NLRB, Region 20 Roundup

An Agency of the United States Government

Spring 2012 | 901 Market Street, San Francisco, CA 94103-1735 | 415-356-5130

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Region 20 Charges 24 Hour Fitness USA, Inc. with Requiring Class Action Waiver

San Francisco, CA – On April 30, 2012, Regional Director Joseph F. Frankl issued complaint against the nation-wide fitness center, 24 Hour Fitness USA, Inc., alleging that 24 Hour Fitness USA, Inc. violated federal labor law by insisting that all employment-related disputes be resolved by individual arbitration. The California-based corporation, which operates fitness centers across the country, requires employees to agree in writing, as a condition of employment, to forego any rights to collective or class action lawsuits or arbitrations. Such a requirement violates protections guaranteed by the National Labor Relations Act, according to the complaint issued by the agency's San Francisco Regional Office.

An investigation was prompted by a charge filed by an employee at the 24 Hour Fitness center in San Ramon, California. Since at least the summer of 2010, the company has enforced its no-class-action policy by asserting it in litigation brought by employees in numerous cases, seven of which are cited in the complaint. In each case, employees, who are not represented by a union, sought to bring workplace-related claims, such as wage and hour violations, on a class-wide basis. In response, 24 Hour Fitness sought to compel the employees to submit their common claims to individual arbitrations, citing the policy in its handbook. The complaint calls for a hearing before an Administrative Law Judge, and seeks an order requiring the company's fitness centers nationwide to stop maintaining and enforcing that portion of the policy that prohibits collective and class action, and to notify all judicial and arbitral forums in which it has opposed such action.

This complaint comes on the heels of *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), in which the Board found that the employer, a home building company, violated Section 8(a)(1) of the Act by maintaining, as a condition of employment, a mandatory arbitration agreement that did not allow its employees to file joint, class, or collective employment-related claims in any forum, arbitral or judicial. This matter is set for hearing before an Administrative Law Judge on June 11, 2012.

Federal Magistrate Judge Awards the Agency and Union More than $250,000 in Fees and Costs

Honolulu, HI – On April 23, 2012, Magistrate Judge Richard Puglisi recommended that the Pacific Beach Hotel be ordered to pay more than a quarter of a million dollars to the Board and the Union, a figure representing more than 80% of the amount requested by the Board in compensatory damages for Pacific Beach Hotel's contempt of an injunction order.

In 2002, following the International Longshore and Warehouse Union, Local 142 filing of a petition to represent a majority of the Employer's workers, two representation elections were ordered to be run because the Hotel engaged in objectionable conduct. The Hotel subsequently locked out its employees.

Section 7 of the National Labor Relations Act (NLRA) gives employees the rights to:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for their benefit and protection
- Choose not to engage in any of these protected activities

Non-Union Protected Concerted Activity

Q: Does the NLRA protect activity with other employees for mutual aid or protection, even if you don't currently have a union?

A: Yes. For instance, employees not represented by a union, who walked off a job to protest working in the winter without a heater, were held by the Supreme Court to have engaged in concerted activity that was protected by the NLRA.

To learn more about the National Labor Relations Board and the National Labor Relations Act, please visit the Agency's website at:

http://www.nlrb.gov

Since the Union was certified in 2005 as the exclusive representative of the majority of the Hotel's workers, two unfair labor practice hearings were successfully tried before an administrative law judge, resulting in findings of multiple unfair labor practices, including bad faith bargaining and discriminatory discharges. One administrative law decision was affirmed by the Board, and the other is currently pending before the Board. For each case, the Region petitioned for and was granted injunctive relief by District Court Judge J. Michael Seabright of Hawaii. In 2011, Regional Director Joseph F. Frankl petitioned the District Court for, and was granted, an order in contempt against Respondents for violating Judge Seabright's first injunction order, which he issued in March 2010.

A Motion for Adjudication and Order in Civil Contempt and for Compensatory Relief was also filed with the Court in 2011, and was granted by Judge Seabright on November 29, 2011. The Judge ordered Respondents to issue back pay to the terminated bargaining committee member, and to pay to the Board and the Union its reasonable fees and costs associated with bringing the Motion for Contempt before the Court.

