WORKER RIGHTS CONSORTIUM

WORKER RIGHTS CONSORTIUM ASSESSMENT PALERMO VILLA, INC. (MILWAUKEE, WI) FINDINGS, RECOMMENDATIONS AND STATUS

February 5, 2013

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I. Introduction

This report outlines the WRC's findings with respect to labor rights compliance by Palermo Villa, Inc. ("Palermo"). Based in Milwaukee, Wisconsin, Palermo manufactures frozen pizzas which are sold at supermarkets and other retailers nationwide.

Palermo is a supplier of frozen pizza bearing collegiate logos to Roundy's, a Milwaukee-headquartered supermarket chain that is a university licensee, and is party to purchasing agreements with several other WRC affiliate schools. Through its production for Roundy's of pizzas sold in packaging bearing university logos, Palermo is subject to university codes of conduct for trademark licensees. As reported on its website, Palermo also produces non-collegiate products for many other retailers, including Costco, Harris Teeter, Woodman's Market, Angelo Caputo's Fresh Market, and Berkot's Super Foods.

The WRC launched this inquiry in response to a complaint by a group of Palermo workers alleging that, in early June 2012, the company carried out a mass dismissal of employees, as well as other labor rights violations, in retaliation for the workers' effort to organize a union at the company's primary manufacturing facility in Milwaukee, Wisconsin. The workers who were terminated were engaged in a strike that began June 1, 2012.

As detailed below, the WRC's inquiry determined that, as alleged, Palermo has committed serious violations of worker rights and that these violations remain ongoing. Substantial evidence indicates that Palermo used an audit by U.S. Immigration and Customs Enforcement (ICE) as a pretext to terminate, on June 8, 2012, approximately 75 striking workers. Although it appears Palermo did not initiate the ICE audit, the company manipulated the audit process to thwart a unionization drive by shortening the period the company afforded employees to provide documents demonstrating work authorization and then terminating these and other workers eight days later for failing to do so.

Palermo fired these workers, even though ICE, acting pursuant to a federal inter-agency policy meant to prevent manipulation of its audits to undermine employees' labor law protections, had stayed its enforcement action in this case. As we discuss in this report, the timing of the dismissals immediately following the unionization drive, coupled with a range of other antiunion actions by this employer prior to the terminations – some of which themselves violate university codes – provide compelling evidence that the dismissals were the result of the company's antiunion animus, making them unlawful under both US and international labor standards.

Palermo has asserted that it was mandated to act as it did because of the ICE audit. However, this claim does not stand up to scrutiny. As noted, prior to the terminations, ICE had informed Palermo it was staying its enforcement activities at the worksite. Yet, despite this indication from ICE that immediate termination of these employees was not necessary, Palermo dismissed the 75 striking workers anyway.

As outlined below, through these actions Palermo violated provisions of university codes of conduct that protect workers' rights of freedom of association and collective bargaining. In interpreting these provisions, the WRC has analyzed Palermo's conduct with reference both to US labor law, namely the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, as well as the core standards of the International Labor Organization (ILO), the agency of the United Nations charged with defining and protecting the rights of workers – focusing on ILO Conventions 87 (Freedom of Association and Protection of the Right to Organize) and 98 (Right to Organize and Collective Bargaining). Under both bodies of jurisprudence, which overlap substantially but not completely with respect to the core issues in this case, Palermo has engaged in serious violations of worker rights.

This case centers on a key challenge in enforcing labor standards in low-wage sectors in the United States: the manipulation of the immigration enforcement process by employers to prevent employees from exercising their rights.[1] Workers experiencing substandard labor conditions are much less likely to complain about such practices if they fear that their employer will retaliate by reporting them to immigration authorities and then terminating them on the basis of suspected immigration violations – a dynamic that undermines labor standards for nearly all low-wage workers.[2]

Such reprisals remain common in certain low-wage sectors. A recent major survey of low-wage workers found that forty-three percent of workers who made a complaint to their employer or attempted to form a union experienced one or more forms of illegal retaliation, including threats to contact immigration authorities.[3]

As described further below, the federal government has sought to address this problem by creating a "firewall" between the immigration and labor enforcement processes. Most notably, these efforts have resulted in Memorandum of Understanding between the Departments of Homeland Security and Labor, establishing that ICE should refrain from worksite enforcement activities where a federal labor agency is investigating a labor dispute.[4]

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[1] For a review of key issues in this area, *see, e.g.*, REBECCA SMITH ET AL., NAT'L EMP'T LAW PROJECT, ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS (2009), *available at* http://www.nelp.org/page/-/Justice/ICED_OUT.pdf?nocdn=1.; DONALD M. KERWIN WITH KRISTEN MCCABE, MIGRATION POLICY INSTITUTE, LABOR STANDARDS ENFORCEMENT AND LOW-WAGE IMMIGRANTS: CREATING AN EFFECTIVE ENFORCEMENT SYSTEM (2011), *available at* http://www.migrationpolicy.org/pubs/laborstandards-2011.pdf.

[2] As the U.S. Supreme Court has stated, "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976).

[3] ANNETTE BERNHARDT ET AL., NAT'L EMP'T LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 25 (2009), *available at* http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

[4] Revised Memorandum of Understanding between Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011) [hereinafter, Memorandum of Understanding between Departments of Homeland Security and Labor], *available at* http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf.

In this case, pursuant to this Memorandum of Understanding, ICE stayed its audit of employee I-9 forms at Palermo's Milwaukee facility after being notified of allegations that Palermo was using the audit to defeat a unionization drive. Palermo's decision to nevertheless terminate its striking workers thus not only constituted a serious violation of its employees' rights of freedom of association and self-organization, but also flew in the face of an important federal policy designed to prevent just this sort of manipulation of the immigration enforcement process.

This report concludes with a series of recommendations for corrective action. In brief summary, the company must take two key steps to comply with university codes of conduct. First, Palermo must promptly reinstate the striking employees it terminated or permanently replaced employees, with full back pay. If ICE later lifts its stay, the company should comply with its directives in a non-retaliatory fashion at that time, affording the affected employees all opportunities to establish their authorization to work that the agency permits.

Second, as outlined further below, the company should recognize the results of an independent review of the union's claim of majority representation. If such a review finds that a majority of the plant's workers supported unionization at the time the union petitioned it for recognition – prior to the company's retaliatory dismissals and other violations of their associational rights – the company should negotiate in good faith with the union toward a collective bargaining agreement.

II. Allegations Assessed in this Report

This report assesses the following factual allegations:

- Palermo retaliated against workers who sought to form a union, using an ongoing ICE audit as a pretext. Specifically, it is alleged that:
    - Immediately following employees' request for union representation and filing of a representation petition with the National Labor Relations Board (NLRB), Palermo shortened the period it had stated it was affording employees to produce documents to re-verify their work authorization from twenty-right to ten days on the pretext that ICE allegedly required the company to do so. Palermo calculated this ten day time period from the original notice, so that it actually gave workers only eight days to produce their documents.
    - At the end of this eight day period, Palermo discharged approximately 75 striking employees on the ground that the employees' work authorization had been called into question by an ICE investigation, even though ICE had already stayed enforcement of its investigation.

- Palermo permanently replaced a group of approximately thirty striking employees whose work authorization was not in question.

- Palermo engaged in other acts of harassment, intimidation and threatening of employees that violated these workers' rights of freedom of association.

