

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

DATE: October 5, 2017

TO: Kathy Drew King, Regional Director
Region 29

FROM: Jayme Sophir, Associate General Counsel
Division of Advice

SUBJECT: International Warehouse Group, Inc.
Case 29-CA-197057

506-0170
506-4033-1700
506-4033-2600
506-4033-5100
506-4033-5500
506-6050-1200
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512-5030-0175
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512-5030-4080-5020
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The Region requested advice as to whether International Warehouse Group, Inc. (the “Employer”) violated Section 8(a)(1) by: (1) interrogating employees about their support for the February 16, 2017¹ “A Day Without Immigrants” national protest; (2) interrogating and threatening employees regarding the Day Without Immigrants activities; and 3) discharging or constructively discharging three employees on February 17 in retaliation for their participation in the Day Without Immigrants.

We conclude that the employees’ participation in the “Day Without Immigrants” was for their mutual aid or protection and constituted a protected strike. The Employer therefore violated Section 8(a)(1) by discharging or constructively discharging employees for engaging in a protected strike vis-à-vis the “Day Without Immigrants,” interrogating and threatening to discharge employees about their intention to participate in the “Day Without Immigrants,” and interrogating employees after the strike and publicly discharging employees directly in front of

¹ Unless otherwise noted, all dates herein are 2017.

coworkers for engaging in these protected concerted activities so as to chill other employees from engaging in protected concerted activities. The Region should therefore issue complaint, absent settlement.

FACTS

The Employer is a corporation based out of Melville, New York that provides transportation and warehouse services to third-party vendors. Employee A, Employee B, and Employee C worked in the (b) (6), (b) (7)(C) and were responsible for (b) (6), (b) (7)(C). The department is predominantly comprised of Latino immigrants who exclusively speak Spanish. (b) (6), (b) (7)(C) the department with the help of (b) (6), (b) (7)(C) who, among other duties, serves as a (b) (6), (b) (7)(C) (b) (6), (b) (7)(C). The amount of hours that employees work fluctuates on both a daily and weekly basis. Work days typically start as early as 6:00 A.M. and end whenever the work is finished; sometimes as early as noon, but typically through the early evening. Similarly, employees work between five to seven days each week, depending on the amount of work available. The busiest months are November and December. The Employer neither maintains formal work rules nor does it routinely enforce an attendance policy; in fact, it was common for employees to skip work, especially in slow months, without repercussion.²

The Latino employees frequently discussed how the Employer treated them unfairly. The Employer regularly underpaid its Latino employees; an issue that employees—including Employee A and Employee B—collectively presented as a group to (b) (6), (b) (7)(C) about two to three times a month. On each occasion, (b) (6), (b) (7)(C) explained that a computer glitch must have caused the pay discrepancy; nevertheless, the issue was never resolved. There was also a prevalent belief amongst the Latino employees that they were forced to work significantly more overtime than their non-Latino coworkers during busy months. Employee B states that there was one shift in (b) (6), (b) (7)(C) in which the Latino employees stopped working in protest of the forced overtime. In response, (b) (6), (b) (7)(C) threatened to fire anyone who did not return to work (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) Notwithstanding (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) Lastly, the L rs also felt that the Employer pressured them to work too fast, shorten their breaks, and forgo trips to the bathroom.

² In response to the Region’s request for “[d]ocuments that reflect all disciplines and/or warnings issued to any employee for time/attendance issues since January 1, 2016,” the Employer responded that no such records exist.

I. Employees Missed Work to Support the “Day Without Immigrants”

The 2017 “Day Without Immigrants” protests reprised similar nationwide and local demonstrations in 2006, wherein immigrants and others attended rallies and abstained from working, shopping, and attending school in order to demonstrate the importance of immigrants to the economy. In the weeks leading up to the February protests, the Employer’s workers learned about the planned day of action through television, radio, and social media, and they discussed participating with their fellow employees. A group of employees—including Employee A, Employee B, and Employee C—developed a plan to participate in the protest by skipping work, refusing to buy food or gasoline, and participate in local demonstrations on February 16.

On or about February 14, while Employee B was discussing the “Day Without Immigrants” in (b) (6), (b) (7)(C) work area with about six other employees, (b) (6), (b) (7)(C) approached and asked the employees whether they were going to come to work on February 16. Employee B responded that (b) (6), (b) (7)(C) would not be at work that day. Employee B called in sick on February 15 and did not report to work on February 16.

On the morning of February 15, while Employee A was working alongside about eight other warehouse workers, (b) (6), (b) (7)(C) approached the group and said that (b) (6), (b) (7)(C) wants to know who is not going to come to work tomorrow. Employee A, and about six of the other workers present, told (b) (6), (b) (7)(C) that they would not be at work on February 16. In fact, Employee A states that (b) (6), (b) (7)(C) and the other workers explained that they were participating in a “Day Without Immigrants” to protest the problems they had at work, e.g., the Employer’s underpayments and pressure to forgo bathroom visits and work too fast. Shortly thereafter, (b) (6), (b) (7)(C) approached the workstation at which Employee C and three other employees were working and repeated that (b) (6), (b) (7)(C) wanted to know if they were coming to work the next day. Employee C states that (b) (6), (b) (7)(C) and another employee told (b) (6), (b) (7)(C) that they were not coming in on February 16 in order to participate in the protest. Employee A and Employee B observed (b) (6), (b) (7)(C) approach and speak to employees at four other workstations.

Later that morning, Employee A was working outside (b) (6), (b) (7)(C) office when (b) (6), (b) (7)(C) was approached by (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) with the aid of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C), asked Employee A why (b) (6), (b) (7)(C) was not coming in on February 16. Employee A explained that (b) (6), (b) (7)(C) was going to participate in a “Day Without Immigrants.” (b) (6), (b) (7)(C) asked Employee A if (b) (6), (b) (7)(C) liked (b) (6), (b) (7)(C) job. After Employee A affirmed that (b) (6), (b) (7)(C) liked (b) (6), (b) (7)(C) job, (b) (6), (b) (7)(C) told (b) (6), (b) (7)(C) that if (b) (6), (b) (7)(C) did not come to work on February 16, there was no more work for (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) then approached the workstation where Employee (b) (6), (b) (7)(C) working, told the employees that (b) (6), (b) (7)(C) had heard most employees were not coming into work on February 16, and warned that employees who did not show up on February 16 would be fired.

Around noon that same day, (b) (6), (b) (7)(C) entered the break room where Employee A, Employee C, and about twenty other employees were discussing (b) (6), (b) (7)(C) comments about the “Day Without Immigrants.” Employee A recalls (b) (6), (b) (7)(C) saying, “Why are you not going to work? Why? Trump is not going to pay your rent.” Employee C remembers (b) (6), (b) (7)(C) directing those who were not coming to work on February 16 to raise their hands. Both Employee A and Employee C state that (b) (6), (b) (7)(C) reiterated what (b) (6), (b) (7)(C) said earlier that morning: those who did not come to work on February 16 would be fired.

