The Bridge

Newsletter for NLRB Regions 20, 32, and Subregion 37
An Agency of the United States Government

Summer 2016 | Region 20 (415) 356-5130 | Region 32 (510) 637-3300

In This Issue

Board Finds Permanent Replacement of Striking Employees Was Unlawfully Motivated

Washington, D.C. -- On May 31, 2016, the Board issued a decision and order finding that American Baptist Homes of the West d/b/a Piedmont Gardens violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by permanently replacing dozens of its striking employees. After Piedmont Gardens and Service Employees International Union, United Healthcare Workers – West had been engaged in contract negotiations for several months but still remained at odds over significant issues, the Union notified Piedmont Gardens that it intended to commence a strike at the employer's continuing care facility in Oakland, California. About 80 bargaining unit employees went out on strike. Piedmont Gardens retained a staffing agency and hired temporary employees to prepare for the strike, telling the staffing agency that the length of the jobs would be three days. After the strike commenced, however, Piedmont Gardens began permanently replacing the striking employees, replacing a total of 38 employees. In a hearing before Administrative Law Judge Burton Litvack, the General Counsel argued that Piedmont Gardens had violated the Act because it had an "independent unlawful purpose" for hiring permanent replacements, running afoul of the Board's decision in *Hot Shoppes, Inc.*, 146 NLRB 802 (1964). The ALJ issued a decision in which he credited a statement by Piedmont Gardens' Executive Director that an "important consideration" in making the decision to hire permanent replacements was that she knew the replacements "would come to work if there was another work stoppage." The ALJ also found that Piedmont Gardens' attorney had told the Union's attorney that Piedmont Gardens hired the permanent replacements because it "wanted to teach the strikers and the Union a lesson" and "avoid any future strikes." The ALJ did not conclude, however, that Piedmont Gardens violated the Act when it hired the permanent replacements, reasoning that an "independent unlawful purpose" is established only when the hiring of permanent replacements is unrelated to the strike itself.

The General Counsel appealed the ALJ's decision, and the Board, overturning the judge's decision, found that the phrase "independent unlawful purpose" includes an employer's intent to discriminate or to discourage union membership, and does not require that the unlawful purpose be unrelated to the underlying strike. The Board further concluded that Piedmont Gardens' decision to hire permanent replacements was motivated by a desire to interfere with employees' future protected activity, and therefore violated the Act. Piedmont Gardens was ordered to offer reinstatement to the permanently replaced employees who have not yet been reinstated, and to make the strikers whole for any loss of earnings or other benefits suffered as a result of Piedmont Gardens' refusal to reinstate them when they offered to return to work. Region 32 Field Attorney Jennifer Kaufman investigated the case. Former Region 32 Field Attorney Jennifer Benesis (now a supervising attorney in Region 20) tried the case.

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

Board's Successor Standard now "Perfectly Clear"

In Adams & Associates and McConnell Jones Lanier & Murphy, LLP, 363 NLRB No. 193 (May 17, 2016), the Board affirmed in large part ALJ Mary Miller Cracraft's decision finding that Adams & Associates (Adams) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) when, in conjunction with McConnell Jones Lanier & Murphy, LLP (MJLM), it assumed control of operations at the Sacramento Job Corps Center, a youth training center operated by the Department of Labor. Judge Cracraft found, and the Board affirmed, that Adams selectively refused to hire several of the predecessor employer's employees as part of a failed attempt to avoid incurring an obligation to recognize and bargain with their union (also known as a *Love's Barbeque,* (245 NLRB 78 (1979) violation), and that it also violated Section 8(a)(1) and (5) by altering various terms and conditions of employment for the unit employees, including changing the probationary period for new employees, barring the employee Union president from the premises, and transferring some work from the bargaining unit to a new purported supervisor position. The Board also affirmed Judge Cracraft's determination that Adams and MJLM are joint employers of the affected employees and jointly and severally liable for the unfair labor practices found.

The Board departed from Judge Cracraft's decision in two significant respects. First, whereas Judge Cracraft determined that it was unnecessary to reach the allegation of unlawful discrimination against the employee Union president—who was reinstated under the terms of a Section 10(j) injunction— in light of her determination that Adams had rigged its hiring system to avoid hiring the employee Union president and others as part of a plan to avoid a successor bargaining obligation, the Board specifically found that Adams violated the Act by refusing to hire the employee Union president because of her prominent union activity. Second, the Board reversed Judge Cracraft's determination that Adams was not a "perfectly clear" successor under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975). In finding Adams to be a "perfectly clear" successor, the Board clarified an area of law that had been criticized as uncertain.