III. Sources of Evidence

The findings presented here are based on the following sources of evidence:

- In-depth offsite interviews with sixteen Palermo employees, and review of sworn affidavits by an additional nine employees.

- A substantial review of relevant documents, including written communications from Palermo, Palermo's employees and their union representatives, Immigrant and Customs Enforcement, and the NLRB; and additional affidavits from relevant witnesses.

- An interview with Chris Dresselhuys, Director of Marketing for Palermo Villa, Inc.

- A review of relevant immigration and labor law and administrative policies, including those of U.S. Immigration and Customs Enforcement.

IV. Findings

A. Summary of Factual Findings

This section outlines key factual findings of the WRC's inquiry in the order that the events we find to have taken place occurred. Some additional facts are presented in the sections that follow this one.

In approximately 2008, workers at the Palermo facility in Milwaukee contacted a community organization, *Voces de la Frontera* ("Voces"), that advocates for the rights of immigrant and low-wage workers. Workers reported to the WRC that they sought the organization's help to address a number of problems at the facility, including what workers believed were unreasonable production pressures, low wages, discrimination against Latino workers in work assignments, yelling and other disrespectful treatment by supervisors, and unsafe working conditions. On at least five occasions between 2008 and 2011, Voces supported concerted activities by Palermo's workers to improve conditions at the company by sending Palermo petitions that had been signed by workers and by meeting with Palermo management on their behalf.

Unsafe working conditions were a particular concern of the employees. A number of workers reported suffering frequent slips and falls on wet flooring as they rushed to meet production quotas. As one worker recalled, "There was always tremendous pressure to

deliver production. You were running around from being pressured, and you would fall down. … I fell three or four times." Workers also complained of instances when workers' fingers were cut or partially severed as they rushed to push pizza dough through a cutting machine or remove packaging material from malfunctioning machinery.[5]

Workers also reported frustration with a Palermo policy linking employee bonuses to departmental accident rates. As one worker recalled:

> When you reported an accident, they [the supervisors] would comment, "Now you're going to lose the bonus." … In the final months [before the employees went on strike], they shamed us publicly in meetings, saying, "This person fell down, slipped or whatever and, because of that, you won't get a bonus."

As a result of this pressure, workers believed, many accidents went unreported and safety hazards went uncorrected.

In December 2011, Palermo workers, with the support of Voces' staff, began taking initial steps towards organizing a union at the facility. Although, because of fear of possible retaliation by the company, the Palermo workers and Voces attempted to organize clandestinely, by late May 2012, it was clear Palermo management had learned of their activities.

During the week of May 21, Palermo management posted a large notice in Spanish near the main entrance to the facility, with the title, "The Perspective of Palermo's Concerning External Organizations."[6] As discussed below, the poster stated that unionization would have negative consequences for workers by harming employee-management relations and would result in employees losing existing benefits.[7] In the same week, the company notified Voces that it must direct any further communications to Palermo to Robert Simandl, an attorney at the firm of Jackson Lewis LLP, which specializes in helping employers prevent their employees from unionizing.

On Sunday, May 27, 2012, a group of approximately 80 Palermo workers held a meeting at Voces' office at which they decided to collect signatures from their fellow employees

[5] See, e.g., Kaufman, Greg, "This Week in Poverty: 'Respect the Worker.'" *The Nation*, August 3, 2012. Available at http://www.thenation.com/blog/169218/week-poverty-respect-worker.
[6] WRC translation of original text in Spanish.
[7] The company claims that it posted this notice because it also was required by the NLRB to post a notice informing employees of their NLRA rights, and it, therefore, decided to, at the same time, inform employees of its views on unionization. However, although the NLRB had adopted a rule requiring employers whose employees are covered by the NLRA to post such a notice, its implementation was enjoined by the D.C. Court of Appeals in April 2012, before it ever went into effect – and more than a month prior to Palermo's posting of its anti-union notice. *See*, NLRB, "NLRB Chairman Mark Gaston Pearce on recent decisions regarding employee rights posting" (news release) (Apr. 17, 2012), http://www.nlrb.gov/news/nlrb-chairman-mark-gaston-pearce-recent-decisions-regarding-employee-rights-posting. Since, as discussed above, at the time of its posting its anti-union notice, Palermo had retained sophisticated outside counsel specializing in labor and employment issues, it is implausible that the company was under the mistaken belief that the NLRB rule had been implemented.

on a petition authorizing representation of the workers by an independent labor organization, the Palermo Workers Union. All or virtually all of the workers in attendance signed the petition. During this meeting, the attendees made a plan to gather additional signatures over the next several days in order to demonstrate to the company's management that the union represented a majority of the facility's workers. Workers also signed a petition at the meeting protesting the company's poster concerning "external organizations," as well as perceived discrimination against Latino workers.

The following day, May 28, Voces faxed the workers' petition to the office of the company's labor attorney, Simandl. On the same day Voces also faxed to Simandl's office a letter signed by eight local community leaders, including clergy and elected officials, expressing concern that their constituents might be subjected to disciplinary action for exercising protected rights, and requesting a meeting with the company to discuss this issue.

On the next day, May 29, Palermo management distributed letters to approximately 90 workers stating that an audit by Immigration and Customs Enforcement had found discrepancies in the information contained in the I-9 Employment Eligibility Verification forms completed at the employees' time of hire. The letter stated that Palermo was therefore requiring that each worker re-verify his or her authorization to work in the United States within twenty-eight days by submitting certain documents identified in the letter.[8]

Additionally, employees reported that on the same day at least fifty workers from a temporary employment agency, BG Staffing, were present at the facility. The company had been steadily increasing its roster of temporary workers over the prior several weeks and had brought in a substantial additional number of such workers on this day. Palermo management informed some of its own employees that they were responsible for training these temporary workers. As one employee recalled, "They [the managers] just told us that we had to teach those who would were going to replace us or about to join [the facility's workforce], so that everyone knew the job." While Palermo previously had used temporary workers from BG Staffing and other employment agencies to meet production needs, the number of such workers who were present on this day was much greater than was normal.

On the afternoon of May 29, 2012, a delegation of workers delivered a petition to Palermo management requesting that the company recognize the Palermo Workers Union as the exclusive representative of the workforce for the purposes of collective bargaining. The workers also presented the above-mentioned petition protesting the company's posting of the notice opposing unionization and anti-Latino discrimination. Management responded to the workers' petition with hostility. Multiple witnesses reported that Giacomo Fallucca, one of the owners of the company, stated that a union would cost the

[8] The letter ICE sent to Palermo informing it that these employees' work authorization documents had been found to be suspect did not specify such any such timeline. *See*, Letter from ICE Special Agent Stilling to Palermo COO Angelo Fallucca ("Notice of Suspect Documents") (May 10, 2012).

company thousands of dollars and that the company would not accept it.[9] Subsequently, on the same day, the union submitted to the offices of Region 30 of the NLRB a representation petition and authorization cards, which the union attests had been signed by roughly 75 percent of the plant's workers.[10]

Shortly after this meeting, many of the facility's workers began a work stoppage. First, a large group of employees from the first shift left the factory and gathered in front of the plant; following this, employees from the second shift refused to enter to begin their shifts. At approximately 3:00 p.m., Mike Walsh, Palermo's Vice President of Operations, reportedly addressed the gathered workers, who numbered approximately 100, yelling, "If you don't come inside, you're fired." Ultimately, in order to end the work stoppage, Palermo management announced it would send home the temporary workers, but did not agree to recognize the union or alter the requirement that workers re-verify their legal authorization to work within 28 days.

