6</sup> In Sheet Metal Workers v. EEOC,<sup>7</sup> the Supreme Court upheld the authority of district courts under the remedial provision of Title VII (§706(g))<sup>8</sup> to order affirmative race-conscious relief to remedy an unlawful pattern and practice of racial discrimination in employment. The Sheet Metal Workers were found guilty of engaging in a pattern and practice of discrimination against blacks and Hispanics in violation of Title VII. The district court ordered the union to admit a certain percentage of nonwhites to union membership (the "affirmative action plan") without regard to their status as discriminatees. The union appealed, arguing that the order is overbroad in that §706(g) of Title VII authorizes a district court to award preferential relief only to the actual victims of unlawful discrimination.

The Supreme Court affirmed the district court order.<sup>9</sup> By comparing the authority under §706(g) with the NLRB's

---

<sup>5</sup> The Employer may, of course, raise normal affirmative defenses to the employment of applicants submitted by the Union. See, e.g., Blue Square II, Inc., 293 NLRB 29 n.3, 41 (1989) (physical disability).

<sup>6</sup> 42 U.S.C. §2000e et seq.

<sup>7</sup> 478 U.S. 420 (1986).

<sup>8</sup> 42 U.S.C. §2000e-5(g).

<sup>9</sup> Justice Brennan's analysis in Part IV holding that relief under §706(g) is not limited only to actual victims of discrimination was joined by Justices Marshall, Blackmun and

remedial powers under Section 10(c) of the NLRA, the Court held that §706(g) authorizes district courts to issue relief benefiting nonvictims through an affirmative action plan. Section 706(g) provides, in pertinent part that,

the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . , or any other equitable relief as the court deemed appropriate . . . .

In comparison, Section 10(c) of the NLRA provides, in pertinent part, that,

the Board . . . shall issue and cause to be served on such person [engaging in an unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .

The Court noted that §706(g) was "modeled after" NLRA Section 10(c), which, "'guide[s] . . . courts tailoring remedies under Title VII.'"<sup>10</sup> Thus, in concluding that Congress intended to vest courts with the authority to issue affirmative action plans which benefit victims and nonvictims alike, the Court likened the District Court's, "broad discretion [under Title VII] to award 'appropriate' equitable relief to remedy unlawful discrimination,"<sup>11</sup> to Section 10(c) which similarly, "was intended to give the

---

Stevens. Id., 478 U.S. at 422. Justice Powell concurred in the result. Id., 478 U.S. at 483.

<sup>10</sup> Id., 478 U.S. at 446 n.26 (quoting Ford Motor Co. v. EEOC, 458 U.S. 219, 226 n.8 (1982)). Accord: Franks v. Bowman Transportation Co., 424 U.S. 747, 769 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975). See also legislative history of Title VII establishing NLRA Section 10(c) as model for §706(g) at 110 Cong.Rec. 6549 (1964) (remarks of Sen. Humphrey); 110 Cong.Rec. 7214 (interpretive memorandum by Sens. Clark and Case).

<sup>11</sup> Id., 478 U.S. at 446.

National Labor Relations Board broad authority to formulate appropriate remedies ...."<sup>12</sup>

The Court thus concluded that an affirmative action plan was necessary in the case at bar, "in light of the District Court's determination that the union's reputation for discrimination operated to discourage nonwhites from even applying for membership ...."<sup>13</sup>

In reliance, in part, on analogous authority under Title VII, we conclude that in the event either Guzman or Benavides is unable to work lawfully in this country, a proper and effective application of the Board's remedial authority is to order the Employer to hire an applicant named by the Union. The Supreme Court in Sheet Metal Workers upheld the authority of district courts to order relief to nonvictims in order to effectuate the goals of Title VII. Section 706(g) under which district courts base their remedial powers, is, in turn, "modeled after" Section 10(c) of the Act. Thus, one can argue that Section 10(c) similarly empowers the Board to order reinstatement for nonvictims in such circumstances where to do otherwise would be to leave a Section 8(a)(3) violation substantially unremedied.

The Supreme Court has long acknowledged Section 10(c)'s broad grant of remedial authority. In Phelps Dodge Corp. v. NLRB,<sup>14</sup> the Court first upheld a Board reinstatement order for employees who had obtained other compensatory employment after they were unlawfully discharged. In so concluding, the Court noted that Section 10(c) is broad enough to address situations which Congress did not expressly envision.

But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empirical process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

---

<sup>12</sup> Id., 478 U.S. at 446 n.26.

<sup>13</sup> Id., 478 U.S. at 477.

<sup>14</sup> 313 U.S. 177 (1941).

Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.<sup>15</sup>

Similarly, in ABF Freight System, Inc. v. NLRB,<sup>16</sup> the Supreme Court held that a Board order reinstating a discriminatee who had committed perjury on the witness stand in the underlying ALJ hearing was "well within [the Board's] broad discretion" under Section 10(c).<sup>17</sup> The respondent had argued that the discriminatee's perjured testimony should necessarily preclude reinstatement. The Court rejected that argument and enforced the Board's reinstatement order, holding that, "Congress' decision to delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act ... involves that kind of express delegation ... merit[ing] the greatest deference."<sup>18</sup>

Further, a Union-applicant reinstatement order is appropriate in the instant matter in order to vindicate the Sections 7 and 9(a) rights of the entire bargaining unit. Although the Board has ordered the Employer to bargain with the Union under Gissel,<sup>19</sup> the Union's bargaining power -- and concomitantly the bargaining unit's rights -- would be adversely affected should the Board allow the Employer to discharge two Union adherents with little likelihood that they could be reinstated. In these circumstances, an order requiring the Employer to hire Union-applicants would serve to counteract any dilution in Union support which resulted from the Employer's unlawful discrimination and thus protect the Union's Section 9(a) status. This is particularly true where the Union will be negotiating its first contract with an Employer which committed pervasive "hallmark" unfair labor practices. The Board stated in the unfair labor practice decision that the Employer through its "highest officials" is,

---

<sup>15</sup> Id., 313 NLRB at 194.

<sup>16</sup> \_\_\_ U.S. \_\_\_, Dkt No. 92-1550 (January 24, 1994).

<sup>17</sup> Id., slip op. at 8.

<sup>18</sup> Id., slip op. at 6-7.

<sup>19</sup> NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

deeply committed to opposing the Union without regard to the lawfulness of its means and is not likely to retreat from that strategy. Their conduct indicates the substantial likelihood that they will renew their unlawful tactics among current or future employees to keep out the Union or any other labor organization as an employee bargaining representative.<sup>20</sup>

Noting similar pervasive discrimination, the Court in Sheet Metal Workers affirmed the district court's affirmative action plan as furthering the purposes and policies of Title VII. The Court stated:

Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected under Title VII.

Accordingly, we conclude that this remedy best effectuates the purposes and policies of the Act.

### **3. Limited Backpay**

We further conclude that the Region should argue to the Board that the discriminatees should receive backpay which would run from the date of the unlawful discharge and would toll upon the earliest of the following events: (1) the Employer lawfully reinstates the discriminatee; (2) the discriminatee fails, within a reasonable time, to seek approval from INS to work; (3) the INS rejects the discriminatee's request for permission to work; (4) the Union's failure, within 14 days of a request by the Employer, to refer an applicant. Provided, however, where the Union has referred an applicant, the backpay period will continue to run until the applicant is hired.<sup>21</sup>

---

<sup>20</sup> APRA, 309 NLRB at 481.

<sup>21</sup> The Union's right to refer the applicant would be triggered by (1) the discriminatee not seeking permission to work or (2) the INS's rejection of the discriminatee's

### CONCLUSION

We conclude that the Region should file with the Board a Motion to File a Supplemental Brief stating that possible remedies to the unlawful discharges of the undocumented aliens in the instant case could include orders directing the Employer to do the following: (1) reinstate the discriminatees conditioned upon their ability to establish that they are lawfully eligible to work in this country; (2) hire an applicant selected by the Union, should the discriminatees be unable to establish their lawful work eligibility within a reasonable period; and (3) pay backpay to the discriminatees from the date of their discharge until the earliest of the following events: the discriminatees' reinstatement (if they can lawfully accept reinstatement); the date the Employer hires the Union-applicant; the discriminatees fail within a reasonable time to seek approval from INS to work; the INS rejects the discriminatees' request for permission to work; or the failure of the Union to submit an applicant for hire within 14 calendar days of the date the Employer requests the Union to supply an applicant. And where the Union has referred an applicant the backpay period will continue to run until the applicant is hired.

---

requests for permission to work. As set forth in our September 3, memorandum, IRCA does not prohibit backpay awards to undocumented aliens. Furthermore, the instant matter is distinguishable from Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), in which the Supreme Court concluded that the Board was without authority to order backpay to undocumented aliens who had been deported and resided in Mexico throughout the Board proceedings. In Garment Workers Local 512 v. NLRB (Felbro, Inc.), 795 F.2d 705 (1986), the Ninth Circuit reversed a Board decision which precluded backpay for undocumented aliens who remained in the United States and whose employer had voluntarily reinstated them. Rather, the court remanded the case to the Board to determine the amount of backpay due to the undocumented employee. The court reasoned that the Supreme Court in Sure-Tan gave no indication that it was addressing any backpay issue other than the amount due, if any, to aliens who were not present in the United States at any time during the backpay period. The court further maintained that the Sure-Tan majority was primarily concerned with the Immigration and Naturalization Act's prohibition against illegal entry into the United States. Accordingly, the Felbro court concluded that the Supreme Court did not address the question as to whether undocumented employees who remain in the United States are eligible for a backpay award. Felbro, 795 F.2d at 716-17.

While not specifically endorsing the above remedy concerning the Union-referred applicant, the Region should develop in the Motion the underlying theory of the remedy as set forth below. The Region should state that this remedy might be necessary in the instant matter because the probability is low that the discriminatees will be able to file a Form I-9, demonstrating lawful ability to accept reinstatement. This remedy may also be appropriate in other, analogous situations in which an employer could defeat traditional remedies under the Act by offering conditional reinstatement to undocumented (and thus unreinstatable) aliens immediately after discharge. The Motion should also provide that if the Board wishes to consider such a remedy it should invite all parties to fully brief this issue. The Motion should explicitly note that submission of this proposed remedy was authorized by Acting General Counsel Daniel Silverman.

R.E.A.

ROF - 0  
x:apra2.ank