On April 23, 2012, Magistrate Judge Richard Puglisi recommended that the Pacific Beach Hotel be ordered to pay more than $250,000 to the Board and the Union. Magistrate Judge Puglisi's Findings and Recommendations are subject to review by District Judge Seabright. The Respondents filed with the United States Supreme Court an appeal of the District Court's 2010 denial of its Motion to Dismiss the Petition for Injunction, and the Court's granting of the Petition. On March 26, 2012, the U.S. Supreme Court refused to hear Respondents' appeal. In addition, Respondents have appealed the Board's Decision in the first Pacific Beach case and Judge Seabright's second injunction order to the Ninth Circuit Court of Appeals and oral argument on both appeals is scheduled to be heard in Honolulu, Hawaii in June. Field Attorneys Dale Yashiki and Trent Kakuda are the litigators in these cases.

ALJ Finds RSN Violated the Act and Owes Employees over $95,000

Sacramento, CA - On April 23, 2012, Administrative Law Judge John McCarrick found that RSN & Associates, a company which operated newspaper and sundries stores and kiosks in the Sacramento Airport, unlawfully ceased payments to the UNITE HERE Local 49 (the Union) Pension and Health and Welfare plans; laid an employee off out of seniority order; ceased operations and terminated all of its employees without bargaining with the Union over the effects of the closure; failed to pay its employees the cash value of their sick and vacation time as required under the terms of the parties' collective-bargaining agreement; and failed and refused to provide the Union with relevant information.

Judge McCarrick also ruled on the Compliance Specification and determined that RSN owed the employees and the Union's Pension and Welfare plans $95,263.51 plus interest for its violations of the National Labor Relations Act. This amount represents the entire amount pled by the Region in the Compliance Specification. The unfair labor practice charges were investigated by Noelle Powell; compliance was investigated by Karen Thompson and Lana Pfeifer; and Field Attorneys Cecily Vix and Joe Richardson tried the case.

Unfair Labor Practice Charge Procedures

Anyone may file an unfair labor practice charge with the NLRB. To do so, they must submit a charge form to any Regional Office. The form must be completed to identify the parties to the charge as well as a brief statement of the basis for the charge. The charging party must also sign and date the charge.

Once a charge is filed the Regional Office begins its investigation. The charging party is responsible for promptly presenting evidence in support of the charge, which often consists of sworn statements and key documents.

The charged party is then required to respond to the allegations, and will be provided an opportunity to furnish evidence in support of its position.

After a full investigation, the Regional Office will determine if the charge has merit. If there is no merit to the charge, the Region will issue a letter dismissing the charge. The charging party has a right to appeal that decision. If the Region determines there is merit to the charge, it will issue complaint and seek an NLRB Order requiring a remedy of the violations, unless the charged party agrees to a settlement.

Federal Court in Hawaii Fines Local Union, Its Officer and Its Attorney for Obstructing NLRB Investigation

Honolulu, Hawaii – On December 28, 2011, a U.S. District Court in Hawaii imposed monetary sanctions against a Sheet Metal Workers local union, its principal officer, and its attorney, for violating the Court's earlier orders growing out of an investigation by the National Labor Relations Board. Previously, Chief U.S. District Judge Susan Oki Mollway had ordered Local 293 of the Sheet Metal Workers International Association's custodian of records to appear for a deposition and produce documents in connection with an investigation by the NLRB's Honolulu office of allegations relating to the Union's hiring hall which has been ongoing since June 2010. In her December 28 order, Judge Mollway found that the Union's conduct at the deposition was "tantamount to a failure to appear at the deposition or failure to answer questions." Judge Mollway also found that the union's attorney "acted with knowledge and with more than recklessness in flouting the court's October 3 order and in inducing Sheet Metal Workers to flout the order," and expressly found both the attorney and the Union's custodian of records to have acted in bad faith.