On the afternoon of May 30, a delegation of local clergy, elected officials, and Voces' staff met at the Milwaukee Athletic Club with Palermo management and its labor counsel, Simandl. During this meeting, the company informed the delegation that earlier that same morning the company had met with ICE and that ICE had ordered the company to shorten the period for the workers to re-verifiy their work authorization from twenty-eight to ten days. The company claimed that it had pressed ICE to provide workers a year to re-verify their documents, but that ICE would not agree to this.

Maria Somma, a representative of the United Steelworkers union (USW), which has supported Voces and the Palermo Workers Union, testified in an affidavit that after learning of these statements by Palermo, she called the ICE special agent in charge of the case, Jeffrey Stillings, and asked him whether ICE had, in fact, directed Palermo to give the employees only ten days to re-verify their immigration status. According to Somma, Stillings informed her that ICE had *not* given Palermo any deadline for re-verification, much less one of ten days.[11] As part of its investigation into this case, the WRC contacted Stillings in January 2013 to confirm whether Somma's account of this conversation was accurate, but Stillings declined to make any statement regarding the case.

The next day, May 31, Palermo issued new letters to employees stating that they now had only ten days to submit documentation re-verifying their authorization to work. These letters indicated that workers had to submit this documentation by June 8, thus actually giving the workers only eight days from the date of receipt to comply.

On the morning of June 1, large numbers of temporary workers were again present at the facility. At approximately 8:00 a.m., Palermo employees began a strike. Later that day, the workers' newly-formed union filed an unfair labor practice charge with Region 30 of the NLRB, stating that the workers were striking to protest unfair labor practices that it

[9] Palermo denies that Giacomo Falluca made this statement.
[10] The WRC has not reviewed these cards or the petition.
[11] Affidavit of Maria Somma (June 27, 2012).

alleged the company had committed in response to the unionization effort. The charges alleged, among other things, that the company had brought in the temporary workers in order to stoke fears of retaliatory dismissal among employees and that its acceleration of the deadline for re-verification was intended to retaliate against employees for forming a union.

Shortly after the strike began, a number of workers who were already working in the facility on the morning of sought to leave the facility to join their striking co-workers who had gathered outside the building. Palermo managers, however, physically blocked the main exit as well as at least one emergency exit so that workers could not leave without engaging in a confrontation with their supervisors. These managers told workers that they must return to work.

One worker, who did exit the facility, reported that as he was trying to leave through an emergency exit, a manager grabbed his shirtsleeve and told him that if he left he would be fired. Palermo denies that this incident occurred.

On or around June 2, Palermo sent letters to approximately 30 of the striking workers informing them that the company was permanently replacing them and/or considered them to have resigned. Reportedly, most or all of the workers who received these letters were employees who had not received letters requesting that they re-verify their authorization to work, suggesting that the company's intention was to target those among the striking employees whom it was not already planning to dismiss on account of their being listed in ICE's Notice of Suspect Documents letter.

On June 7, the Division of Operations Management of the NLRB made a request to ICE that it suspend its workplace enforcement activities at Palermo in order to enable the NLRB to complete its review of unfair labor practice charges that had been submitted by the union following the incidents of the previous week. The request was made pursuant to an ICE policy, established under the previously-noted Memorandum of Understanding between the Departments of Homeland Security and Labor, which provides that ICE shall refrain from worksite enforcement activities where there is a labor dispute involving workers' exercise of the right to "form, join, or assist a labor organization."[12] The express purpose of this policy is to prevent the "inappropriate manipulation" of the immigration enforcement process to undermine effective enforcement of federal labor laws.[13]

ICE promptly agreed to the NLRB's June 7 request. On the same day, ICE sent a single-sentence letter to Palermo's immigration counsel stating, "At this time, ICE will stay further action on its Notice of Suspect Documents."[14]

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[12] Revised Memorandum of Understanding between Departments of Homeland Security and Labor, *supra* note 4. Although the NLRB is not formally a party to the Memorandum, it apparently appealed to the policy of the agreement, which as noted, is designed to effectuate core NLRA rights.
[13] *Id.*
[14] *See* Letter from Immigration and Customs Enforcement Deputy Chief Counsel, John Gountanis, June 7, 2012.

Nevertheless, on the following day, June 8, Palermo issued letters to a number of workers stating that they had failed to provide documents demonstrating authorization to work and, accordingly, were being terminated with immediate effect. Of the workers who received these termination notices, the great majority – approximately 75 employees – were participants in the ongoing strike. Workers received these letters by mail on June 10 and 11.

On June 10, the Palermo Workers Union faxed and hand-delivered a letter to Palermo conveying that, based on the assurance provided by ICE's decision to stay its enforcement action at Palermo, the union was offering to unconditionally end the strike, direct all participating workers to return to work, and request that the unfair labor practice charges it had filed with the NLRB be dismissed with prejudice, provided that Palermo suspend its request that employees re-submit their immigration documents for inspection and that all striking workers be permitted to return to work. Palermo declined to accept this proposal.

Subsequent to these terminations, Palermo repeatedly communicated to the remaining workforce its hostility toward worker organizing. In late June and early July, Palermo management distributed a leaflet to employees, in both English and Spanish, that urged workers to "Vote No to the Union" and stated, "What do unions give you? Dues. Fees. Fines. Strikes." A notice that the company distributed to workers in their paychecks said that, "unions want to take your job and give them to protesters" and that "the picketers are not coming back." The notice also directed workers that, "if union supporters come to your home," employees should "ask them to leave." In June, the company posted a banner at the facility stating that, "a union will not change your immigration status." Workers also report that managers repeatedly expressed their hostility to the union during mandatory meetings with employees inside the plant.

B. Violations

This section outlines the WRC's findings with respect to alleged violations of university codes of conduct.

1. Use of Immigration Audit as Pretext to Retaliate Against Workers' Exercise of Freedom of Association

a. Applicable Standards Under US and International Law

University codes of conduct require licensees and their suppliers to recognize and respect the right of employees to freedom of association and collective bargaining[15] and to abide

[15] For example, the Collegiate Licensing Company's Special Agreement Regarding Labor Codes of Conduct ("CLC Code of Conduct"), to which the University of Wisconsin-Madison's licensees, including Roundy's, are contractually bound, states at its Section II (B) (9), "Freedom of Association and Collective Bargaining: Licensees shall recognize and respect the right of employees to freedom of association and collective bargaining." CLC Code of Conduct (Jan. 2008).

by all national laws.[16] With respect to the alleged violations assessed in this report, these rights and obligations are further elaborated in applicable US laws and international labor standards.