On February 16, Employee A, Employee B, Employee C, and several other workers did not report to work in support of the “Day Without Immigrants” protest. On (b) (6), (b) (7)(C), Employee B and Employee C reported to work at their normal time; however, Employee A did not return to work because, based on (b) (6), (b) (7)(C) repeated claims on February 15, (b) (6), (b) (7)(C) believed (b) (6), (b) (7)(C) was already fired for (b) (6), (b) (7)(C) participation in the protest. Several hours after work began, (b) (6), (b) (7)(C) called all the warehouse workers together—approximately thirty in total—and directed the employees who did not come to work on February 16 to raise their hands. After about eight employees raised their hands, (b) (6), (b) (7)(C) asked them to step aside, announced that they were all fired, and instructed them to pick up their paychecks in the cafeteria.

Employee A’s last day of employment was February 15, whereas (b) (6), (b) (7)(C) was Employee B and Employee C’s last day. Following their respective final days of work, they did not receive any communication from the Employer inquiring whether they planned to return to work.

II. The 2017 “Day Without Immigrants”

In broad terms, the 2017 “Day Without Immigrants” arose in response to President Trump’s immigration agenda and campaign rhetoric, and it was aimed at highlighting the contributions immigrants make to the economy. The February 16, 2017 day of action—alternatingly referred to in the press as a strike, protest, or boycott—was a grassroots effort that called for immigrants to abstain from working, shopping, and attending school, and local marches and demonstrations were organized across the country.³ Many businesses closed for the day in solidarity with their immigrant laborers or as a practical necessity because they were short-staffed.⁴

³ See Bill Chappell, ‘A Day Without Immigrants’ Promises a National Strike Thursday, NAT’L PUBLIC RADIO, Feb. 16, 2017, <http://www.npr.org/sections/thetwo-way/2017/02/16/515555428/a-day-without-immigrants-promises-a-national-strike-thursday> (“boycott/strike”); Leanna Garfield, *Businesses Across the US Are Closing for the ‘Day Without Immigrants’ Protest*, BUS. INSIDER, Feb. 16, 2017, <http://www.businessinsider.com/day-without-immigrants-protest-strike-businesses2017-2> (“strike” and “protest”); Liz Robbins & Annie Correal, *On a Day*

In the weeks leading up to the “Day Without Immigrants,” President Trump implemented a number of measures designed to crack down on undocumented immigrants living in the country and curb the influx of foreign nationals.⁵ Consistent with the President’s campaign promise to deport millions of undocumented immigrants, the administration issued an executive order that, among other things, tripled the number of immigration enforcement officers and redefined the Department of Homeland Security’s deportation priorities, greatly expanding the class of immigrants targeted for deportation.⁶ Specifically, under the executive order, anyone who has been charged with a crime or has merely committed acts that constitute a chargeable criminal offense is a priority for deportation.⁷ Experts believe this standard is broad enough to target up to 8 million unauthorized laborers, the vast majority of whom have worked in violation of law by making false claims on federal employment forms in order to secure a job.⁸

Without Immigrants’ Workers Show Their Presence by Staying Home, N.Y. TIMES, Feb. 16, 2017, available at <https://www.nytimes.com/2017/02/16/nyregion/day-without-immigrants-boycott-trump-policy.html> (grassroots “boycott” and “protest”).

⁴ See, e.g., Robbins & Correal, *supra* note 3.

⁵ For example, the administration issued highly-publicized executive orders directing, inter alia, the construction of a physical wall along the southern border, a temporary ban on entry by individuals from majority-Muslim countries, and the suspension of refugee admissions programs. Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017); Exec. Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977, 8978-79 (Feb. 1, 2017).

⁶ Exec. Order No. 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017). See also Nat’l Immigration Law Ctr., *Understanding Trump’s Executive Order Affecting Deportations & “Sanctuary” Cities*, Feb. 24, 2017, <https://www.nilc.org/issues/immigration-enforcement/exec-order-deportations-sanctuary-cities/> (hiring 10,000 new officers would triple current workforce of 5,000); Liz Robbins & Caitlin Dickerson, *Immigration Agents Arrest 600 People Across U.S. in One Week*, N.Y. TIMES, Feb. 12, 2017, available at <https://www.nytimes.com/2017/02/12/nyregion/immigration-arrests-sanctuary-city.html> (executive order “vastly expanded the group of immigrants considered priorities for deportation”).

⁷ Exec. Order No. 13768, 82 Fed. Reg. at 8800.

⁸ Brian Bennett, *Not Just ‘Bad Hombres,’: Trump is Targeting Up to 8 Million People for Deportation*, L.A. TIMES, Feb. 4, 2017, available at

During the week prior to the “Day Without Immigrants,” immigration agents conducted a series of large-scale raids that created a sense of panic among immigrant communities.⁹ To many, the raids signaled a new, more aggressive crackdown on undocumented immigrants, and validated fears that bystanders without criminal records would not be spared if they happened to be present during a raid.¹⁰ As a

<http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html>.
See also Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002) (Immigration Reform and Control Act of 1986 “makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents.”).

⁹ *See* Robbins & Dickerson, *supra* note 6; Chappell, *supra* note 3; Lisa Rein et al., *Federal Agents Conduct Immigration Enforcement Raids in at Least Six States*, WASH. POST, Feb. 11, 2017, available at https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.7289747fd555.

¹⁰ *See* Robbins & Dickerson, *supra* note 6; Chappell, *supra* note 3; Rein, *supra* note 9; Camila Domonoske, *75 Percent of Immigration Raid Arrests Were for Criminal Convictions*, NAT’L PUBLIC RADIO, Feb. 13, 2017, <http://www.npr.org/sections/thetwo-way/2017/02/13/515032423/75-percent-of-immigration-raid-arrests-were-for-criminal-convictions-dhs-says> (prior week’s arrests “included ‘collateral damage,’ or people who were picked up despite not being targeted in the operations—because, for example, they were in the same place as a person who *was* targeted, and did not have documentation”); Nicholas Kulish, et al., *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES, Feb. 25, 2017, available at <https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html> (Under the Trump administration, “[b]ystanders are now being taken in if they are suspected to be undocumented, even if they have committed no crime, known within the agency as ‘collateral’ arrests. While these arrests occurred under the Obama administration, they were officially discouraged, to the frustration of many [immigration] agents.”). *See also* Maria Sacchetti & Ed O’Keefe, *ICE Data Shows Half of Immigrants Arrested in Raids Had Traffic Convictions or No Record*, WASH. POST, Apr. 28, 2017, available at https://www.washingtonpost.com/local/social-issues/ice-data-shows-half-of-immigrants-arrested-in-raids-had-traffic-convictions-or-no-record/2017/04/28/81ff7284-2c59-11e7-b605-33413c691853_story.html?utm_term=.9db6db4fe48e (arrests of immigrants with no criminal record more than doubled in early 2017 as compared to same period in 2016).