According to the Board, Adams became a "perfectly clear" successor under *Spruce Up* at the moment its Executive Director and the head of its on-site team in Sacramento (Executive Director) told predecessor bargaining-unit employees during a staff meeting that they were "doing a really good job" and that Adams "didn't want to rock the boat" and "wanted a smooth transition" and that, "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job," even though the Executive Director also mentioned that Adams planned to reduce the number of bargaining-unit positions from 25 to 15. In overturning the ALJ's decision, the Board clarified that the relevant inquiry for finding a "perfectly clear" successor is not whether the successor employer intends to retain all of the predecessor's employees, but rather whether it is perfectly clear that it intends to retain a sufficient number to continue the union's majority status. Applying this rule to the facts of the case, the Board reasoned that the Executive Director's announcement of a reduction in the number of bargaining-unit employees did not signal a change in terms and conditions of employment sufficient for Adams to avoid its obligation to bargain with the Union before changing the predecessor's terms and conditions of employment. The Board also found that Adams' subsequent announcement of changes to terms and conditions of employment did not alter its status as a "perfectly clear" successor, even though the changes were announced before predecessor employees accepted positions with the new company. The Board's decision in Adams therefore clarifies that an employer taking over a business with union-represented employees can become a perfectly clear successor unless it announces changes to terms and conditions of employment either prior to or at the same time that it announces its intent to retain a sufficient number of predecessor employees to continue the union's majority status. This case was investigated and tried by Region 20 Field Attorney Joseph Richardson, with assistance at trial from Region 20 Field Attorney David Reeves.

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.

Major Victory for Kaiser Optical Employees in *Heinz* Refusal-to-Execute Case

Oakland, California – On June 15, 2016, the Board adopted, in the absence of exceptions, the May 2, 2016 decision of Administrative Law Judge Amita Baman Tracy in Case 32-CA-149245 finding that The Permanente Medical Group (TPMG) violated Section 8(a)(5) of the Act by both repudiating and failing to execute and implement a collective-bargaining agreement which charging party National Union of Healthcare Workers (NUHW) had agreed to on March 14, 2015.

TPMG and NUHW had been bargaining for a first contract covering TPMG's optical unit employees at several locations since January 2011. Early in bargaining, the parties agreed to ground rules which among other things required that the making or withdrawal of proposals be in writing and come from a party's designated spokesperson at the bargaining table. After years of bargaining about job classifications and non-economic language items, and after NUHW survived a decertification effort, the parties finally got down to brass tacks on money. TPMG began including a retroactive component to its wage proposal in the optical unit in December 2012, and never rescinded or withdrew that retroactivity at any time before NUHW accepted TPMG's final proposal. While TPMG briefly contemplated removing the retroactivity before it submitted its final proposal, it decided against it at the last moment and retained the retroactivity in its proposal just as it had been for over two years.

In her decision, ALJ Tracy rejected TPMG's argument that the retroactivity language was a mere "placeholder" or "dead letter," finding that TPMG was bound by its statements and actions at the table rather than its unexpressed subjective intent or misunderstanding. The ALJ also rejected TPMG's argument that the retroactivity proposal had been withdrawn via an oral statement by someone other than TPMG's chief spokesperson during a side bar discussion between TPMG and the Union in an entirely different bargaining unit. The ALJ further rejected TPMG's arguments that the contract had to be ratified in order to be binding and that certain provisions of the contract were inherently ambiguous.

It is expected that the award of retroactive wage increases to all of the optical unit employees will be in excess of 4.5 million dollars. Region 32 Field Attorney Amy Berbower investigated the case. Region 32 Field Attorney Criss Parker tried the case.

Region 20 Scores a Victory in United Site Services

On March 17, 2016, Region 20 secured a victory for the General Counsel from ALJ Dickie Montemayor in the United Site Services cases, which involved a 25-person unit of drivers and laborers, 21 of whom went out on an economic strike. Even before the strike, the Employer had planned on permanently replacing the workers. Once the strike began, the Employer implemented its plan without informing the Union or the workers until all positions had been filled with purported permanent replacements. The Employer therefore refused to reemploy the strikers upon their unconditional offer to return. Not long after, a decertification petition was circulated with a majority of the workforce signing, and the Employer withdrew recognition from the Union.

The GC made numerous arguments to the ALJ. At the broadest level, the GC argued to reverse the Board's holding in *Hot Shoppes, Inc.*, 146 NLRB 802 (1964), that the hiring of permanent replacements is essentially equivalent to demonstrating a substantial and legitimate business justification for replacing economic strikers and, therefore, lawful. Given the severe impact permanent replacement has on the Section 7 and 13 rights of employees to strike, the GC argued that an employer should be made to affirmatively demonstrate a legitimate business justification for choosing to permanently replace economic strikers.

The GC also argued that, under a narrow exception carved out in the *Hot Shoppes* case, 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.

Employer's surreptitious replacement plan and other conduct demonstrated an "independent unlawful purpose," i.e., a desire to break the Union, behind hiring permanent replacements. In addition, the GC attacked various replacement hires as shams, and challenged the removal of various others from the Employer's recall list. Finally, the GC challenged the withdrawal of recognition as unlawful under the circumstances.