Under US labor law, the right to form or join a union is protected by Section 8(a)(3) of the NLRA which makes it unlawful for an employer to discourage or encourage membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment."[17] The critical factor in determining whether such unlawful discrimination has occurred is employer motivation. To prove unlawful motivation, a prima facie case, shown by a preponderance of evidence, must be made that is "sufficient to support the inference that protected conduct [union activity] was a 'motivating factor' in the employer's decision."[18] It must be shown that workers engaged in union activities and/or other protected concerted activities, that the employer had knowledge of these activities, and that the employer took adverse employment actions against the workers because of the activity.[19] Once this showing is made, the burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct."[20]

Applicable international labor standards likewise prohibit discrimination with respect to employment where antiunion animus is a motivating factor. ILO Convention 98, which applies to all ILO member states, including the United States,[21] states that "workers shall enjoy adequate protection against acts of antiunion discrimination in respect of their employment. . . . Such protection shall apply more particularly in respect of acts calculated to … b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities."[22] ILO Convention 87, also applicable to the United States, provides that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."[23]

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[16] Id. at § II (A) ("Licensees must comply with all applicable legal requirements of the country(ies) of manufacture in conducting business related to or involving the production or sale of Licensed Articles…[but] [w]here there are difference or conflict between the Code and the laws of the countries of manufacture, the higher standard shall prevail . . . .").
[17] 23 U.S.C. § 158(a)3.
[18] *Wright Line*, 251 NLRB 1083 (1980), enforced, NLRB v. *Wright Line, a Division of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).
[19] *La Goria Oil & Gas*, 337 NLRB 1120, 1123 (2003).
[20] *Wright Line*, 251 NLRB at 1089.
[21] *See*, ILO Declaration on Fundamental Principles and Rights at Work (1998) ("All Member[States] , even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions,"), *available at:* http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.
[22] International Labor Organization, Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (No. 98), Art. 1(1).
[23] International Labor Organization, Convention Concerning Freedom of Association and Protection of the Right to Organize, 1948 (No. 87), Art. 2.

The WRC has examined Palermo's conduct in reference to the NLRA in order to determine compliance with the requirement under university codes of conduct that suppliers to university licensees abide by all national labor laws, but in reference to ILO Conventions 87 and 98 with respect to assessing suppliers' compliance with the freestanding freedom of association provisions of university codes of conduct.[24]

b. Antiunion Animus as a Motivating Factor Behind Palermo's Conduct

There is no doubt that Palermo workers engaged in protected concerted activity when they, among other actions, launched a union organizing campaign in December 2011, submitted authorization cards on May 29, 2012, and went on strike on June 1, 2012. Palermo management claims that it was unaware of the unionization effort until the workers presented authorization cards to the NLRB; however, this strains credulity. Palermo management posted a notice in the facility concerning unionization on May 21 and, in the same week, instructed Voces to direct all communication concerning its employees to a law firm that specializes in preventing unionization efforts. There can be little doubt, in light of these actions, that management had knowledge of the unionization effort prior to May 29.[25] There is also no doubt that Palermo management took actions adverse to workers by substantially curtailing the time it afforded them to submit new authorization documents and then terminating them for failing to do so.

The remaining question is whether Palermo's acceleration of the deadline for submission of new documents and its subsequent mass termination of workers who failed to provide them were substantially motivated by the company's hostility to unionization. Substantial evidence indicates that such hostility was indeed the key motivator of the company's conduct.

First, the timing of Palermo's actions strongly supports an inference of antiunion animus. The company issued its letters shortening the deadline for re-verification immediately following concerted activities by workers related to unionization. As detailed above, employees staged a work stoppage at the company and made a request to the company for union recognition on May 29. The very next day, May 30, Palermo announced it was shortening the period afforded to workers to submit work authorization documents from 28 to 10 days. It then terminated 75 workers on June 8, despite, as discussed further below, ICE's announcement the previous day that the agency was suspending its investigation. Absent a compelling explanation, this chronology is strong circumstantial evidence that the company's conduct with regard to requiring submission of work authorization documents was related to the workers' concerted activities.

Second, this conclusion is further buttressed by statements made by Palermo management evincing an antiunion attitude. As discussed above, Palermo openly made its antiunion views known to its employees when it placed the poster entitled "The Perspective of Palermo's Concerning External Organizations" in a prominent location near the entrance

[24] See discussion, *infra*, at 20, n. 51.
[25] *See*, *supra*, at 5, n. 6.

to the facility in mid-May. The poster's text begins with the following: "Palermo's believes it is important that that its employees understand the position of the Company concerning external organizations and the ways that these organizations can negatively impact the work environment at Palermo and the relations between employees and management." (WRC translation) The poster, which makes clear that by "external organizations" it means labor unions, goes on to convey a series of antiunion messages, including that joining such organizations could cause workers to lose vacation days or be forced to pay dues, while having no voice over how this money would be used. Also as noted above, Palermo has subsequently continued to make such statements and to express its hostility to unionization.

Third, Palermo's hostility toward unionization is reflected in the company's retention of Jackson Lewis, a New York-based law firm with a longstanding reputation for advising employers in the use of aggressive tactics to defeat workers' unionization drives. It has published articles with such titles as "Inoculate Your Employees to the Union Virus Early," which encourages managers to treat unions as if they were "contagious diseases."[26] An academic article describing the firm's activities states:

> Since 2001, the firm has been running seminars titled, 'Union Avoidance War Games'. Alongside a graphic of a bomb dropping, the seminar brochure warns employers not to be "lulled into a false sense of security — this is war." It states that participants will experience "first-hand the battlefield conditions of union organizing," and suggests that, when dealing with the union 'threat', "War is hel . . . pful."[27]

While the firm states that it counsels employers to use only lawful tactics, it has been accused of encouraging its clients to engage in unlawful behavior. The *New York Times,* for example, in 2003, chronicled a case in which a South Carolina battery manufacturer, which Jackson Lewis had advised, "accus[ed] it [the law firm] of malpractice, including misleading federal investigators, giving illegal assistance to [an employee] and engineering 'a relentless and unlawful campaign to oust the union.'"[28] The company had been forced to pay $7.75 million to settle NLRB charges and union lawsuits arising from a lengthy antiunion campaign directed by Jackson Lewis.

As discussed above, Palermo retained Robert Simandl, a Jackson Lewis lawyer based in Milwaukee, as its labor counsel. Simandl's online profile notes his "extensive experience in advising employers in … maintaining union-free status."[29] If nothing else, Palermo's

[26] Jackson Lewis, "Inoculate Your Employees to the Union Virus Early," September 19, 2003, http://www.jacksonlewis.com/resources.php?NewsID=474 (last accessed January 7, 2012).
[27] John Logan, "The Union Avoidance Industry in the U.S.," British Journal of Industrial Relations, 44:4 (2006), 651–675, 659; see also Jackson Lewis, "War is Hel...pful: Union Avoidance Training," July 7, 2001, http://www.jacksonlewis.com/resources.php?NewsID=237 (last accessed January 7, 2012).
[28] Steven Greenhouse, "How Do You Drive Out a Union? South Carolina Factory Provides a Textbook Case," *New York Times* (Dec. 14, 2004), http://www.nytimes.com/2004/12/14/national/14union.html?_r=0.
[29] Jackson Lewis, Profile of Mark Simandl, http://www.jacksonlewis.com/people.php?PeopleID=1916 (last accessed September 8, 2012).

hiring of Jackson Lewis clearly showed the company's intent to prevent its employees from unionizing.

Fourth, Palermo management's response to the unionization effort and workers' protest activities included a pattern of conduct plainly calculated to dissuade or prevent workers from exercising their associational rights, and portions of which, in themselves, constituted unfair labor practices. This included the following acts:

- During the week of May 21, as noted above, a manager told a worker that she should not speak to her coworkers concerning workplace issues.

- On May 29, in response to the workers' petition for union recognition, Palermo manager Giacomo Falluca made statements implying that unionization would be futile because the company would not accept higher costs in a collective bargaining agreement. On the same day another manager said that the company would never negotiate with workers who were on strike.

- On the same day, manager Walsh told workers that if they did not abandon their work stoppage and return to work, they would be fired.