result of these raids, many immigrants became fearful of going to work.¹¹ The raids took place in both homes and workplaces and were reminiscent of enforcement efforts by previous administrations involving worksite raids that rounded up all unauthorized workers.¹² Many had predicted that workplace apprehensions would play a vital role in meeting President Trump's goal of swiftly deporting millions of undocumented immigrants,¹³ and anxiety about the possible revival of workplace raids appears to have been well-founded.¹⁴

¹¹ See Mizue Aizeki, *Families Fearing Deportation Because of Trump's Immigration Policies Prepare for I.C.E. Raid*, NEWSWEEK, June 28, 2017, available at <http://www.newsweek.com/immigration-immigration-and-customs-enforcement-ice-donald-trump-628896> (“many immigrants scared to take their children to school or to show up for work”).

¹² Rein, *supra* note 9.

¹³ See Brian Bennett, *When Trump Says He Wants to Deport Criminals, He Means Something Starkly Different Than Obama*, L.A. TIMES, Nov. 14, 2016, available at <http://www.latimes.com/politics/la-na-pol-trump-immigration-criminals-20161114-story.html> (“Trump’s advisors are drafting plans to resume workplace raids . . . in an effort to meet Trump’s goal to deport 2 million to 3 million migrants who he says are criminals. . . . To boost the tallies, his advisors say, Trump will probably reinstate workplace raids to find those in the country illegally, to push illegal immigrants out of jobs and to send a signal across the borders”); Amy Chozick, *Raids of Illegal Immigrants Bring Harsh Memories, and Strong Fears*, N.Y. TIMES, Jan. 2, 2017, available at <https://www.nytimes.com/2017/01/02/us/illegal-immigrants-raids-deportation.html> (experts anticipate return of workplace raids to meet Trump’s deportation goals); Brian Bennett, *As Soon As He is Inaugurated, Trump Will Move to Clamp Down on Immigration*, L.A. TIMES, Jan. 19, 2017, available at <http://www.latimes.com/nation/la-na-pol-trump-immigration-actions-20170119-story.html> (advocates predict workplace raids).

¹⁴ See Aizeki, *supra* note 11 (50 percent increase in community arrests, such as at work, during first 100 days of 2017 compared to 2016). See also Tim Carman & Avi Self, *An ICE Agent Visited a Restaurant. About 30 Employees Quit the Next Day, Its Owner Says*. WASH. POST, June 27, 2017, available at https://www.washingtonpost.com/news/food/wp/2017/06/27/an-ice-agent-visited-a-restaurant-about-30-employees-quit-the-next-day-its-owner-says/?utm_term=.12db1d70b788; Associated Press, *ICE Agents Eat Breakfast, Compliment Chef, Then Arrest 3 Workers at Michigan Restaurant*, CHI. TRIB., May 26, 2017, available at <http://www.chicagotribune.com/news/nationworld/midwest/ct-michigan-restaurant-immigration-arrests-20170525-story.html>; Michael Matza, *After ICE Raid at Chesco Mushroom Farm, Anxiety High Among Immigrant Workers*,

ACTION

The Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by: terminating or constructively discharging employees who engaged in a protected strike in support of their own workplace grievances and the “Day Without Immigrants,” interrogating and threatening to discharge employees about their intention to participate in the “Day Without Immigrants,” and interrogating and publicly discharging employees specifically for their engagement in these protected concerted activities so as to chill other employees from engaging in protected concerted activities.

I. The Employees Engaged in Protected Concerted Activity within Section 7’s Mutual Aid or Protection Clause

Section 7 grants employees the right to engage in “concerted” activities for the purpose of “mutual aid or protection.” The latter element “focuses on the *goal* of concerted activity,” specifically, “whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees.”¹⁵ The Board analyzes whether an activity is for “mutual aid or protection” using an objective standard; thus, employees’ subjective motives are irrelevant.¹⁶

The “mutual aid or protection” clause covers employee efforts to improve their terms and conditions of employment through direct actions targeted at their specific employer, as well as efforts to “improve their lot as employees through channels outside the immediate employee-employer relationship” and activities “in support of employees of employers other than their own.”¹⁷ The Board has long recognized that Section 7 protection extends to concerted political advocacy when the subject matter of that advocacy has a direct nexus to employees’ “interests as employees,” based on a

PHILA. INQUIRER, May 7, 2017, *available at* <http://www.philly.com/philly/news/ice-raid-mushroom-fear-deport-chester-county.html>.

¹⁵ *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

¹⁶ *Id.* (quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 n.10 (7th Cir. 1976)) (“The motive of the actor in a labor dispute must be distinguished from the purpose for his activity.”).

¹⁷ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 559-60, 565 (1978) (upholding Section 7 protection for distribution of literature that, inter alia, urged employees to vote for candidates supporting a federal minimum wage increase and to lobby legislators against incorporation of right-to-work statute into state constitution).

totality of the circumstances.¹⁸ For example, in *Kaiser Engineers*,¹⁹ the Board held that a group letter to Congress, in which employees opposed a competitor's rumored application to the labor department to ease restrictions on visas for foreign engineers, was protected where the apparent reason for the letter was concern that an influx of foreign workers would threaten the job security of the employees and others in the profession.²⁰

Here, the employees' participation in the "Day Without Immigrants" was motivated, in large part, by the mistreatment the employees suffered at their workplace. This falls within the scope of the Act's "mutual aid or protection" clause. One of the Act's fundamental purposes is to facilitate peaceful resolutions of

¹⁸ *Id.* at 565-67 (efforts to "improve working conditions through resort to administrative and judicial forums" and "appeals to legislators to protect their interests as employees" are protected). See *Nellis Cab Co.*, 362 NLRB No. 185, slip op. at 2 (Aug. 27, 2015) (extended break during which taxicab drivers drove down boulevard honking and flashing lights while refusing to pick up passengers protected where object was to protest taxicab authority's possible issuance of additional medallions, which would likely decrease drivers' pay); *Kaiser Engineers*, 213 NLRB 752, 755 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976); Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum GC 08-10, dated July 22, 2008, at 3-7; see also *Five Star Transportation, Inc.*, 349 NLRB 42, 45 (2007) (quoting *Endicott Interconnect Technologies, Inc.*, 345 NLRB 448, 450 (2005), *enforcement denied*, 453 F.3d 532 (D.C. Cir. 2006)) ("written communication must be viewed 'in its entirety and in context' in order to determine whether there is a nexus"), *enforced*, 522 F.3d 46 (1st Cir. 2008); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1104 n.15 (2000) (quoting *Atl.-Pac. Constr. Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995)) (nexus "gleaned from the totality of the circumstances").

