UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM B. COWEN, Plaintiff, v. PACIFIC GREEN TRUCKING, INC., Defendant.	Case No. 2:19-cv-00663-AB-RAO ORDER GRANTING PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT

Before the Court is a Petition for a Temporary Injunction under Section 10(j) of the National Labor Relations Act ("NLRA"), filed by Petitioner William B. Cowen, Regional Director of Region 21 of the National Labor Relations Board ("Petitioner"). (Dkt. No. 1, "Pet.") Petitioner alleges that Respondent Pacific Green Trucking, Inc. ("Pacific Green") has engaged in unfair labor practices against employees affiliated with the International Brotherhood of Teamsters ("the Union"). As of the date of this Order, Pacific Green has not filed an opposition or otherwise appeared in this action. For the reasons discussed below, the Court **GRANTS** the Petition.

I. BACKGROUND

On January 29, 2019, Petitioner filed the instant Petition for Temporary Injunctive Relief under Section 10(j) of the NLRA. Petitioner contends that it will likely prevail on the merits of the underlying administrative proceeding in Board Case

21-CA-226775, alleging that Pacific Green engaged in, and continues to engage in, unfair labor practices in violation of Section 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3), that affect commerce within the meaning of Sections 2(6) and (7) of the Act, 29 U.S.C. § 152(6) and (7). Specifically, Petitioner contends that Pacific Green's general manager interrogated the primary union supporter, Ricardo Bonilla Colindres ("Bonilla"), about his union activities, threatened him with discharge because of his union activities, refused to assign him work, and terminated his employment because of his union activities.

On February 13, 2019, Administrative Law Judge Jeffrey Wedekind ("the ALJ") issued an administrative decision and recommended order in which he found that Pacific Green committed the same unfair labor practices Petitioner seeks to enjoin in this proceeding. Shortly thereafter, Petitioner requested that this Court take judicial notice of the ALJ's decision.[1] (*See* Dkt. No. 15-1.)

II. LEGAL BACKGROUND

This case involves "some of the most fundamental provisions of the NLRA—Section 8(a)(1) [and] (3)." *Coffman v. Queen of Valley Med. Ctr.*, 895 F.3d 717, 724 (9th Cir. 2018); *see* 29 U.S.C. § 158(a)(1), (3). Section 8(a)(1) prohibits employers from "interfer[ing] with . . . employees in the exercise of the rights guaranteed" under the NLRA, such as "the right to . . . join[ ] or assist labor organizations [and] to bargain collectively through representatives of their own choosing." *Id.* §§ 157, 158(a)(1). Section 8(a)(3) similarly prohibits employers from "discriminat[ing] in regard to . . . any term or condition of employment to . . . discourage membership in any labor organization." *Id.* § 158(a)(3).

Section 10(j) authorizes the Board to seek a preliminary injunction in federal

[1] The Court takes judicial notice of the ALJ's decision pursuant to Federal Rule of Evidence 201. *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1186 (9th Cir. 2011). The Court does not rely on the ALJ's decision, but if it did, the ALJ's decision would provide additional support for the Court's findings.

district court to enjoin an employer's unfair labor practice. *Id.* § 160(j). The district court may grant "such temporary relief . . . as it deems just and proper" under the NLRA. *Id.* Courts apply the preliminary injunction standard set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), which requires that Petitioner show (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Id.*; *see Coffman*, 895 F.3d at 724-25.

III. DISCUSSION

A. Likelihood of Success on the Merits

Petitioner has demonstrated a likelihood of success on the merits of the underlying Board case. To show a likelihood of success on the merits, Petitioner must show a "probability that the Board will issue an order determining that the unfair labor practices alleged by the . . . Director occurred and that this Court would grant a petition enforcing that order." *Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051, 1062 (9th Cir. 2012) (*Frankl II*) (quoting *Frankl ex rel. NLRB v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011) (*Frankl I*)). Petitioner meets this burden if it can "produc[e] some evidence to support the unfair labor practice charge, together with an arguable legal theory." *Id.* (quoting *Frankl I*, 650 F.3d at 1356) (alteration in original). The Regional Director's petition for a 10(j) injunction is owed "special deference" when the Board authorizes it, since this may indicate the Board's eventual decision on the merits. *Id.* at 1062 (citing *Small,* 661 F.3d at 1187).

Here, Petitioner has presented evidence that Pacific Green's manager, Vicente Zarate, made disparaging comments about unions and told Bonilla he should not get involved with the union because he, Zarate, was the one who employed him; that Zarate made these comments knowing that Bonilla was involved with the union; that Zarate told Bonilla that if he heard Bonilla was "fighting" with other drivers again, he

would fire him; that Zarate used the word "fighting"[2] with drivers as a euphemism for discussing or debating the union with drivers; that Zarate sent Bonilla home early one day after Zarate made the above statements even though additional work could have been assigned to Bonilla; that Zarate subsequently fired Bonilla and later told him it was because he was "fighting" with other drivers and he did not want other workers "fighting"; and that Zarate told a Teamsters organizer that Bonilla was fired because he had been having problems with drivers "fighting."