- On the morning of June 1, when workers sought to leave the factory to join their co-workers who had just gone on strike, managers blocked the exit and at least one emergency exit to obstruct workers attempting to leave. When one worker attempted to leave through an emergency exit, Walsh grabbed the workers' shirt and told him that if he left he would be fired. Attempting to physically prevent workers from leaving the workplace to participate in a strike is an obvious violation of workers' freedom of association.

- Subsequently, Palermo and/or staffing agencies working at its direction refused to allow eight striking workers whose names did not appear in ICE's Notice of Suspect Documents to return to work. These employees included at least two temporary workers employed by BG Staffing who were informed that they could no longer work at Palermo because they had participated in the strike.[30]

As discussed further below, it is well established that workers' rights of freedom of association is violated when employers assert that unionization will be futile because employers will not bargain with employees in good faith, threaten that any employees

[30] Palermo apparently maintains the right to control the terms and conditions of employment of the temporary workers, including the authority to hire, fire, discipline, supervise, and direct them. In this case, moreover, the evidence indicates Palermo specifically ordered the workers' termination in view of its belief that the workers participated in the strike. Accordingly, Palermo is responsible as a joint employer of the workers for unfair labor practices committed against the temporary worker described here and any other similarly situated workers. *See, e.g, Chesapeake Foods*, 308 NLRB 711 (1992) (establishing joint employer standard for NLRA). As noted, Region 30 of the NLRB informed the union that it reached the same conclusion – that Palermo is liable as a joint employer – with respect to the termination of the temporary workers in question.

who strike will be fired, physically prevent workers from participating in a strike, or refuse to allow striking employees who make an unconditional attempt to return to work to actually do so. Indeed, the regional office of the NLRB informed the union on November 21, 2012, that its investigation found that each of the actions by Palermo that are described above violated workers' rights under the NLRA and that it planned to issue a complaint against the company based on the charges the union had filed with the Board concerning these incidents.[31] These actions likewise constitute violations of applicable university codes of conduct protecting the rights of employees to freedom of association and collect bargaining.

In sum, in view of the factors described above – the timing of Palermo's conduct immediately following the unionization drive, its statements to the workforce conveying antiunion views, its retention of a firm that specializes in defeating union organizing drives, and its unlawful acts threatening statements and retaliatory terminations – there is a strong basis to infer that when the company sharply curtailed the opportunity for employees to provide documents verifying their authorization to work and then terminated workers en masse eight days later for failing to do so, it was motivated substantially by antiunion hostility.

c. Palermo's Justification for Terminating Employee Union Supporters

As discussed above, under US labor law, once evidence is shown that an employer likely took adverse action against an employee due to antiunion animus, the burden shifts to the employer to rebut this evidence by demonstrating that it would have taken the same actions even in the absence of the employee's exercise of freedom of association.[32]

Palermo claims that it terminated the workers as a result of the ICE audit, because the company would have faced criminal penalties and fines if it did not so act. However, this claim is not supported by the facts.

[31] The union's brief to the NLRB general counsel, appealing the regional office's partial dismissal of its charges, filed December 13, 2012, states at page 8: "On November 21, after investigating the Union's charge, an investigator for the Regional Director of Region 30 orally informed the Union that he planned to issue complaint on the following portions of the charge, finding that Palermo had: (a) On May 29, communicated to workers that it would be futile to join a union; b) on June 1 communicated to workers that they would be terminated for engaging in concerted activity, including the strike which commenced on the that date; c) on June 1 physically prevented employees from leaving the plant to join the picket line in front of the plant; d) on June 4 and other dates created the impression of surveilling workers by stating it had kept lists of workers supporting union activities; f) discriminated against at least six striking workers who made unconditional offers to return-to-work, and g) acted as joint employer with the temporary staffing agency, BG Staffing, in discriminating against at least two BG employees who were terminated for supporting the Union's activities." According to press reports, Palermo is in the process of negotiating a settlement of these charges with the NLRB, but the NLRB will not conclude such a settlement until an appeal concerning other unfair labor practice charges upon which the Board did not issue a complaint is resolved. *See* Georgia Pabst, "Palermo's, NLRB Negotiating Limited Settlement," *Milwaukee, Wisconsin Journal Sentinel* (Dec. 4, 2012), http://www.jsonline.com/news/milwaukee/palermos-nlrb-negotiating-limited-settlement-ho7tgct-182063891.html.

[32] *Wright Line*, 251 NLRB at 1089.

Indeed, at the time Palermo terminated the workers, ICE had already informed the company that it had, in fact, suspended its investigation. As discussed above, after receiving the union's unfair labor practice charges, the NLRB requested that ICE stay its investigation pending their resolution. In response to this request, on June 7, ICE informed Palermo in writing that it was "stay[ing] further action on its Notice of Suspect Documents." [33] Yet the very next day, Palermo issued letters terminating the employment of approximately 75 striking workers. In view of ICE's notice that it was suspending its investigation, Palermo's claim that it was obligated to terminate the workers lest it face imminent criminal sanctions is not credible.

Additionally, when announcing its decision to shorten the time frame it granted workers for re-verifying their work authorization, Palermo provided what appears to be a false explanation for its actions. As noted above, on May 31, having the previous day issued letters to employees requiring submission of new documents within 28 days, Palermo told a delegation of clergy, elected representatives, and Voces staff that it had just met, that same morning, with representatives of ICE who, the company claimed, had mandated that Palermo give employees only ten days to verify their authority to work. Palermo announced it was therefore shortening the time employees had to re-verify accordingly. This explanation, that ICE representatives informed Palermo that it only had ten days for employees to re-verify their work authorizations, was repeated by company representatives to the WRC.

As discussed above, however, Somma, the USW representative, indicated in a sworn affidavit that on May 30 she spoke with ICE Special Agent Stillings, who was in charge of the case, and told her that ICE had *not* directed Palermo to give the employees only 10 days to re-verify their status. [34] According to Somma, Stillings informed her that ICE had not given Palermo a new ten-day deadline or any other deadline.[35] He stated that Palermo was not a high priority case for ICE and stated further that any deadline imposed came from the employer itself (Palermo).[36] Consistent with Somma's account of her conversation with Stillings, the Notice of Suspect Documents issued by ICE to Palermo makes no reference to a 10-day deadline or any other deadline.[37]

A possibly different account of the company's motive for shortening the deadline, and terminating striking employees who failed to meet it, appears in a letter issued by the NLRB Regional Office, which, finding these actions to be non-retaliatory, declined to issue an unfair labor practice complaint on these grounds (though it informed the union it

[33] *See,* Letter to Palermo attorney Benjamin Kurten from ICE Deputy Chief Counsel, John Gountanis (Jun. 7, 2012).
[34] Affidavit of Maria Somma (June 27, 2012). While Somma's affidavit is hearsay as to whether or not Special Agent Stillings made these statements to her, this account of ICE's position are consistent with ICE's written communications with the company and therefore probative to some degree. *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997) (stating that hearsay evidence may be considered "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence").
[35] Ibid.
[36] Ibid.
[37] Notice of Suspect Documents, *supra*, n. 7.

would issue a complaint with respect to other the charges which we have discussed).[38] The Regional Office stated that on or about May 29, Palermo learned that ICE has a policy of presuming that all re-verifications that occur within ten days of the receipt of a Notice of Suspect Documents (NSD) are filed timely, and, therefore, in order to secure the 'safe harbor' of this presumption, Palermo needed to shorten the re-verification period from twenty-eight to ten days. [39] The Regional office's letter does not specify whether Palermo claimed to have learned this from ICE directly, as the company has claimed, or from another source. The Regional Office also cites "on or around May 29" as the date when Palermo learned of this policy, while Palermo stated that it was told of the policy by ICE on May 30.