¹⁹ 213 NLRB 752, *cited with approval in Eastex*, 437 U.S. at 566 n.16.

²⁰ *Id.* at 755. See also *Petrochem Insulation, Inc.*, 330 NLRB 47, 49 (1999) (union's intervention before state environmental and other regulatory permit proceedings protected where objective was to secure a living wage for non-unionized employees, thereby expanding union job opportunities, improving union's ability to bargain for higher wages, and furthering employee health and safety), *enforced*, 240 F.3d 26 (D.C. Cir. 2001); *Tradesmen International, Inc.*, 332 NLRB 1158, 1159-60 (2000) (union organizer's testimony to municipal board that nonunion contractor was subject to bonding requirement protected because union sought to level the playing field between union and nonunion contractors, thereby protecting job opportunities of unionized employees), *enforcement denied*, 275 F.3d 1137 (D.C. Cir. 2002).

industrial disputes about wages, hours, and other working conditions.²¹ Thus, it is axiomatic that the employees' demands for their full wages, fair distribution of overtime hours between Latino and non-Latino workers, and adequate breaks, in particular bathroom breaks, are goals that fall within the Act's "mutual aid or protection" clause.

The employees' other goal, to support the "Day Without Immigrants," also falls within the Act's "mutual aid and protection" clause, as it concerns their interests as employees. The "Day Without Immigrants" was a response to, inter alia, the sudden crackdown on undocumented immigrants living and working in the United States and the possible revival of immigration raids in the workplace.²² On a basic level, President Trump's executive orders plainly threaten the job security of unauthorized workers, many of whom came to this country to seek employment and are now at risk of deportation because they presented false documents in order to secure a job.²³ Given that up to 8 million unauthorized laborers are now priorities for deportation, it is no coincidence that missing work was a central element of the day of action. Immigrants' absence from work was not only a political gesture aimed at the new administration—it was also a show of strength aimed at employers and the business community for the purpose of eliciting respect and support for their labor and continued presence in the country.

Moreover, the subject matter of the employees' advocacy on the "Day Without Immigrants" is connected to employees' interests as employees because more vigorous immigration enforcement will likely cause employment standards and working

²¹ 29 U.S.C. § 151 (outlining purpose of the Act and the need to protect employees' right to collectively organize for their mutual aid and protection); see *Eastex*, 437 U.S. at 569-70 (acknowledging that "[f]ew topics are of such immediate concern to employees as the level of their wages"); *American Mfg. Concern*, 7 NLRB 753, 759 (1938) (holding that a walk-out motivated by a demand for a forty-hour work week was a protected strike).

²² Whether workplace raids actually have or will become a common practice again under the Trump administration is irrelevant. See, e.g., *Union Carbide Corp.*, 259 NLRB 974, 977 (1981) (taxpayer petition complaining of employer's use of government funds to fund anti-union campaign protected "whether the premise on which it was based was ill founded or not"), *enforced in relevant part*, 714 F.2d 657 (6th Cir. 1983).

²³ See *Kaiser Engineers*, 213 NLRB at 755 (political letter protected where employees evidently feared that relaxing immigration laws might affect job security).

conditions to deteriorate for all workers, especially in lower-wage industries.²⁴ Laws that protect employees' wages, health and safety, and entitlement to breaks, not to mention collective-bargaining rights, largely rely on workers filing complaints with government authorities.²⁵ In a climate of aggressive immigration enforcement, undocumented immigrants are less likely to initiate complaints, or exercise their right to organize for better working conditions, for fear that their employer will retaliate by contacting immigration authorities, a tactic commonly used by employers.²⁶ Indeed, even documented immigrants may be reluctant to report workplace violations or attempt to otherwise better their working conditions due to concern that it may expose co-workers or family members to scrutiny by immigration authorities.²⁷ This is particularly true in the current climate, given that immigration officers have more freedom to arrest bystanders when conducting raids, including at homes and workplaces.²⁸ In light of these realities, workers participating in the "Day

²⁴ See Laura D. Francis, *Fear of Immigration Raids May Harm Workplace Rights*, BLOOMBERG BNA, Mar. 1, 2017, <https://www.bna.com/fear-immigration-raids-n57982084586/>; Justin Miller, *Trump's Immigration Crackdown is Dangerous for Workers (Not Just Immigrants)*, AMER. PROSPECT, Jan. 31, 2017, available at <http://prospect.org/article/trump%E2%80%99s-immigration-crackdown-dangerous-workers-not-just-immigrants>.

²⁵ See Kati L. Griffith, *Laborers or Criminals? The Impact of Crimmigration on Labor Standards Enforcement*, in *THE CRIMINALIZATION OF IMMIGRATION: CONTEXTS AND CONSEQUENCES* 89, 93-94 (Alissa R. Ackerman & Rich Furman eds., 2014), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2059&context=articles>.

²⁶ *Id.* at 95-96. See also Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 392-93 (2004) (fact that 55 percent of workplace immigration raids in New York City occurred in the midst of a wage and hour or other labor dispute "not surprising, as some employers have long seized upon [immigration] raids as a tool to retaliate against workers and escape liability for labor violations").

²⁷ See *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 3 n.7 (Sept. 8, 2014) (quoting *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004)) ("even documented workers may be intimidated by threatened scrutiny of their immigration status, for they 'may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends'"); Miller, *supra* note 24.

Without Immigrants” would reasonably be concerned about greater exploitation on the job as a result of the new administration’s more vigorous approach to immigration enforcement.

Finally, the subject matter of employees’ advocacy is linked to work-related concerns because workplace raids and stricter enforcement will likely diminish workers’ employment opportunities. First, employers may avoid hiring immigrants due to fear that employing an immigrant workforce may prompt a workplace raid, increase the risk of criminal and civil sanctions under immigration laws, or create unwanted turnover due to employee deportations.²⁹ Even documented workers’ employment prospects could be affected, since vigorous immigration enforcement would likely discourage employers from hiring individuals who merely look or sound “foreign.”³⁰ In addition, undocumented workers may feel so threatened by the possibility of workplace raids that they might limit their job search to so-called “sanctuary” employers or jurisdictions that require employers to mitigate the impact of workplace raids on their employees.³¹

We would reject any argument by the Employer that the nexus between the 2017 “Day Without Immigrants” and immigrants’ concerns as employees is too tenuous because the primary thrust of the 2017 protests concerned deportation itself,

²⁸ See Domonoske, *supra* note 10; Kulish, *supra* note 10.