The Ninth Circuit holds "[a]n employer discriminates against an employee under the NLRA 'when the employee's involvement in a protected activity was a substantial or motivating factor in the employer's decision to discipline or terminate the employee.'" *Coffman*, 895 F.3d at 729 (quoting *Frankl II*, 693 F.3d at 1062). To establish that the conduct was a substantial or motivating factor, the petitioner need only show that "the employee was engaged in protected activity, the employer knew of such activity, and the employer harbored anti-union animus." *Id.* Then, the burden shifts to the employer "to demonstrate that it would have taken the same action regardless of the employee's union activity." *Id.* "[A]n employer cannot overcome this burden where its asserted reasons for a discharge are found to be pretextual." *Id.* (internal quotation marks and citations omitted).

Petitioner's evidence in the record is sufficient to establish a prima facie case, and that any asserted justification is pretextual. Petitioner has therefore shown a likelihood of success on the merits.

B. Likelihood of Irreparable Harm

Petitioner has presented sufficient evidence to demonstrate a likelihood of irreparable harm due to Pacific Green's unfair labor practices. If the petitioner

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[2] Petitioner points out that Zarate used the Spanish word "peleando" when he accused Bonilla of "fighting" with his coworkers. (Pet. at 8 n.7.) In the proceeding before the ALJ, the interpreter explained that "peleando" could be interpreted as "fighting" in the physical sense or struggling alongside others in support of unionization. (*Id.*; Pet., Ex. 3, 197-98, 343.)

"presents evidence of an employer's 'clear hostility toward the Union, as well as a pattern of discrimination against employees active in the Union,'" the petitioner "establishes a likelihood of irreparable harm for a preliminary injunction." *Coffman*, 895 F.3d at 730 (quoting *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 501-02 (7th Cir. 2008).

Here, Petitioner's evidence shows that Zarate engaged in retaliatory and hostile acts against union supporters on several occasions. The evidence also indicates dissipation of employee participation in union activities and employee fear of retaliation and discrimination by Pacific Green. *See id.* at 728; *Frankl I*, 650 F.3d at 1363. Petitioner has therefore offered sufficient evidence of a likelihood of irreparable harm in the absence of an injunction.

C. Balance of Equities and Public Interest

As stated above, if a likelihood of irreparable harm and success on the merits is established, "the [Regional Director] will have established that preliminary relief is in the public interest," and there is considerable support for a finding that the equities weigh in favor of an injunction. *Frankl I*, 650 F.3d at 1365; *Coffman*, 895 F.3d at 729 ("[W]hen the 'Director makes a strong showing of likelihood of success and of likelihood of irreparable harm, the Director will have established that preliminary relief is in the public interest.'") (citation omitted). "In § 10(j) cases, the public interest is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Small*, 661 F.3d at 1197 (quoting *Frankl,* 650 F.3d at 1365). Nor has Pacific Green articulated any countervailing interest to justify denial of injunctive relief. The Court finds that "[w]ithout an injunction," Pacific Green "will have succeeded at least for now in its efforts to resist the union organizing effort." *Id.* at 1196.

Accordingly, the Court finds that the latter two factors of the preliminary injunction analysis also weigh in favor of granting injunctive relief.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Petition for Temporary Injunctive Relief Under Section 10(j).

Based upon the record, as well as the foregoing, it is **ORDERED, ADJUDGED AND DECREED**, that, pending final disposition of the matter now pending before the Board, Pacific Green, its officers, agents, supervisors, employees, attorneys, and all persons acting in concert or participation with it are hereby enjoined and restrained from:

(a) Threatening employees with job loss because they engage in protected union activity;

(b) Denying work to employees because they engage in protected union activity;

(c) Terminating employees because they engage in protected union activity;

(d) In any like or related matter interfering with employees in the exercise of their Section 7 rights.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matter herein now pending before the Board, Pacific Green, its officers, representatives, supervisors, agents, employees, attorneys, and all persons acting on its behalf or in participation with it, shall take the following affirmative steps **within five (5) business days** of the issuance of the Court's order:

(a) Offer, in writing, Ricardo Bonilla Colindres interim reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, displacing any employee who has taken his former position and shift, if necessary;

(b) Rescind and remove from Respondent's personnel files all references to the termination of Ricardo Bonilla Colindres, pending the final decision

of the Board, and notify him in writing that this has been done and that the discharge will not be used against him in any way;

(c) Post copies of this Order in English and Spanish at Pacific Green's facility, including all places where notices to its employees are customarily posted; maintain these postings during the pendency of the Board's administrative proceeding free from all obstructions and defacements; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to its facilities to monitor compliance with this posting requirement. Translation of this Order to Spanish shall be at Pacific Green's expense. The translation shall be approved by the Regional Director;

(d) **Within fifteen (15) days** of the issuance of this Order, hold a mandatory meeting or meetings, during work time at a time scheduled to ensure maximum employee attendance, at which this Order is to be read in English and Spanish to employees at Pacific Green's Wilmington, California facility by a responsible management official in the presence of a Board agent, or at Pacific Green's option, by a Board Agent in the presence of a responsible management official.

(e) **Within twenty (20) days** of the issuance of this Order, file with the Court and serve upon the Regional Director of Region 21 of the Board, a sworn affidavit from a responsible official describing with specificity the manner in which Pacific Green has complied with the terms of this Order, including how and when it posted the documents required by this Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall maintain continuing jurisdiction to enforce this Order. Petitioner must notify the Court no later than **ten (10) days** of the disposition of matters pending before the Board and seek an order dissolving the injunction and dismissing the Petition.

Petitioners must also file a report every **120 days** informing the Court about the status of Board proceedings.

IT IS SO ORDERED.

Dated: April 1, 2019

HONORABLE ANDRE BIROTTE JR.
UNITED STATES DISTRICT JUDGE