A review by the WRC of publicly accessible ICE policy documents found no evidence that the agency actually has such a policy.[40] Given the lack of documentary evidence, in either the NSD letter or in ICE's public guidance documents, to support Palermo's claim as to its motive for shortening the timeline, along with the sworn affidavit from USW representative Somma that the ICE agent in charge denied having communicated one, the WRC concludes that Palermo shortened the timeline for its own retaliatory purposes, rather than to secure a presumptive safe harbor from sanction by ICE.

As noted above, the NLRB Regional Office reached the opposite conclusion from the one we reach here concerning Palermo's motivation for shortening the re-verification deadline. It also concluded that the company's decision to terminate workers for failing to re-verify their work authorizations, even though ICE had stayed its investigation, similarly lacked retaliatory motive. For this reason, although the Regional Office informed the union that it would issue an unfair labor practices complaint with respect to other charges the union had brought, it would not do so concerning these two key issues.[41]

The NLRB Regional Office concluded that Palermo's decision to proceed with the terminations even after ICE had issued its stay was motivated by the fact that the stay "did not relieve the Employer of its general obligations under immigration law" or "provide any temporary work authorizations to the employees named in the NSD or shield the Employer from any civil or criminal liability for employing [them]. . . ." In the Regional Office's view, then, Palermo would have terminated the employees named in the NSD, even after the stay was issued, in order to avoid legal liability for employing possibly unauthorized workers, even absent any interest on the company's part in punishing workers who had gone on strike and were demanding recognition of a union.

The Regional Office's conclusion as to Palermo's decision-making, however, lacks logical consistency and contradicts the company's own claims as to its motives. The only

[38] Notification of Partial Dismissal of Charges, supra note 32.
[39] National Labor Relations Board, Region 30, Notification of Partial Dismissal of Charges (Case 30-CA-082300), Nov. 29, 2012.
[40] *See, e.g.,* ICE Fact Sheet: Form I-9 Inspection Overview, *available at* http://www.ice.gov/news/library/factsheets/i9-inspection.htm.
[41] Notification of Partial Dismissal of Charges, supra note 32.

entity empowered to take action which could result in legal liability for the company if Palermo did not dismiss the employees named in the NSD was ICE, itself – which, as noted, already had stayed such action.

The purpose of a stay is to suspend proceedings in one matter, here, the ICE enforcement action, until proceedings in another matter, in this case the adjudication of unfair labor practice charges filed by the union, are adjudicated.[42] The effect of ICE's stay, then, was, in effect, to 'stop the clock' on ICE's enforcement proceedings under the NSD letter. This meant that even *if* Palermo originally *had* reason to believe that it only had until June 8 to have employees re-verify their work authorizations, it no longer had reason to believe this once the stay was issued on June 7.

In other words, even if one accepts the company's claims about the ten-day deadline at face value, Palermo still has no grounds for asserting that it would have incurred a risk of sanction by ICE if it had failed to dismiss the workers on the NSD list who had not yet re-verified on June 8. Indeed, after June 7, the only way Palermo could have been subject to sanctions by ICE is if the agency *did* lift the stay and re-initiate its enforcement proceedings. At that point, however, Palermo presumably would still have the opportunity to dismiss the workers who failed to re-verify their documents in order to avoid sanctions from ICE.

Indeed, the only scenario under which the Regional Office's reasoning makes sense – and Palermo actually believed it would have risked legal sanction by failing to proceed with the terminations on June 8 – is one in which we must assume that ICE somehow would have later played 'gotcha' with the company and, upon lifting its stay, then sought to punish Palermo for *not* dismissing the employees under the NSD letter while ICE's stay was in effect.[43] Because Palermo's management was counseled by a large and sophisticated law firm, which is well-versed in the DOL-ICE MOU under which the stay was issued, and the policy it is intended to further,[44] it is not plausible that Palermo would have construed the stay in this fashion.

Since Palermo did not actually face any immediate risk of sanctions from ICE if it did not proceed with the terminations, the key question is whether Palermo would still have done

[42] *Cf., In re Montoya*, 965 F.2d 554, 556 (7th Cir. 1992) (noting that effect of automatic stay of creditor actions against debtor in bankruptcy extends statute of limitations for such action until a minimum of thirty days until after stay is issued).

[43] If a stay of enforcement activities by ICE leaves an employer still able to claim that by not taking action against employees, while ICE's stay is in effect, it risks incurring additional liability after the stay is lifted, then the intended prophylactic effect of the stay is largely negated. This would incentivize precisely the type of employer misbehavior the ICE-DOL MOU is intended to prevent – "manipulat[ion of] its worksite enforcement activities for illicit or improper purposes." ICE-DOL MOU at 2.

[44] Minnie Fu, "Civil Worksite Enforcement Agreement Between Department of Labor and Department of Homeland Security," *Immigration Blog* (Jackson Lewis: Apr. 5, 2011) (article by Jackson Lewis attorney on law firm-published blog discussing DOL-ICE MOU under which ICE "agreed that . . . it would refrain from engaging in civil worksite enforcement at a worksite if there is an existing DOL investigation of a labor dispute"), http://www.globalimmigrationblog.com/2011/04/articles/us-immigration/civil-worksite-enforcement-agreement-between-department-of-labor-and-department-of-homeland-security/.

so, were it not for the fact that these same employees were then engaging in union activities. It is difficult to believe that Palermo, which was not, at the time, facing any immediate sanction compelling such action, would terminate roughly a third of its production force, including, by the company's admission,[45] many long-term employees, and exacerbate a very serious labor dispute, without some other powerful motive.

The WRC concludes that this motive was the company's demonstrated hostility to its workers' exercise of freedom of association, as evidenced by the totality of the company's other conduct up to and following the decision to terminate these employees. Recognizing that the stay meant that ICE's investigation would be put on hold, and that the NLRB's investigation of unfair labor practices would move forward, the company took immediate and deliberate action, under the cover of compliance with the immigration authorities, to rid itself of workers who were seeking to form a union.

Because we find that retaliation for employees' union activities was, in fact, the company's actual motive for proceeding with the terminations, we also conclude, therefore, that the Regional Office erred in its conclusion concerning this aspect of the case. [46] We note that the Regional Office's decision has been appealed to the office of the NLRB's General Counsel.

2. Permanent Replacement of Striking Workers

As discussed above, beginning around June 2, 2012, Palermo issued letters to approximately thirty striking workers stating that the company was permanently replacing them. As previously noted, it appears that, with only a few exceptions, such letters were only sent to strikers who were not identified in the NSD.