²⁹ See Vin Gurrieri, *Trump’s Immigration Plans Put Employers, Workers On Edge*, LAW360, Mar. 1, 2017, <https://www.law360.com/articles/897103/trump-s-immigration-plans-put-employers-workers-on-edge> (employers concerned about “heightened scrutiny” by immigration enforcement agents, being caught for immigration violations, and losing a “large segment of [their] workforce”).

³⁰ See Griffith, *supra* note 25 at 93-94.

³¹ Hundreds of restaurants nationwide have designated themselves “sanctuary restaurants,” a label indicating that an employer has received education about how to handle immigration agents during a possible raid. See Justin Phillips, *Bay Area Restaurants Register As Sanctuary Businesses*, S.F. CHRON., Feb. 16, 2017, available at <http://www.sfchronicle.com/restaurants/article/Bay-Area-restaurants-register-as-sanctuary-10938249.php>. The California legislature is considering a bill that would require employers to take measures to shield workers during workplace raids, such as by insisting on a judicial warrant or subpoena before granting access to immigration agents. Associated Press, *California Assembly OKs Protection Against Workplace Raids*, VENTURA COUNTY STAR, June 1, 2017, <http://www.vcstar.com/story/news/2017/06/01/assembly-oks-protection-against-workplace-raids/361111001/>.

rather than, as in 2006, proposed legislation expressly regulating the *employment* of undocumented immigrants. Loss of employment is an inevitable consequence of deportation, and thus job-related concerns are naturally implicated when employees perceive a greater risk of being expelled from the country. Moreover, as explained above, there is a direct nexus here because employees could reasonably believe that the Trump administration’s immigration agenda—particularly the more aggressive immigration enforcement, including workplace raids—would harm their terms of employment and work prospects.³² Indeed, the Employer recognized that the day of action work stoppage was for the purpose of valuing and protecting immigrants’ labor, since it reacted to the employees’ plans to partake by suggesting that it was not at fault for the Trump administration’s immigration policies, and jibing that it was the Employer, and not Trump, who was “going to pay your rent.”

Likewise, any contention that participation in the 2017 protests should be unprotected because the new administration’s executive orders do not specifically mention the *employment* of immigrants is unavailing. The Board has found activity to be protected even when the subject matter of the government petitioning is not explicitly or obviously connected to workplace concerns. For example, in *Petrochem Insulation*,³³ the Board found that a union campaign, which consisted of filing various environmental objections and challenging the issuance of permits, was protected, and therefore the employer violated Section 8(a)(1) by filing a meritless and retaliatory lawsuit to enjoin the union’s activities.³⁴ The Board reasoned that the petitioning was protected because the union’s objective was to secure a living wage for employees at non-union construction companies, which the Board considered to be a form of area-standards campaign.³⁵ Likewise, in *Tradesmen International*,³⁶ the Board found protected a union organizer’s testimony before a city building standards board urging application of a surety bond requirement to a labor supply firm. Although the ordinance did not relate to working conditions, nor did the testimony refer to that subject,³⁷ the Board reasoned that there was a nexus because the testimony was

³² See *Senior Citizens Coordinating Council*, 330 NLRB at 1104 (complaint about lack of supervision to city agency had a “direct impact” on working conditions where employees “could reasonably believe” their jobs might be in jeopardy).

³³ 330 NLRB 47.

³⁴ *Id.* at 48, 50-51.

³⁵ *Id.* at 49.

³⁶ 332 NLRB 1158.

³⁷ See *id.* at 1162 (Member Hurtgen, dissenting).

“designed to protect local unionized companies and, in turn, the job opportunities of their employees” by leveling the playing field between union and non-union contractors.³⁸ Thus, the fact that President Trump’s executive order relating to deportation priorities did not explicitly target immigrants’ jobs does not undercut the direct nexus between the day of action and employees’ interests as employees.³⁹

In sum, we find the employees’ dual goals of pressuring their employer to acknowledge their mistreatment in their own workplace and support the national “Day Without Immigrants” protest to fall within the protection of the “mutual aid or protection” clause. In the alternative, even if the employees’ participation in the “Day Without Immigrants” protest is found to be outside the bounds of the “mutual aid or protection” clause, we conclude that the employees’ goal of improving the wages, hours, and conditions of employment in their own workplace would nonetheless be for mutual aid or protection.⁴⁰

Concluding that the employees’ withholding of labor in support of the “Day Without Immigrants” constituted protected concerted activity is only part of the requisite analysis concerning the employees’ discharges because “conduct with a protected object may nonetheless be unprotected because of the means employed.”⁴¹ In order for the employees’ protected concerted activity to constitute a protected strike, the manner in which the employees sought to achieve the protected object

³⁸ *Id.* at 1159-60.

³⁹ Indeed, President Trump’s advisors anticipated bringing back workplace raids, in part, for the very purpose of displacing immigrants from their jobs. *See Bennett, supra* note 13.

⁴⁰ *See Fun Striders, Inc.*, 250 NLRB 520, 525 (1980) (concluding that employees’ leaflets, which contained both inflammatory political material and a variety of workplace grievances, were protected because the latter comments concerned wages, hours, and conditions of employment), *enforcement denied*, 686 F.2d 659 (9th Cir. 1981); *Samsonite Corp.*, 206 NLRB 343, 346 (1973) (clarifying that employees’ newsletter was protected, despite including “gratuitous remarks or ‘social comment,’” because that material did not detract from the overall purpose of seeking improvements in wages and conditions of employment); *see also* (b) (7)(A) | [REDACTED]

⁴¹ Memorandum GC 08-10, *supra* note 18, at 12.

must not run afoul of the Act. As further analyzed herein, we conclude that both the object and means of the employees' concerted activity constituted a protected strike; thus, the Employer unlawfully discharged the employees that went on strike on February 16.

II. The Employer Unlawfully Terminated Employees Engaged in Protected Strike

Employees have a statutorily protected right to withhold labor from their employer in an effort to improve their terms and conditions of employment.⁴² The Supreme Court has stated that the right to strike is a pillar of the collective-bargaining system, and “is to be given a generous interpretation within the scope of the [L]abor Act.”⁴³ Indeed, this generous interpretation is evident in Board decisions liberally finding strikes of unorganized workers protected,⁴⁴ as well as extending Section 7 protection to a work stoppage regardless of whether a specific demand is

⁴² See *NLRB v. Drivers, Chauffeurs, Helpers, Local 639 (Curtis Bros.)*, 362 U.S. 274, 281 (1960) (Section 13 “provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right . . . unless ‘specifically provided for’ in the Act itself”); *NLRB v. Preterm, Inc.*, 784 F.2d 426, 429 (1st Cir. 1986) (pursuant to Section 7, “employees are granted the right to peacefully strike, picket and engage in other concerted activities”).