The court awarded sanctions including a fine of $250 per day against the Union, running from October 18, 2011 and continuing until compliance; attorneys' fees and court reporter costs incurred by the NLRB due to the union's non-compliance, to be paid by the union's custodian of records and its attorney, personally; as well $2,500 against each personally. Judge Mollway additionally directed the Union to appear for a further deposition no later than January 13, 2012. The court also ordered that during the deposition, any objection must be stated in ten words or less and that any party stating an objection over ten words would be sanctioned $100 per word (excepting only instructions not to answer a question based on attorney- client privilege). Commenting on the ruling, San Francisco Regional Director Joseph F. Frankl stated, "The NLRB cannot do its job of investigating unfair labor practices without the cooperation of parties or, failing that, their obedience to lawful judicial orders to provide evidence. We appreciate the court's patience with this unnecessarily protracted process and especially its willingness to impose 'strong medicine' to compel future compliance."

After the December 28 order, the Union retained new counsel and, under the advice of the new attorney, appeared for the second deposition and turned over any remaining documents. The case investigation proceeded quickly from there and resulted in a settlement between the Charging Party and the Union, which resulted in the Charging Party withdrawing the charges in February 2012. While the Agency is still awaiting payment of fees and sanctions, the Union's first attorney has filed an appeal of the personal sanctions levied against him. The Union does not plan to appeal the sanctions against them, or its officer, and is making arrangements for payment. Field Attorney Katrina Woodcock tried the case.

Bettie Page Clothing Found to Have Unlawfully Fired Three Sales Employees for Posting Complaints on Facebook

San Francisco, CA – On April 27, 2012, Administrative Law Judge William G. Kocol issued a decision finding that Design Technology Group, LLC and DTG California Management, LLC, as single employers, d/b/a Bettie Page Clothing ("Employer") violated Section 8(a)(1) of the National Labor Relations Act by discharging three sales employees for engaging in protected concerted activity, and by maintaining a rule in its employee handbook prohibiting the disclosure of wages or compensation to any third party or other employees. The

Representation Case Procedures

The National Labor Relations Act provides the legal framework for private-sector employees to organize into bargaining units in their workplace, or to dissolve their labor unions through a decertification petition.

The filing of a petition seeking certification or decertification of a union should be accompanied by a sufficient showing of interest to support such a petition. Support is typically demonstrated by submitting dated signatures of at least 30% of employees in the bargaining unit in favor of forming a union, or to decertify a currently recognized union.

Any union, employer or individual may file a petition to obtain an NLRB election.

The NLRA does not include coverage for all workers, excluding some employees such as agricultural and domestic workers, those employed by a parent or spouse, independent contractors, supervisors, public sector employees, and workers engaged in interstate transportation covered by the Railway Labor Act.

employees' protected concerted activity consisted of their presenting group complaints about their store manager both in person and online. As the ALJ explained in his decision, Section 7 of the Act gives employees the right to act together ("concertedly") to improve their working conditions. Concerted activity is activity that is engaged in, with or on the authority of other employees, and not solely by, and on behalf of, the employee herself. He noted that it is also well-settled Board law that concerted protests by employees over supervisory conduct that affects their working conditions are protected activity under Section 7 of the Act.

The judge concluded that the Employer unlawfully fired three sales employees because they engaged in "protected concerted" activities, specifically, when they expressed their concerns, both online via Facebook and in person, to the Employer, and to each other, about their store manager's conduct negatively impacting their working conditions. Although the Employer asserted it fired the three employees for lawful reasons, the judge found the Employer failed to meet its evidentiary burden to support such an assertion. The ALJ's recommend order requires the Employer to offer full reinstatement to each of the three discharged employees plus backpay, and to rescind the unlawful rule in the employee handbook and inform employees it has done so. Field Attorneys Christy Kwon and Yasmin Macariola appeared as Counsel for the Acting General Counsel in this case.

ALJ Finds American Postal Workers Union Violated the Act by Failing to Provide Grievants with Certain Information

San Francisco, CA – On April 23, 2012, Administrative Law Judge Gerald Wacknov found that the American Postal Workers Union violated Section 8(b)(1)(A) of the Act by failing to provide information to grievants who signed a petition requesting that the Union inform them of the status of their grievance and provide certain documents.

