

The Downtowner

January 2008
Volume 3, Issue 1

News from and about Region 21



In This Issue:

Regional Perspective

From the R Case Desk

Litigation

**Recent Developments:
GC and Board Update**

Upcoming Events

Other News

Board Bits

Regional Perspective

By James F. Small, Regional Director

This is my first time to write for The Downtowner as Regional Director. The Board adopted the General Counsel's recommendation and named me as Director on October 2, 2007. I am privileged and honored to serve. I follow in the footsteps of former Director Victoria Aguayo who served with dedication overseeing Region 21 for nearly 22 years. What should I say? What would be appropriate to share in my first Regional Perspective?

Simply put, the work of Region 21 goes on. With the continued C case filings, we now have a professional staff ceiling of 27 professionals. Since the last issue of The Downtowner, we have experienced the loss of several professional employees and key support staff personnel. Currently, Region 21 is nearly 20% below our staffing ceiling. The 2008 Agency budget will permit only the most meager hiring during the coming year. The Agency is addressing our staffing shortfall through a number of methods including trial assistance, investigation assistance and docketing assistance being provided by Regions that are more fully staffed. The highly talented, dedicated and hardworking professionals and support staff of Region 21 are redoubling their collaborative efforts to ensure that our public is fully served. In my view, with the outside assistance provided and the continued efforts of the staff, Region 21 remains in a strong position to effectively serve the Southern California community and to carry out the important work of the Agency.

What will change in Region 21? Director Aguayo left a legacy of effective and efficient administration of the Act. The public we serve deserves that level of service. We will strive to avoid any reduction in our service, even in light of the Agency's serious budgetary constraints. We may, in an effort to accommodate our

staffing imbalance and conserve limited resources, implement some enhancements to Regional procedures. For example, we will redirect Regional resources toward resolving disputes short of trial. The settling of a case short of complaint or trial saves resources for all parties. In you have a case before the Region, and the case appears to involve a clear violation of the Act, don't be surprised to receive a telephone call from Regional Attorney William Pate and/or myself suggesting the matter be settled. The personal involvement of Regional managers in the settlement process will hopefully promote meaningful, effective and appropriate settlements. Likewise, we will insist that charging parties expeditiously present evidence and fully cooperate in all investigations.

The Region remains committed to vigorously enforcing the Act. Appropriate remedies will always be considered, including the applicability of injunctive relief under Section 10(j).

The Regional office will remain at our current location of 888 S. Figueroa Street, Los Angeles, CA, until at least 2012. In the future when you visit us, you'll notice the new carpet, paint and other remodeling. The managers, supervisors and staff of Region 21 remain open to hearing from you. Drop by and say hello. I look forward to working with you in the years ahead.



Regional Director James F. Small

Contact Us

**888 S. Figueroa Street
9th Floor
Los Angeles, CA
90017-5449**

(213) 894-5204

NLRBRegion21@nlrb.gov

**Agency website:
www.nlr.gov**

**Agency toll free
number:
1-866-667-6572**

**For an electronic
version, send us your
email address**

**Geographic Territory:
Orange, Riverside,
San Diego, Imperial
and southeast
Los Angeles Counties**

From the R Case Desk

With my recent promotion to Director, the position of ARD will be temporarily vacant. However, I started this article while I was serving as ARD so I think it's appropriate to include a final "Musings" in *The Downtowner*.

Region 21 had, until recently, avoided the significant decline of representation cases that has marched across the country. During the last six month period, the number of elections conducted and the number of employees voting in those elections fell by nearly half. Less than two thousand employees voted in elections conducted by Region 21 since the last issue of *The Downtowner*.

The Board has squarely addressed R case issues in a number of recent decisions. In *Medieval Knights, LLC*, 350 NLRB No. 17 (June 29, 2007), the Board clarified what an employer may communicate to employees about unions and collective bargaining during the critical period prior

to a representation election. In this case, the Employer advised employees that "should the Union win the election, the Employer would drag out negotiations for at least a year." The Union argued that the Employer was threatening the employees that electing the Union as their bargaining representative would be futile. However, the Board panel 2-1 majority found that merely pointing out "the possible pitfalls for employees of the collective-bargaining process" was not objectionable.

In *Trustees of Columbia University*, 350 NLRB No. 54 (August 9, 2007), the Board held that it is not objectionable for the Employer to refuse to provide electronic (e-mail) addresses of eligible voters. The unit involved a group of employees on a research vessel, who were often at sea for extended periods of time. The Union argued that the Employer thwarted the manifest purpose of the

Musings by the ARD

Excelsior Underwear requirement to provide employees' names and addresses. The Board majority declined to extend the *Excelsior* requirement to include e-mail addresses. The Board noted 1) there was no evidence the Employer used the e-mail system to communicate with employees about the election; and 2) the Union won an election in another unit of employees under the same conditions.