⁴³ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-34 (1963) (noting that the “solicitude for the right to strike” is so strong that “when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgement in exacting detail” so that the “positive command of S[ection] 13” would be preserved).

⁴⁴ *NLRB v. Washington Aluminum*, 370 U.S. 9, 14-15 (1962) (employees' spontaneous work stoppage protected; having no bargaining representative and no established procedure for negotiating with the company, they took the most direct course to let the company know that they wanted a warmer place in which to work); see, e.g., *Serendipity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (employees' joint cessation of work to protest perceived safety violations and inadequate health insurance coverage protected, especially where there was no bargaining representative, notwithstanding the reasonableness of their perception, any lack of notification to the employer of their intent to cease work, or the existence of alternative methods of solving the problems); *Polytech, Inc.*, 195 NLRB 695, 696 (1972) (noting that employees were unrepresented and lacked “structured procedures to protest . . . working conditions” in finding single concerted refusal to work overtime protected).

proffered before, during, or even after a strike.⁴⁵ The right to strike is, of course, not without limitation.⁴⁶ Whether a work stoppage is protected depends, in part, on its purpose. To obtain protection, employees must be withholding labor to pressure their employer to remedy a work-related complaint or grievance.⁴⁷

Although it is not entirely clear whether, in order to find a protected “strike,” the employer must in fact be able to remedy the employees’ work related complaint, in *Eastex* the Supreme Court suggested in dicta that an employer should have some degree of control over resolution of the objective of striking employees in order for the application of economic pressure to fall within the Act’s protection.⁴⁸ Following the 2006 “Day Without Immigrants,” General Counsel Meisburg adopted the Supreme Court’s suggestion and concluded that, while the purpose of the 2006 “Day Without Immigrants”—to protest proposed legislation affecting the employment of undocumented immigrants—was protected under the mutual aid or protection clause of Section 7, the employees’ means of achieving that protected purpose—withholding their labor—was not a protected “strike” because employees’ underlying grievance

⁴⁵ *Washington Aluminum*, 370 U.S. at 14 (employees’ work stoppage protected despite failure to make specific demand upon employer to remedy objectionable condition).

⁴⁶ For instance, strikes that are unlawful, violent, or in breach of contract are not protected. *Id.* at 14-17 (employees’ strike did not include illegal conduct that would have made it lose the Act’s protection, which superseded employer’s plant rules).

⁴⁷ See, e.g., *New York State Nurses Assn.*, 334 NLRB 798, 800 (2001) (citing *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978), *enforced mem.*, 605 F.2d 652 (9th Cir. 1979)) (nurses’ concerted refusal to volunteer for overtime work was strike because it was “intended to put pressure on the [employer] to change its staffing practices”); cf. *Quantum Electric, Inc.*, 341 NLRB 1270, 1279 & n.29 (2004) (leaving work early to attend union meeting was unprotected where not intended as protest of working conditions); *Bird Engineering*, 270 NLRB 1415, 1415 n.3 (1984) (noting that workers’ protest against the employer’s new on-campus lunch policy might have been protected had they engaged in a proper work stoppage, rather than merely violating the new rule).

⁴⁸ *Eastex, Inc.*, 437 U.S. at 568 n.18 (quoting Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U.P.A.L.REV. 1195, 1221 (1967) (“The argument that the employer’s lack of interest or control affords a legitimate basis for holding that a subject does not come within ‘mutual aid or protection’ is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing.”)).

concerning the proposed legislation was not one that their employers could remedy.⁴⁹

More recently, in *Nellis Cab Company*, the Board acknowledged the Supreme Court's dicta in *Eastex* that an employer should have some degree of control over the outcome of a political dispute for economic pressure in support of that dispute to be protected.⁵⁰ Without explicitly agreeing with the Court's suggestion, the *Nellis* Board concluded that the employer taxicab company had some control over whether a state agency issue more taxi medallions because the employer, along with the other fifteen local taxicab companies, could influence the state agency's decision.⁵¹ Therefore, the taxicab drivers' brief protest in opposition to the increase in medallions, during which the drivers refused to pick up passengers, was a protected strike designed to "influence the influencers."⁵²

In this case, the employees who withheld their labor in support of their workplace grievances and the "Day Without Immigrants" were engaged in a protected strike. One of the employees' goals was to pressure the Employer to improve the wages, hours, and conditions of employment at their workplace; specifically, they sought full wages, fair distribution of overtime hours between Latino and non-Latino workers, and adequate breaks. The Employer clearly was in a position to resolve these workplace concerns. And, as discussed above, the employees also withheld their labor to highlight and counteract the negative impact they believe President Trump's administration is having on the job security, workplace standards, and employment opportunities for documented and undocumented immigrant employees.⁵³ Although

⁴⁹ Memorandum GC 08-10, *supra* note 18, at 10; *see also Reliable Maintenance*, Case 18-CA-18119, Advice Memorandum dated Oct. 31, 2006 (finding employees who left work to attend demonstrations to protest federal immigration policies were not engaged in valid strikes, even though the walkouts were for mutual aid or protection, because the conduct was not "directed at an employer who has control over the subject matter of the dispute. . . .").

⁵⁰ 362 NLRB No. 185, slip op. at 2.

⁵¹ *Id.*, slip op. at 2 & n.11 (noting the Supreme Court's acknowledgement that "Congress entrusted to the Board, 'in the first instance,' the task of delineating the boundaries of the 'mutual aid or protection' clause.").

⁵² *Id.*, slip op. at 2.

⁵³ *See supra* pp. 10-12; National Immigration Law Center, *Understanding Trump's Executive Order Affecting Deportations & "Sanctuary" Cities* (last revised Feb. 24, 2017) (highlighting how President Obama's policy focused predominantly on criminals and gang affiliated undocumented immigrants in stark contrast to President Trump's

not presented to the Employer in a formal strike notice, the Employer was made aware of both of these goals. Employee A states that, on February 16, [REDACTED] and other workers explained to [REDACTED] that they planned to participate in the “Day Without Immigrants” to protest problems at the workplace, e.g., underpayments and pressure to forgo bathroom visits and to work too fast. Previously, in December 2016, employees had confronted [REDACTED] with their grievances about disproportionate amounts of overtime assigned to Latino workers. Moreover, [REDACTED] learned through [REDACTED] polling that the employees were not reporting to work in protest of their wages, hours, and conditions of employment, as well as the workplace rights of Latino immigrants as a whole.

