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Abruzzo's Tweets Take Aim At Employer-Friendly Labor Law Precedent

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NLRB General Counsel Jennifer Abruzzo recently tweeted her intention to push for two fundamental pro-union changes to U.S. labor law. Piggybacking on her August 12 memo detailing cases that must be submitted to advice, Abruzzo targeted employer free speech and the use of permanent replacements during economic strikes.

Employer Free Speech

During a union campaign, an employer is limited in what it can communicate to employees regarding unionization. But Section 8(c) of the National Labor Relations Act provides that the "expression of any views" by an employer is lawful so long as it does not contain "a threat of reprisal or force or promise of benefit."

Under the NLRB's 1985 Tri-Cast decision, this has been interpreted to provide employers with broad freedom to speak with employees about the benefits and risks of unionization. Specifically, Tri-Cast dealt with a common talking point during a union campaign: that if employees vote in a union the employer and employees will no longer be able to work directly together, but rather will have to work through the union. The Board found that the statement was not unlawful, despite perhaps conflicting with the fact that employees have a statutory right to bring complaints directly to their employer, whether they have a union or not. Following precedent, the Tri-Cast Board declined to "probe into the truth or falsity of the parties' campaign statements."

Abruzzo's goal is to change that posture and push the Board to police employer statements and misstatements during union campaigns, a change

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that would unwind decades of legal framework. Closer scrutiny of employer statements (and those of employer representatives and agents) during campaigns would provide unions with additional grounds to challenge losing election results where employees have exercised their statutory right to remain union-free.

Permanent Strike Replacements

For more than half a century – a substantial period of time in the NLRA's 86-year history – employers have been able to permanently replace workers on strike for better job conditions (an economic strike) absent evidence that the employer sought to illegally undermine their union.

The use of permanent strike replacements can be a powerful tool in a strike, as replacement workers allow employers to weather a strike and remain in operation. Indeed, it is for this purpose – seeking to remain in business – that the Board approved the use of permanent strike replacements in its 1964 Hot Shoppes decision.

Abruzzo has pushed for a change that would overrule Hot Shoppes and require employers to prove a "legitimate and substantial business justification" for the use of permanent strike replacements. Abruzzo's goal is a long shot, and one that was also pursued unsuccessfully during the Obama administration. The reversal of Hot Shoppes would undermine the NLRA's stated goal of promoting industrial peace by encouraging more frequent strikes.

Abruzzo faces a long road in any attempt to overturn decades of precedent. But with a pro-union Board and several more years to institute change, employers should remain vigilant of these potential labor law changes.