US labor law permits permanent replacement of striking employees, although only where a strike is carried out to achieve economic aims, rather than to protest what is deemed an unfair labor practice.[47] In this case, Palermo workers carried out a strike to protest what the union alleged were unfair labor practices – Palermo's retaliatory response to the unionization effort through the acceleration of the re-verification timeline and its use of temporary workers to create fear of retaliatory dismissal among its employees. Because, as discussed, the Regional Office of the NLRB announced in November 2012 that it would not issue a complaint with respect to these charges – though as noted this decision

[45] Interview with Palermo Marketing Dir. Chris Dresselhuys (January 23, 2013).
[46] It bears noting that the WRC on occasion reaches determinations that local or national labor authorities overlooked or misinterpreted evidence in reaching findings concerning labor law enforcement. *See, e.g.,* WRC, PRELIMINARY REPORT ON MINIMUM WAGE VIOLATIONS IN BANGALORE, INDIA (Mar. 4, 2010) (disputing state labor authorities' characterization of downward revision of minimum wage as correcting a "clerical error") *available at* http://www.workersrights.org/Freports/Minimum%20Wage%20Violations%20in%20Bangalore,%20India.asp; WRC, ASSESSMENT RE E GARMENT (CAMBODIA) (Dec. 13, 2012) (determining that Cambodian labor authorities approved dismissal of union leaders based on fabricated evidence), *available at* http://www.workersrights.org/Freports/E%20Garment.asp.
[47] *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938); *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956).

has been appealed to the NLRB General Counsel – the Office also concluded that the strike is not an unfair labor practice strike.[48] Because the WRC reaches a contrary conclusion on the company's motive for the acceleration of the re-verification deadline, the WRC finds that the strike *is* an unfair labor practice strike.

In any case, the issue of permanent striker replacement is an area in which US labor law diverges significantly from international labor rights jurisprudence, which, as we have explained, substantially governs the interpretation of university codes of conduct. Because permanent replacement of striking employees has the effect of severely undermining freedom of association, this practice, though permitted under US labor law, has been repeatedly criticized by international labor law bodies and human rights authorities. In 1991, the ILO's Committee on Freedom of Association, the foremost international authority in interpreting this right, determined that the permanent replacement of striking employees violated workers' right to strike and, therefore, their freedom of association itself.[49] Similarly, in a report published in 2000, the world's leading human rights research organization, Human Rights Watch, observed that "Employers' power to permanently replace workers in the United States who exercise the right to strike runs counter to international standards recognizing the right to strike as an essential element of freedom of association."[50] Consistent with these authorities, the WRC views the practice of permanently replacing striking employees as a violation of

[48] Notification of Partial Dismissal of Charges, *supra* note 32, at 3.
[49] "The right to strike . . . is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker just as legally." International Labor Organization, Committee on Freedom of Association, *Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*, Report No. 278, Case No. 1543 (1991).
[50] *See* Human Rights Watch, *Unfair Advantage: Workers= Freedom of Association in the United States under International Human Rights Standards* (2000) at p. 38, http://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf.

freedom of association under university codes of conduct, which are clearly written to protect this right as it has been established under internationally recognized labor standards.[51]

3. Other Violations of Freedom of Association

The WRC's inquiry found that, apart from the termination of employees and permanent replacement of striking workers, Palermo engaged in a variety of additional practices which violated its workers' rights to freedom of association. Some of these practices have been discussed above as evidence of antiunion animus with respect to the earlier discussed violations. They are also, independently, violations of university codes of conduct.

First, Palermo managers made various comments to the effect that it would be futile for workers' at the facility to organize a union because the company would not negotiate with them if they did. As noted above, a company manager reportedly stated on May 29 that the company would not accept workers' request for union recognition because it would not tolerate the higher costs associated with unionization. Another manager stated on the same day that the company would "never negotiate with the kind of people" who were striking, or words to this effect. Communicating to workers that it is futile to select a union as their bargaining representative because the employer will simply refuse to bargain has long been held a violation of Section 8(a)(1) of the NLRA, which prohibits acts which "interfere with, restrain, or coerce employees in the exercise of the rights" protected by the Act.[52] When an employer makes such a statement, it effectively tells its employees that even if they select a collective bargaining representative, the employer will violate the employees' rights of collective bargaining going forward by refusing to adhere to its obligation to bargain in good faith.

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[51] It would make little sense for the right of freedom of association, as protected under university codes of conduct, to be applied with reference to the NLRA rather than ILO Convention 87. First, University codes of conduct explicitly refer to "freedom of association," a term which does not appear in the National Labor Relations Act (NLRA), but is the very subject of ILO Convention 87, the core international standard defining this right. *Compare* 23 U.S.C. 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection") to ILO Convention 87 (Convention Concerning Freedom of Association and Protection of the Right to Organise) and Collegiate Licensing Corporation, *Special Agreement Concerning Labor Codes of Conduct* (Jan. 2008) Sched. I § 2(b)(9) ("Freedom of Association: Licensees shall recognize and respect the rights of employees to freedom of association and collective bargaining."); (2) Second, while the NLRA does not apply extraterritorially, university codes of conduct do, and, moreover, require adherence to the codes' own standards where, as here, the latter are more protective than national law. *See, Benz v. Compania Naviera Hidalgo*, S.A., 353 U.S. 138, 147 (1957) (stating that the legislative history of the NLRA "describes the boundaries of the Act as including only the workingmen of our own country and its possessions"); *and compare with* CLC, *supra*, Sched. I § 2(a) ("Licensees must comply with all legal requirements of the countr(ies) of manufacture . . . [and [w]here there are difference or conflict between the Code and the laws of the countries of manufacture, the higher standard shall prevail . . .").

[52] *See, e.g., Shorkline Corp*., 142 NLRB 875 (1963); *Oak Mfg. Co*., 141 NLRB 1323 (1963); *General Indus. Elec. Co*., 146 NLRB 1139 (1964); *General Dynamics Corp*., 250 NLRB 719 (1979), *enforced in part*, 630 F.2d 934 (3d Cir. 1980).

Second, Palermo managers sought to prevent workers from participating in a strike by physically blocking workers from exiting the facility through the main exit. On the morning of June 1, as workers began their strike outside the facility, workers who were working inside the facility sought to leave the plant to join the strike. These workers were, however, impeded from exiting by Palermo managers who blocked the main exit and at least one emergency exit. When one worker attempted to leave through an emergency exit, manager Walsh grabbed the worker's shirtsleeve. Palermo management denies that managers attempted to physically prevent workers from leaving; however, the NLRB Regional Office found that this incident did take place. Palermo management stated that it had video footage taken by closed circuit security cameras that supported its claim. The WRC requested that Palermo provide this footage to investigators and Palermo management indicated its willingness to do so; however, Palermo has yet has not provided this footage to the WRC.

The right to strike is protected by provisions of the NLRA that guarantee to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[53] The physical obstruction of workers from taking part in a strike constitutes unlawful interference and restraint under Section 8(a)(1) of the NLRA, as well as a violation of ILO Conventions 87 and 98.[54] Here this obstruction took the form of managers standing directly in front of the exit doors as this required any employee who wished to join the strike to physically confront these managers, an action which workers could legitimately believe might lead to either physical harm to, or disciplinary action against, the worker.

Third, Palermo managers made categorical threats that any workers who participated in the strike would be fired. On May 29, for example, manager Walsh told workers participating in a work stoppage protesting the company's hostile response to their request for union recognition and its introduction of temporary employees that, if they did not abandon the work stoppage and return to work, they would be fired. Similar threats were conveyed by Walsh as workers sought to leave the facility to join the strike on the morning of June 1. Such threats of retaliation violate workers' rights of freedom of association because they would tend to chill workers' exercise of the right to strike. Under US labor law, striking employees retain their employee status and right to ultimately return to work.[55] As discussed above, whether employees have a right to immediate reinstatement upon offering to unconditionally return to work depends on whether the strike is deemed an unfair labor practice strike (where immediate reinstatement is required) or an economic strike (where if the worker is permanently

[53] *See, e.g.,* 23 U.S.C. §§ 157, 163 (providing that the NLRA "shall not be construed to interfere with or impede or diminish the right to strike" except as expressly stated in the statute).
[54] *See, e.g.,* International Labor Organization, "Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO," Fifth (revised) edition (2006) (hereinafter ILO Committee on Freedom of Association Digest), ¶¶ 520-255.
[55] 23 U.S.C. § 152(3) (defining employee to "include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .").

replaced, reinstatement can be delayed until a position becomes available at the firm).[56] Regardless of how the workers' strike here was construed, however, Palermo's threat of outright termination for striking amounted to an illegal threat of retaliation.

