



The Bridge

Regions 20, 32, and Subregion 37
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ALJ Finds Hobby Lobby's Arbitration Agreement Violates the Act

San Francisco, CA – Administrative law judges continue to apply Board law under *D.R. Horton*, 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) to find that arbitration agreements containing class action waivers violate Section 8(a)(1) of the National Labor Relations Act (the Act). The recent decision against Hobby Lobby Stores, Inc., JD(SF)–36–15 (September 8, 2015), includes a novel argument and some distinguishable findings by Administrative Law Judge (ALJ) Eleanor Laws. This case involved the maintenance and enforcement of a mandatory arbitration agreement (MAA) that required employees to waive their right to collective action in any forum as a condition of employment. The ALJ agreed with the General Counsel that the maintenance and enforcement of the MAA was unlawful under the Act. However, the ALJ's decision is distinguishable from *D.R. Horton* and *Murphy Oil* in three respects. First, the ALJ rejected the Employer's affirmative defense that the MAA was lawful under the Federal Arbitration Act (FAA). The ALJ was persuaded by the Charging Party's argument that the MAA itself is not a transaction that affects commerce and as the FAA is only applicable to transactions that affect commerce, the MAA was not subject to the FAA. Second, the ALJ found that the Employer's employee truck drivers, who transport products across state lines, fell within one of the exceptions of the FAA. Thus, as the FAA is inapplicable to these truck driver employees, the Employer's requirement that the truck drivers sign the MAA as a condition of employment is unlawful under the Act. The final distinguishing point is that the ALJ not only recommended that the Employer notify the district courts where it had enforced individual arbitration that it would be revising and/or rescinding its unlawful MAA, but that the Employer also reimburse the two plaintiffs, who had their class action cases dismissed pursuant to the Employer's motion to compel individual arbitration, for litigation expenses and attorneys' fees. This case was investigated by Region 20 Field Attorney Carmen León and tried by Region 20 Field Attorney Yasmin Macariola.

Winery Test of Certification Case Raises Interesting *Specialty Healthcare* Issues

Oakland, California – On July 29, 2015, the Board issued its decision in *Woodbridge Winery*, 362 NLRB No. 151 (2015), granting summary judgment upholding the Petitioner's certification in a refusal to bargain test of certification case involving a large bulk wine producer in Acampo, California. In the underlying representation proceeding, the Petitioner, Teamsters Local 601 sought to represent a unit comprised entirely of the employees working in the Employer's outside cellar department. Conversely, the Employer argued that only a wall to wall production and maintenance unit was appropriate. After a lengthy hearing, the Regional Director of Region 32 issued a Decision and Direction of Election in which he initially found that there was sufficient evidence that the petitioned

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

for unit of cellar employees (operator I, operator II, senior operator, and foreman) was an appropriate unit because such employees worked closely together throughout all shifts, regularly interchanged with each other, had similar skills and training, and reported to the same supervisors. Contrary to the Employer's contention, the Regional Director found that while a unit might be fractured and arbitrary if limited to members of a classification working on a particular floor or shift, the petitioned-for cellar unit consisted of the entire department for all shifts and was co-extensive with a line the Employer had already drawn. Having determined that the petitioned-for unit of cellar employees was an appropriate unit, the burden of proof under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), then shifted to the Employer to demonstrate that the production and maintenance employees it sought to add shared such an overwhelming community of interest with the cellar employees that the community of interest factors overlapped almost completely. After considering factors including departmental organization, skills and training, job duties, functional integration, contact, interchange, terms and conditions of employment and common supervision, the Regional Director found that the Employer had failed to meet its burden, as the cellar employees shared little in common with the barrel, bottling, bottling sanitation, bottling maintenance, recycling, cellar services, facilities maintenance, and warehouse employees which the Employer sought to add as part of an overall production and maintenance unit. The Regional Director reasoned that while the production and maintenance employees all worked as part of an integrated process to transform grapes into wine, each department, including the cellar employees, played a specialized and distinct role in the winemaking process.

The Employer has filed a petition for review with the United States Circuit Court of Appeals for Second Circuit and the Board has cross-petitioned for enforcement of its Order. A decision from the Second Circuit is likely to be issued early next year.