In one of the most important cases in recent memory, the Board in a 3-2 decision modified its recognition-bar doctrine, and held that an employer's voluntary recognition of a labor organization does not bar a decertification or rival union petition that is filed within 45 days of the notice of recognition. *Dana Corp.*, 351 NLRB No. 28 (September 29, 2007). In *Dana*, the Board majority held that the uncertainty surrounding voluntary recognition based

upon an authorization card majority, as opposed to union certification after a Board election, justifies delaying the election bar rule for a brief period during which unit employees can decide whether they prefer a Board-conducted election. Under the new policy, an employee or rival union can file a petition during the 45-day period following notice that a union has been voluntarily recognized. The Board is requiring a posted Board Notice to employees advising employees of their right to a secret-ballot election. During the upcoming **Coffee with the Board** interactive seminar, on March 4, 2008, Region 21 will provide an update on the new *Dana* procedures and other R case developments.

James F. Small
Former Assistant
to the Regional
Director

Recent Developments: GC and Board Update

New Ballot Disclaimer Language under *Ryder Memorial Hospital*

On September 28, 2007, the Board issued its decision in *Ryder Memorial Hospital*, 351 NLRB No. 26 (2007), in which it revised the Board's official election ballot so that it will include language that asserts the Board's neutrality in the election process and makes clear that the Board was not involved in any alteration of the sample ballot. The Board noted that this disclaimer language will preclude any reasonable impression that the Board endorses a particular choice in the election and that it will cease to evaluate altered or defaced sample ballots on a case-by-case basis. Election ballots have been revised to include the following language:

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

The Board ruled, "The case-by-case analysis of the nature and contents of altered sample ballots developed in *SDC* will no longer be required. Rather, we will decline to set aside elections based on a party's distribution of an altered sample ballot, provided that the sample ballot is an actual reproduction of the Board's sample ballot, i.e., that it includes the newly added disclaimer language." The Board further ruled, "Given the layout of the new ballot, it is highly unlikely that an altered sample ballot's failure to include the new disclaimer language will be inadvertent. Therefore, if a party distributes altered sample ballots from which the disclaimer language has been deleted, we will deem the deletion intentional, and designed to mislead employees. The distribution of such altered ballots will be treated as per se objectionable."

NLRB Clarifies Reinstatement Rights of Striking Employees

In *Jones Plastic & Engineering*, 351 NLRB No. 11 (Sept. 27, 2007), the Board announced that at-will employment status does not detract

Litigation

Comments from the Regional Attorney

There has been an upsurge in C-case intake during the last few months, and this has been reflected in a busy trial calendar. One upcoming trial, Villa Maria Elena Healthcare Center, which is being handled by Field Attorneys Patrick Cullen and Irma Hernandez, involves the issue of a successor employer's bargaining obligation in a unit of employees at a skilled nursing facility. Another significant case, Cintas Corporation, which is being handled by Field Attorney Sonia Sanchez, involves the discharge of an employee and other alleged unfair labor practices in connection with a union organizing campaign. This is the last of numerous cases involving this employer

which were coordinated on a nationwide basis. The matter was settled during the course of the trial over the objections of the Charging Party, with a novel settlement providing, *inter alia*, front pay for the lone discriminate.

A trial involving Inland Valley Medical Center was conducted during November 2007, involving allegations about the display of union insignia, restrictions on distribution of union literature, harassment and monitoring of union supporters. This trial, consolidated with objections to a decertification election, was handled by Region 21 Field Attorney Cecelia Valentine and Region 20 Field Attorney Christy Kwon, who provided very able assistance

to Region 21 because of our difficult trial schedule.

A second trial involving Chinese Daily News concluded recently. This case involves alleged discrimination against union supporters as well as some alleged independent 8(a)(1) violations, and it was necessary for most of the witnesses to testify through a Mandarin interpreter, and for much of the documentary evidence to be translated as well. Field Attorneys Irma Hernandez and Ami Silverman appeared for the General Counsel in this proceeding. The ALJ found several 8(a)(1)s and an 8(a)(3) violation concerning the wearing of union insignia.

Finally, an unusual situation occurred recently in a supplemental compliance proceeding in First Transit. It was necessary for the hearing to convene for one day in a hearing room at a California State prison in Lancaster, to obtain the testimony of a former employee who is serving a lengthy sentence there. The Region's counsel on this case, Field Attorney Lisa McNeill, made the arrangements with the prison and appeared there during the hearing before Administrative Law Judge James Kennedy.

William Pate
Regional Attorney



Board Bits

1. Who was referred to as the 6th Board member at his recent retirement party?
2. What equals \$251.7 million?
3. In which regions has Regional Director James Small worked?
4. What is 21-VR-1?
5. Can a Board with only two members issue decisions and orders?