Any chance of these unorganized employees opening a fruitful dialogue with the Employer to address these concerns was remote, absent further action, because past efforts were stonewalled and the language barrier strained communication between the two parties.⁵⁴ Thus, the employees’ best option to demand resolution of their grievances was to withhold their labor in support of the “Day Without Immigrants” and pressure the Employer to take action to improve their terms of employment and, to the extent possible, insulate its workplace from the threat of job loss resulting from work raids and deportations.

We reject the Employer’s argument that it does not have control over resolution of the employees’ concerns. First, it is incontrovertible that the Employer can resolve the employees’ specific grievances about the wages, hours, and conditions of employment at its workplace. Second, the Employer could reassure employees that it will not exploit their vulnerable immigration status in denying them fair treatment at work.⁵⁵ Third, the Employer also has a number of options that it could implement to

desire to deport “virtually any removable noncitizen”); *ICE Arrests 600 in Nationwide Raids After Trump Order Expands Criminalization of Immigrants*, (Democracy Now! Feb. 13, 2017) (interviewing President of the California State Senate Kevin de León, who stated “I can tell you half of my family would be eligible for deportation under the executive order, because if they got a false Social Security card, if they got a false identification, if they got a false driver’s license prior to us passing AB 60, if they got a false green card—and anyone who has family members, you know, who are undocumented knows that almost entirely everybody has secured some sort of false identification. That’s what you need to survive, to work”).

⁵⁴ See *supra* note 44 (discussing the Board’s broad interpretation of the right to strike and willingness to find strikes of unorganized workers protected).

⁵⁵ Sophia Tareen, *Restaurants Nationwide seek ‘Sanctuary’ Status for Immigrant Employees*, PBS NEWSHOUR (Jan. 25, 2017)

<http://www.pbs.org/newshour/rundown/restaurants-nationwide-seek-sanctuary->

help alleviate the concerns created by the administration's immigration policies. For example, the Employer could pledge that it will not call ICE to investigate its employees. In the event ICE attempts to investigate or raid its workplace, the Employer could refuse to permit ICE to enter its property or search its files unless and until a warrant or subpoena is produced,⁵⁶ upon which the Employer could proactively limit ICE's search to the strict confines of that document to minimize exposure to its workforce and prevent collateral arrests.⁵⁷ Further, the Employer could serve as a conduit between its employees and immigrant or legal aid groups so that employees can learn about their rights and how to best protect themselves if confronted by ICE.⁵⁸ The Employer could publicly denounce the administration's actions and advocate for more liberal immigration policies. The Employer could also publicly designate itself a so-called "sanctuary" employer.⁵⁹ Thus, although the

status-immigrant-employees/ (employers are reaffirming their adherence to anti-discrimination policies and creating safe spaces for their employees in an effort to alleviate fear of deportation and other harassment); *Oakland May Call for Employers to Establish Sanctuary Workplaces*, CBS SF (Apr. 18, 2017) <http://sanfrancisco.cbslocal.com/2017/04/18/oakland-city-council-sanctuary-workplaces-proposal/> (proposing a resolution that will force employers to respect and refrain from threatening their workers' immigration status).

⁵⁶ Davis Bae, *How to Prepare for an ICE Raid on your Workplace*, FAST COMPANY (Mar. 10, 2017), <https://www.fastcompany.com/3068857/how-to-prepare-for-an-ice-raid-on-your-workplace> (providing steps employers should take in the event of an ICE raid); Michael H. Neilfach & Amy L. Peck, *What Employers Need to Know about Immigration Raids on Their Premises*, JACKSON LEWIS (Mar. 29, 2017), <https://www.jacksonlewis.com/publication/what-employers-need-know-about-immigration-raids-their-premises> (same).

⁵⁷ Bae, *supra* note 56; Neilfach & Peck, *supra* note 56.

⁵⁸ Neilfach & Peck, *supra* note 56.

⁵⁹ Hundreds of restaurants nationwide have designated themselves "sanctuary restaurants," a label indicating that an employer has received education about how to handle immigration agents during a possible raid. See Justin Phillips, *Bay Area Restaurants Register As Sanctuary Businesses*, S.F. CHRON., Feb. 16, 2017, available at <http://www.sfchronicle.com/restaurants/article/Bay-Area-restaurants-register-as-sanctuary-10938249.php>. The California legislature is considering a bill that would require employers to take measures to shield workers during workplace raids, such as by insisting on a judicial warrant or subpoena before granting access to immigration agents. Associated Press, *California Assembly OKs Protection Against Workplace*

Employer does not personally control the administration's immigration agenda, it could take a stand with hundreds of other companies and thereby influence the administration to change course just as the Board found cab companies could sway the state agency's determination in *Nellis Cab Company*.⁶⁰

In a case such as this, in which Employee A was constructively discharged⁶¹ and Employee B and Employee C were terminated for engaging in a protected strike, the Employer's motive is not at issue.⁶² In finding that the employees engaged in a

Raids, VENTURA COUNTY STAR, June 1, 2017, <http://www.vcstar.com/story/news/2017/06/01/assembly-oks-protection-against-workplace-raids/361111001/>.

⁶⁰ *Nellis Cab Co.*, 362 NLRB No. 185, slip op. at 2.

⁶¹ An employee is constructively discharged when an employer presents a clear and unequivocal "Hobson's choice of resignation or continued employment conditioned on the relinquishment of rights guaranteed by Section 7 of the Act." *White-Evans Service Co.*, 285 NLRB 81, 81 (1987). Here, the Employer's conduct resulted in Employee A reasonably believing that [REDACTED] only options were waiving [REDACTED] right to engage in protected concerted activity on February 16 or face termination, a clear violation of Section 8(a)(1). See *Transportation Management*, 257 NLRB 760, 760 (1981) (finding that employer constructively discharged employees for refusing to waive their right to strike), *enforced*, 686 F.2d 63 (1st Cir. 1982); see also *Atlas Refinery, Inc.*, 354 NLRB 1056, slip op. at 17 (2010) (finding manager's threat to discharge locked-out employee if he did not return to work under terms implemented by employer violated 8(a)(1); noting that questions of manager's subjective motive and whether his presentation of a "Hobson's choice" succeeded or failed in coercing the employee are irrelevant to finding the violation), *enforced*, 620 F. App'x 99 (3d Cir. 2015).