Board, Court Find Unlawful Withdrawals of Recognition in Region 20 Cases

San Francisco, CA - On August 21, 2015, the Board issued its decision in *Scoma's of Sausalito, LLC*, 362 NLRB No. 174, affirming the decision of Administrative Law Judge (ALJ) Mary Cracraft. The ALJ previously found that Respondent, a seafood restaurant in Sausalito, California, had violated Section 8(a)(5) of the Act by unlawfully withdrawing recognition of the Union. Respondent based its decision to withdraw its longstanding recognition of the Union entirely on a decertification petition it received from an employee. The petition was signed by 29 of the 54 bargaining unit employees. However, when Respondent notified the Union a few days later that it would no longer recognize the Union, the Union had in its possession a petition signed by 6 employees revoking their earlier signatures from the decertification petition. This meant the decertification petition relied upon by Respondent only had 23 valid signatures out of 54 bargaining unit employees, which left the Union with majority support at the time Respondent withdrew recognition. The Board's decision in *Scoma's* makes clear that the requirement that an employer demonstrate proof of a union's loss of majority support at the time of withdrawal of recognition applies whether or not the employer is aware of countervailing evidence. This decision relies heavily upon *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001), and another Region 20 case, *Fremont-Rideout Medical Center*, 354 NLRB 453 (2009), adopted 359 NLRB No. 51 (2013). The Board, in an unpublished decision, subsequently rejected a motion for reconsideration filed by Respondent. This case was investigated by Region 20 Field Examiner Sam Hoffman and tried by Region 20 Field Attorney Sarah McBride.

In a similar vein, the U.S. Court of Appeals for the D.C. Circuit, in *Pacific Coast Supply, LLC, d/b/a Anderson Lumber Co.*, 801 F.3d 321 (D.C. Cir. 2015), recently rejected the Employer's argument that employee testimony of intent should have been considered in determining whether its withdrawal of recognition was lawful. The court held that such after-acquired evidence was irrelevant because it was not known to the Employer at the time of withdrawal. Also relying on *Levitz*, the court rejected the employer's argument that certain inherently ambiguous statements by employees demonstrated their lack of

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.

union support. The court held that it was not unreasonable for the Board to read the employees' statements as indicating that they no longer wished to be *members* of the Union, rather than that they no longer wished to be *represented* by the Union, and held that the Employer did not meet its burden of proof under *Levitz*.

Board Adopts ALJ's Finding that Employer's Memorandum Undermined Remedial Impact of Notice to Employees

Oakland, CA -- On May 19, 2015, the Board adopted, in the absence of exceptions, Administrative Law Judge Ariel Sotolongo's Decision and Recommended Order finding that Memorial Medical Center failed to effectively remedy its unfair labor practices by virtue of a memorandum that was posted next to a Board-ordered Notice to Employees.

On November 25, 2013, Administrative Law Judge William L. Schmidt issued a decision finding that the Employer had committed various unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act. The Judge recommended that the Employer be ordered to, among other things, post a Notice to Employees assuring that it would refrain from engaging in such conduct in the future. No exceptions were filed to the Judge's decision, and the Board adopted the Decision and Recommended Order. Thereafter, the Employer posted the Notice to Employees throughout its facility. At the same time, however, the Employer posted a memorandum to employees alongside the Board-ordered Notices. The Employer's memorandum stated, among other things, that "[w]e strongly disagree with the [Judge's] findings," and "[w]e believe that our managers have acted lawfully at all times." The Employer went on to address the specific conduct that was found unlawful by the Judge and to reiterate that it did not believe its managers had acted unlawfully in those instances. After learning about the memorandum, the Regional Director for Region 32 issued a Compliance Specification and Notice of Hearing alleging that the Employer had not complied with the remedial requirements of the Board's Order because the memorandum had minimized the effect of the Notice. The Compliance Specification further pled that the Employer must be required to re-post the Notice to Employees, free of any side postings by the Employer, in order to adequately remedy its unfair labor practices. Judge Sotolongo agreed, and found that the Employer's memorandum had "dilute[d], diminish[ed], and defeat[ed] the remedial purpose" of the Board-ordered Notice and had "in essence invite[d] employees to disregard the Board Notice." The Judge concluded that the Employer's unfair labor practices remained unremedied and recommended that the Employer be ordered to re-post the Notice for an additional 60-day period. The original case was investigated by Region 32 Field Attorney Jennifer Kaufman and tried by Region 32 Field Attorney Gary Connaughton; the compliance investigation was completed by Region 32 Compliance Officer Hokulani Valencia, and the compliance case was tried by Field Attorney Kaufman.