Recent Developments, *continued from page 2*

from an employer's otherwise valid showing that it has permanently replaced striking employees. The Board overruled *Target Rock*, 324 NLRB 373, 374 (1997), *enfd.* 172 F.3d 921 (D.C. Cir. 1998), to the extent it is inconsistent with that principle. The Board majority stated:

"[W]e view as untenable any implication in *Target Rock* that conditions on hiring other than those enumerated in *Belknap* detract from a finding of permanent replacement status. Instead, we find that the status of the replacements hired by the Respondent in this case is indistinguishable from the status of probationary employees found to be permanent replacements in *Kansas Milling*, [97 NLRB 219, 225-226 (1951)], and its progeny. In those cases, the probationary employees were subject to discharge without cause, and their post-probation employment was subject to their satisfaction of the employer's standards. As a matter of law, then, equivalent conditions imposed by the Respondent through its at-will disclaimers do not detract from other evidence proving the replacements' status as "permanent employees" for the purpose

of federal labor law."

Applying those principles, the Board found that the Respondent's issuance of at-will disclaimers informing employees that their employment was for "no definite period" and could be terminated for "any reason" and "at any time, with or without cause" did not detract from its showing of permanent replacement status.

REASONABLY BASED LAWSUIT NOT UNLAWFUL

In *BE&K Construction Company*, 351 NLRB No. 29 (September 29, 2007), the Board held that the filing and maintenance of a reasonably based lawsuit does not violate the National Labor Relations Act (Act), regardless of the motive for bringing the suit.

BE&K's federal lawsuit against several unions was dismissed. Thereafter, the unions filed unfair labor practice charges alleging that the lawsuit was unlawfully retaliatory. Pursuant to *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Board and the Sixth Circuit Court of Appeals found merit to the charges. *BE&K Construction Company*, 329 NLRB 717 (1999); *BE&K Construction Co. v. NLRB*, 246 F.3d 619 (2001).

Answers to Board Bits



1. Harold J. Datz, Former Chief Counsel to the NLRB Chairman, was known as the 6th Board Member.
2. The NLRB budget for FY 2008 is \$251.7 million - \$200,00 more than FY 2007. The Board will have to absorb all 2008 COLA costs.
3. Director Small has served in Regions 25 (Indianapolis), 5 (Baltimore), 31 (Los Angeles), 28 (Las Vegas) and 21 (Los Angeles).
4. Hilton Orange County/Costa Mesa, Case 21-VR-1, filed December 12, 2008, is Region 21's first Dana posting case.
5. Yes. The Board recently delegated its powers to Members Liebman, Schaumber, and Kirsanow, so a two-member quorum can make decisions after Member Kirsanow's term ends.

Recent Developments, Cont. from page 3

The Supreme Court, however, rejected the Board's analysis on First Amendment grounds. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). The Court found that the threat of an NLRB adjudication amounted to a burden on such petitioning. It also found that the Board's standard for evaluating the lawfulness of completed, unsuccessful lawsuits raised a difficult First Amendment issue. The Court adopted a limiting construction of Section 8(a)(1) to avoid this constitutional issue, and it invalidated the Board's legal standard because it did not comport with that limited construction. On remand, the Board majority noted, first, that in *Bill Johnson's*, the Court had held that, in order to protect the First Amendment right to petition, an ongoing, reasonably based lawsuit could not be enjoined as an unfair labor practice even if its motive was to retaliate against the exercise of rights protected by the Act. The Board then found, "[J]ust as with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor practice. In determining whether a lawsuit is reasonably based, we will apply the same test as that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis, or is "objectively baseless," if "no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors*, 508 U.S. [49] at 60 [(1993)]."

Save the Dates

March 4, 2008 NLRB Region 21 Coffee with the Board 9:30 to 11:30 a.m.

This interactive seminar hosted by Region 21 will feature updates on recent Board and court decisions and tips on effectively using Board procedures. You'll learn about the Board's decision on the use of email in *The Guard Publishing Company, d/b/a The Register-Guard*, 351 NLRB No. 70 (December 16, 2007), the Board's new voluntary recognition (VR) postings, which are now the only way employers and unions can establish a recognition bar to the filing of election petitions, and much more!

Please pre-register for this **FREE** seminar by calling (213) 894-5204 or by emailing Region 21 at NLRBRegion21@nlrb.gov. Attendance is limited so **REGISTER TODAY**.

March 6, 2008 The Los Angeles County Bar Association Southern California Labor and Employment Law Symposium

The annual symposium, to be held at the Biltmore Hotel in Downtown Los Angeles, is recognized as one of the most important and dynamic programs in the field. This conference provides several hundred attendees with intensive instruction on the latest issues in employment and labor law. Speakers are nationally known experts in this rapidly changing area. Earn MCLE credits. For more information visit <http://www.lacba.org/>.

July 23, 2008 26th Annual OCIRRA Labor & Employment Law Conference

One of the BEST one-day conferences in the WEST!

Twenty-six years ago, Region 21 and the Orange County Industrial Relations Research Association (OCIRRA), also known as Orange County Chapter Labor & Employment Relations Association (O.C. LERA), presented the first of what was to become one of the preeminent labor law programs in Southern California. Over the past quarter century, the NLRB and OCIRRA, joined by the Federal Mediation and Conciliation Service, have presented timely and informative programs that have continued to keep pace with changing labor and employment developments. Earn MCLE credits. For more information visit www.ocirra.org, or email to NLRBRegion21@nlrb.gov, or SBolander@octa.net.