⁶² Compare *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011) (clarifying that the judge erred in analyzing the 8(a)(1) discharge allegation under *Wright Line* because, in cases in which employees are discharged for engaging in a protected work stoppage, motive is irrelevant to the existence of an 8(a)(1) violation), with *Quantum Electric, Inc.*, 341 NLRB at 1279 (analyzing the employees' work stoppage under *Wright Line* after finding that leaving work early to attend a union meeting did not constitute a strike). See also *CGLM, Inc.*, 350 NLRB 974, 974 n.2 (2007) (quoting *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981)) (concluding the existence or lack of unlawful animus is not material when the "very conduct for which employees are disciplined is itself protected concerted activity"), *enforced mem. per curiam*, 280 F. App'x 366 (5th Cir. 2008).

protected strike, we therefore conclude that the Employer violated the Act by terminating employees for engaging in a protected strike.⁶³

III. The Employer's Interrogations and Threats of Discharge Prior to the "Day Without Immigrants" Violated Section 8(a)(1)

We also conclude that the Employer violated Section 8(a)(1) by interrogating and threatening its employees about their decision to engage in protected concerted activity prior to the "Day Without Immigrants." Questioning employees regarding their intention to participate in a strike, with certain exceptions, is inherently coercive and tends to interfere with employees' Section 7 rights.⁶⁴ The Board thus only permits an employer to poll employees regarding their strike intentions where there is a reasonable basis for believing a strike is imminent such that the employer has a legitimate need to determine its ability to adequately staff its operations.⁶⁵

⁶³ A *Wright Line* analysis is unnecessary at this time. When the very conduct for which an employee is disciplined is itself alleged to be a protected concerted activity, such as a strike, the employer's motive is not at issue. *See, e.g., Readyjet, Inc.*, 365 NLRB No.120, slip op. at 1 n.4 (Aug. 16, 2017). Here, the Employer is not arguing that it would have taken the same adverse action in the absence of protected concerted activity. In the event the Employer alters its strategy to include a *Wright Line* defense, such that an argument in the alternative may be appropriate, see the *Wright Line* analysis in *EZ Industrial Solutions, Inc.*, Case No. 07-CA-193475, Advice Memorandum dated Aug. 30, 2017, at 19-21, for guidance.

⁶⁴ *See Transportation Management Corp.*, 257 NLRB at 767 (ALJ, affirmed by Board, found that employer unlawfully polled drivers as to whether they would waive their right to strike because such polling inherently subjects employees to fear of discrimination and reprisals and employer lacked legitimate basis to conduct the poll); *Preterm, Inc.*, 240 NLRB 654, 656 (1979) (citing *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965)) (in order to lessen the inherently coercive effect of polling its employees as to whether they would participate in a strike, employer obligated to explain fully the purpose of the questioning, assure employees that no reprisals would be taken as a result of their response, and refrain from otherwise creating a coercive atmosphere).

⁶⁵ *See, e.g., W.A. Sheaffer Pen Co.*, 199 NLRB 242, 242-43 (1972) (employer cannot rely on unsubstantiated rumor as justification for questioning employees concerning their intent to strike or cross a picket line), *enforced*, 486 F.2d 180 (8th Cir. 1973); *Transportation Management*, 257 NLRB at 767 (rumors of a strike, even where a union has conducted a strike vote, did not provide a reasonable basis for believing a strike was imminent); *see also Mosher Steel Co.*, 220 NLRB 336, 336 (1975) (systematic questioning of employees concerning participation in a strike before a

Notwithstanding this right, an employer's poll may still run afoul of the Act if the poll is coupled with coercive conduct.⁶⁶

In this case, the Employer had a reasonable basis for believing that a sizable portion of its workforce, the majority of which were Latino immigrants, would participate in the "Day Without Immigrants."⁶⁷ Therefore, the Employer's initial polling of its employees was not a per se violation of the Act. By adding an explicit threat of discharge to the poll, however, the Employer exceeded the bounds of permissible inquiry and violated the Act by forcing employees to choose between their rights under the Act or losing their jobs.

IV. The Employer's Post-strike Interrogation and "Public Execution" of Strikers Further Violated Section 8(a)(1)

The Employer's post-strike interrogation of employees and the "public execution" of Employee B and Employee C on (b) (6), (b) (7)(C) each constitute separate violations of Section 8(a)(1). In analyzing whether the post-strike interrogation violates Section 8(a)(1), the Board analyzes "[w]hether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."⁶⁸ We conclude that requesting employees to publicly identify themselves

strike vote was taken and before negotiations had reached impasse violated 8(a)(1), *enforced mem.*, 532 F.2d 1374 (5th Cir. 1976).

⁶⁶ Compare *Transportation Management*, 257 NLRB at 767 (clarifying in arguendo that even if the employer had a reasonable expectation of an imminent strike, the employer's poll still violated the Act because it elicited employees to waive their right to strike), with *Industrial Towel & Uniform Service Co.*, 172 NLRB 2254, 2254 (1968) (reversing ALJ's finding and holding that an employer who merely asked an employee whether he intended to join the ongoing strike did not interfere with the employee's exercise of his statutory rights).

⁶⁷ Regardless of whether (b) (6), (b) (7)(C) overheard employee discussions about supporting the "Day Without Immigrants," or (b) (6), (b) (7)(C) merely heard about the protest through the media and speculated that the Employer's predominantly Latino immigrant workforce might consider participating, (b) (6), (b) (7)(C) reasonably believed that a strike involving at least some employees was imminent.

⁶⁸ *Rossmore House*, 269 NLRB 1176, 1177 (1984), *aff'd*, 760 F.2d 1006 (9th Cir. 1985); see *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985) (the Board considers a number of factors in determining whether the interrogation was coercive, including: whether the employee interrogated was an open and active union supporter; whether there is a history of employer hostility towards or discrimination against union

as participants in the strike, particularly in light of (b) (6), (b) (7)(C) previous threat to discharge anyone who participated in the “Day Without Immigrants,” would tend to restrain and coerce employees in violation of the Act.⁶⁹ Furthermore, (b) (6), (b) (7)(C) dramatic “public execution” of the employees who acknowledged that they engaged in a strike the previous day would undoubtedly leave a lasting impression on the remaining work force and chill concerted activities for the foreseeable future.⁷⁰

Accordingly, based on the foregoing, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1).

/s/
J.L.S.

ADV.29-CA-197057.Response. InternationalWarehouseGroup (b) (6), (b) (7)

supporters; whether the questions were general and nonthreatening; and whether the management official doing the questioning had a casual and friendly relationship with employee being questioned).

⁶⁹ See *Nellis Cab*, 362 NLRB No. 185, slip op. at 1, 11 (concluding that the employer’s interrogation of employees about why they went on strike and who their leader was violated Section 8(a)(1)).

⁷⁰ *Garvey Marine, Inc.*, 328 NLRB 991, 993, 995 (1999) (concluding the employer took steps to ensure that disciplinary action was purposefully dramatic and public to send a message to the rest of the employees in violation of the Act), *enforced*, 245 F.3d 819 (D.C. Cir. 2001).