Charges Against San Francisco-based Bauer's Intelligent Transportation, Inc. End in All-Party Formal Settlement Agreement

San Francisco, CA – On June 29, 2015, Region 20 issued complaint against Bauer's Intelligent Transportation, Inc., a San Francisco-based transportation company that includes shuttle services between San Francisco and the Silicon Valley for employees of tech companies. The case, which included allegations that the Employer violated the Act by engaging in unlawful surveillance and interference during an organizing drive by Charging Party Teamsters Local 665 (Teamsters), was rare in its allegations of unlawful assistance to and domination of a labor organization in violation of Section 8(a)(2) of the Act. Following the March 12 organizing drive by the Teamsters, Bauer's recognized Professional Commuter Drivers Union, an in-house union led by a Bauer's road supervisor. The Region sought and was granted authorization by the NLRB's Injunction Litigation Branch in Washington, D.C. to seek injunctive relief under Section 10(j) of the Act and subsequently filed its petition in the Northern District of California Court. A hearing date was set for September 14, 2015, and oral argument on the injunction set for October 1, 2015.

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.

On September 14, 2015, before the hearing opened, the parties reached a formal settlement agreement remedying all of the allegations in the Complaint and including some special remedies. As a formal Board settlement agreement, the settlement agreement consisted of a written stipulation providing that, on approval by the Board, a Board order in conformity with the settlement terms would issue, and it provided for a consent entry of a United States District Court judgment enforcing the order. The remedies contained in the formal settlement agreement included the disestablishment and disavowal of the in-house union, the Employer ceasing to recognize and give effect to the in-house union and its purported collective-bargaining agreement, posting and mailing an NLRB Notice to employees at its San Francisco and Santa Clara facilities regarding their statutory rights, Teamsters access to Employer bulletin boards at the Employer's San Francisco and Santa Clara facilities; and Teamsters access to the Employer break room at its San Francisco and Santa Clara facilities. The Employer also agreed to a stipulation and order continuing the 10(j) proceedings, which provided the injunctive relief sought by the Region until the Board approved and enforced the settlement agreement. The 10(j) stipulation also included the posting, mailing, and reading of the Order and Stipulation to employees regarding their statutory rights. This case was investigated by Region 20 Field Attorney Marta Novoa and assigned for trial and settled by Field Attorneys Novoa and Carmen León.

Region 20 has New Assistant to the Regional Director and New Supervisory Field Examiner

San Francisco, CA -- In June 2015, Region 20 congratulated its own Daniel Owens on his promotion to Assistant to the Regional Director. Daniel started with the agency in 2000 as a field examiner and in 2008 he became a supervisory field examiner. As a fluent bilingual Board Agent, Daniel contributed to the success of numerous investigations over the years. He brought that experience to supervising his team and to successful case processing in both the Unfair Labor Practice and Representation Case settings. When not managing the San Francisco office, Daniel brews his own beer and plays softball.

Just in August of this year, Region 20 celebrated another promotion- that of Supervisory Field Examiner Olivia Vargas. Olivia started with the agency in 2003 as a field examiner, having just graduated from UC Berkeley in Political Economy of Industrial Societies. Olivia's family background-- her father was a union-represented electrician, her grandfather a Teamster -- first drew her to the job and has allowed her to connect with the population we serve. Olivia has worked under the mentorship of Daniel Owens and has also used her bilingual skills to successfully perform the work of a Board Agent,

investigating countless ULPs and successfully conducting numerous representation case proceedings.

Congratulations to them, both! We know these two Region 20-grown managers will make the office proud!



To arrange for a presentation about the NLRB in the Bay Area and throughout Northern California, contact Region 20's Outreach Coordinator, Jennifer Benesis at 415-356-5130, or Region 32's Jeff Henze at 510-637-3300. For questions about The Bridge, contact Newsletter Editor, Field Attorney Carmen León at: 415-356-5130. For more information: <http://www.nlr.gov/>



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