This case grew out of grievances filed against the United States Postal Service because of its practice of using part-time custodians in order to avoid paying contractual benefits. The Union's efforts were successful, leading to an increase in the number of full-time janitors, but the grievances, which were consolidated after being settled by the International Union, were remanded to the Locals to collect the monetary amounts owed. Upon receiving the back pay claims, local USPS management claimed the amounts exceeded what was truly owed. Consequently, the Local stopped trying to collect the money owed from the Employer. The grievants' request for information was ignored and at the trial the Union turned over all the documents they had related to the grievance. A detailed letter was sent to affected members even before the decision issued. Field Attorney Lucile L. Rosen appeared as Counsel for the Acting General Counsel.

Region 20's Jurisdiction Covers Guam – Yes, Guam

Did you know that out of the entire Agency, the sun shines first on Region 20? The Honolulu Sub-regional office, part of Region 20, has jurisdiction extending well across the International Date Line and as far west as the Northern Marianna Islands. Field Attorney Katrina Woodcock, based out of Honolulu, recently had the opportunity to travel to Guam to run a large, complex election for certain employees of the Guam Shipyard.

Guam is a small tropical island which is the southernmost island of the Mariana archipelago, and is nearly 4000 miles west-southwest of Honolulu. It is a US territory, however, retains many "international" qualities such as the need for a

To arrange for a presentation about the NLRB in the Bay Area and throughout Northern California, contact Region 20's Outreach Coordinator, Micah Berul, or Field Attorney Carmen Leon at: 415-356-5130

or visit us online at the Internet address above and click on the speakers link.

For questions about NLRB, Region 20 Roundup, contact Newsletter Editor, Field Attorney Carmen León at: 415-356-5130

passport on return, and international roaming coverage for your US-based smart phone. The election itself was not unusual- two unions were on the ballot and the total number of eligible voters neared 300. However, because of the location, many logistical issues arose. The primary issue encountered both in the pre-election investigation as well as coordination of the election once on the island, was the time zone issue. Because Guam is on the other side of the International Date Line, they are a day ahead of the office in Honolulu, give or take 4 hours. The parties involved in this case couldn't have been more spread out, ranging from Vermont to California to Hawaii to Guam. This presented a number of things to be mindful of as we had to constantly be in touch with any one of the individuals to coordinate things like dates of required notice postings to access to the employer's secured facility on the day of the election. Guam Shipyard is a large employer on the island, and therefore this election had garnered significant local media attention, showing up in top news stories every day.

Region 20 Bids Farewell to Supervisor Mark Berman; Honors former Director Natalie Allen

On March 27, 2012, the Region held a luncheon to celebrate the distinguished career of Supervisory Field Attorney Mark Berman, who retired earlier this year after 43 years of exemplary service with Regions 21 and 20. As a supervisor, Mark mentored scores of Board Agents and shepherded countless cases from investigation to prosecution. He also served as the Region's Settlement Coordinator and its Outreach Coordinator. Over 75 guests attended the event, held at a nearby restaurant, including private practitioners as well as many former NLRB staff members, who had worked with Mark over the years. The Region wishes Mark and his wife, Laurie, the very best in Mark's retirement, and thanks him for the numerous contributions he has made to the Agency's mission of upholding employee rights during his career.

Following the luncheon, the company repaired to Region 20's hearing room, named in memory of former RD Natalie P. Allen (1975-1981). There, RD Joe Frankl unveiled a framed montage of two portraits of Ms. Allen along with the press release that announced her appointment. Frankl remarked that, with the recent departures of Mark Berman, DRA Bob Buffin, and others, the ranks of Region 20 staffers who knew "Nat" first-hand were thinning, and that it is important to preserve the memory of this path breaker for future generations. Nat's son Mike and his wife Amy were on hand to share reminiscences.

RD Joe Frankl with Mike and Amy Allen

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