Fourth, Palermo directed the termination of at least two temporary workers because the company believed they had participated in the strike. One of these workers provided testimony that when she arrived at work on June 6, she was told by a manager (employed by BG Staffing) that she could not enter the facility and was being terminated at the direction of Palermo's management because she had a false social security number. After the worker showed the BG Staffing manager her social security card and another document showing that she was a legal resident, the manager explained that she was not being removed from the Palermo facility because of the social security number, but because she was involved in the strike. (The worker, in fact, had not participated in the strike, but had missed work during the strike for other reasons.) It is a violation of Section 8(a)(3) of the NLRA to terminate a worker purely for participating in protected concerted activity, including strikes,[57] which was Palermo's intent here, even if the affected worker, in this case, was not a striker.

Fifth, Palermo refused to permit the return to work of approximately seven striking workers who – between June 1 and June 8 – made unconditional offers to do so. These were employees whose names did not appear on ICE's NSD letter. As discussed above, it is unlawful to terminate workers for participating in an unfair labor practice strike, which, as noted, the WRC finds the strike that began on June 1 to be.

In this case the terminations were unlawful even if one finds the strike to be an economic strike, as did the NLRB Regional Office. Under US labor law, an economic striker who unconditionally applies for reinstatement remains an employee, even if the employer has hired a permanent replacement for that worker.[58] She is entitled to preferential reinstatement when job openings appear unless she has acquired equivalent employment elsewhere.[59] The company's termination of these employees thus violated US labor law. As noted above, the Regional Office of the NLRB found that each of the above practices were unfair labor practices which violated workers' rights under federal labor law.

Finally, to the present date, Palermo has continued to express its hostility to the workers' union in communications to employees. At least one of these communications represented, in itself, a further violation of freedom of association. A leaflet the company distributed with workers' paychecks directed employees that, "if union supporters come to your home ask them to leave." By making this statement, Palermo explicitly instructed workers not to exercise their associational rights, so that to associate with the union or its members an employee would have to disobey an explicit directive from her employer.

[56] See, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).
[57] 23 U.S.C. §§ 158(a)3, 163.
[58] *Laidlaw*, 71 NLRB 1366 (1968).
[59] 23 U.S.C. § 152(3).

Recommendations

In view of the findings outlined above, the WRC recommends that Palermo take the following actions without delay:

- Reinstate the workers whom Palermo terminated or permanently replaced between June 2 and 8, 2012. As explained above, the WRC finds Palermo terminated or replaced these employees in retaliation for their protected union activities. With respect to employees whose terminations were justified by the company with reference to their failure to verify their immigration status, these employees should be allowed to work at least until such time as ICE has lifted the stay of its investigation, and they have had a reasonable opportunity to re-verify their authorization to work.

- Provide full back pay to the approximately 105 terminated and permanently replaced employees from the date of termination to the date of reinstatement. It bears noting that the U.S. Supreme Court held in its 2002 decision in *Hoffman Plastics v. NLRB* that back pay is not an appropriate remedy where an employee who has been unlawfully terminated is determined to have lacked legal authorization to work for the employer in the first place.[60] However, for multiple reasons, that rule is not applicable to the WRC's findings here as to the proper remedies for Palermo's failure to comply with university codes of conduct. First, because Palermo retaliated against employees by accelerating the period for re-verification and ICE then stayed its enforcement action, no such determination of lack of authorization to work has been completed with regard to these employees. Second, as previously noted, the WRC assesses compliance with university codes of conduct concerning freedom of association, including determining appropriate remedies in case of its violation, with reference to international labor standards, not US labor law, except where the latter may represent a higher standard.[61] With reference to this specific issue, the ILO Committee on Freedom of Association has found that the *Hoffman Plastics* bar on back-pay for undocumented workers who have been the victim of retaliatory termination is incompatible with adequate protection of freedom of association, noting that "the remedial measures left to the NLRB ... [were] inadequate to ensure effective protection against acts of anti-union discrimination."[62]

- Recognize the results of a union membership verification exercise, conducted by a neutral third-party, to test the union's claim, as made on May 29, 2012, to represent a majority of the facility's workers. Because the company has carried out extraordinarily serious violations of worker rights, including the retaliatory

[60] *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 140 (U.S. 2002).
[61] See discussion, *supra*, 20, n. 51.
[62] International Labor Organization, Committee on Freedom of Association, Complaints Against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), in *332nd Report of the Committee on Freedom of Association*, GB.288/7 (Part II), 288th Session (November 2003) ¶42, available at <www.ilo.org/public/english/standards/relm/gb/ docs/gb288/pdf/gb-7.pdf.

termination of more than a third of the workforce, the "laboratory conditions" necessary for a NLRB union election to be a fair determination of worker sentiment cannot reasonably be achieved at this juncture. The appropriate approach is to determine whether the union at the time it claimed to represent a majority of the plant's workers – before the company's retaliatory actions – in fact did so. This approach is consistent with the *Gissel Packing* doctrine of US labor law which provides that where an employer has so interfered with the union's organizing drive that a fair election is unlikely, the employer shall be ordered to bargain based upon a review of union authorization cards signed by a majority of employees.[63] This review of union membership authorization cards (or other evidence of union majority support such as participation in the strike[64]) should be conducted by a neutral and independent person or committee of persons, a process that is commonly employed for this purpose in the US and other countries.[65] If such an exercise confirms the union did represent a majority of the workers at that time, the company should recognize the union as the employees' representative and commence good faith bargaining.

- Issue a statement to the workforce conveying the following: i) workers employed by Palermo Villa have the right to join a union of their choosing; ii) Palermo management will in no way interfere with this choice nor take any adverse action of any kind against any worker who makes this choice; iii) any manager or supervisor who attempts in any way to coerce or threaten any worker because of his choice to unionize will be disciplined; iv) management will not use the immigration enforcement process to retaliate against workers' exercise of freedom of association; iv) any worker whose work authorization is questioned will have a full and fair opportunity to present proof of authorization; and iv) Palermo will negotiate a collective bargaining agreement in good faith with any union selected by a majority of its workers as their representative. Palermo should require every department supervisor or manager at the facility to read this statement aloud to the employees under his or her direct supervision, and should provide a typed copy of this statement, on company letterhead, to every employee, in English, Spanish, Burmese, and any other language spoken as a first language by a significant number of the employees. The public announcement and distribution procedures should be carried out under the observation of the WRC or another respected labor rights advocacy organization.

[63] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).
[64] In previous cases of this kind, evidence other than authorization cards has been legally accepted to indicate majority support, such as a union-called strike or strike vote. *See NLRB v. Dahlstrom Metallic Door Co.*, 112 F.2d 756 (2d Cir. 1940).
[65] *See, e.g.*, James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV.819 (2005).