Deferring on the request to alter Board law, the ALJ saw fit to apply the rarely-invoked *Hot Shoppes* exception. Relying in particular on the secretive nature of the replacement, the ready availability of temporary replacements, and the time and monetary costs associated with bringing on permanent replacements, the ALJ determined that the Employer's conduct evidenced the independent unlawful purpose of desiring to break the employees' union. Thus, the Employer's refusal to reinstate the strikers upon their unconditional offer to return to work was unlawful as to all the strikers. The seriousness of the unfair labor practices and the Employer's counting of the illegitimate replacements as amongst the unit majority provided distinct but equally applicable reasons for finding the withdrawal of recognition unlawful as well.

The GC in the meantime had secured an injunction from the United States District Court, Eastern Distirct of California, requiring the Employer to reinstate several strikers, to recognize and bargain with the Union, and post the District Court's Order at its facility.

The case is currently pending before the Board on appeal. This case was litigated by Region 20 Field Attorneys Richard McPalmer and Elvira Pereda.

The World of Compliance

By Region 32 Compliance Officer Paloma Loya

The mission of the compliance team is to uphold the Act by securing compliance from charged parties who have either agreed or been ordered to remedy unfair labor practices. After the examiners and attorneys have completed their work in the field, the office, or the hearing room, and after those efforts result in settlements, ALJ decisions, Board Orders, or district court judgments, the torch is passed on to me to make sure the words on those documents become a long-awaited reality.

Generally, the work in a compliance case starts as soon as a settlement agreement is approved or a decision issues. The compliance unit immediately reaches out to the charged party to outline the specific steps that the charged party must take. We closely oversee compliance with the affirmative remedies in each settlement agreement and order, such as make-whole remedies, expungement letters, notice postings, bargaining, handbook rules revisions, notice readings and mailings, among others. For a backpay remedy, we will ask the charged party to provide documents needed to calculate backpay and give specific instructions on the issuance of backpay checks. Most of the time, we also handle the distribution of backpay checks to discriminatees. If we are lucky, the remaining work in the case will be just a matter of following up with the parties to ensure all requirements have been completed before we recommend that the case close. However, the compliance world is rarely this simple.

In a perfect world, backpay calculations would be available immediately. Oftentimes, however, compliance officers confront imperfect memories and incomplete records. The challenge sometimes lies with the discriminatees themselves. After years of litigation efforts, discriminatees may move or change their contact information, forgetting to keep us apprised of their whereabouts. Sometimes, we do not know of the existence of a discriminatee who is owed money until a charged party releases its records. A substantial amount of time is spent locating such individuals.

Other other tricky issues include bankruptcy filings, claims of inability to pay and insolvency, or disappearing employers. In bankruptcy cases, it will often be necessary for the Region's compliance officer to file a proof of claim so that we can secure payment liquidated through assets or restructured debt. When employers pack up and disappear and there is no indication that they are running a related business anywhere else, it can be even more difficult to obtain money for backpay. In those rare cases, it can lead to the

frustrating reality that we may be forced to close the case without compliance.

Nevertheless, every minute of the challenges is worthwhile when we secure full remedies for unfair labor practices.

Region 20 Celebrates Constitutionality Day!

By Region 20 Field Attorney Richard McPalmer

April 12 is the date, in 1937, when the U.S. Supreme Court issued its decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), declaring the National Labor Relations Act constitutional. Region 20 staff celebrated this anniversary by holding an "Outreach Blitz" aimed at educating the public about the Act.

The NLRA (or, Wagner Act as it was colloquially known) was signed into law by President Roosevelt on July 5, 1935.

Of course, the constitutionality of much of President Roosevelt's New Deal program remained in dispute in 1935—largely due to the Supreme Court's refusal to accept the Administration's expanded view of the power of Congress to pass legislation under the Commerce Clause. Indeed, legislation creating what would be a precursor to the NLRB was declared unconstitutional in the 1935 case *Schechter Poultry Corp. v. United States*, 295 U.S. 495.

Nevertheless, with FDR's signature on the law, the Board began its work.

One early NLRB case involved the Jones & Laughlin Steel Company. Jones & Laughlin Steel was America's ninth largest steel producer. Unfair labor practice charges claimed the company discriminated against workers who wanted to join the Steel Workers Organizing Committee (SWOC)—which later became the United Steelworkers of America. The company had fired ten employees at its plant in Aliquippa, Pennsylvania after they moved to unionize. The NLRB ruled against the company and ordered the workers be reinstated with back pay.

The company refused to comply, and the Fifth Circuit Court of Appeals agreed that the NLRA was unconstitutional. 82 F.2d 998, 999 (1936).

In a surprise to most, the Supreme Court ruled in the 5-4 decision, issued April 12, 1937, that the NLRA passed constitutional muster.

In Chief Justice Hughes' Opinion, the Court described the scope of the Act and the violation of the rights involved (57 S.Ct. at 622):

> [I]n its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.
>
> That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. ****

The Court went on to find the scope and purposes of the Act within the bounds of federal power under the Commerce Clause, writing (57 S.Ct. at 626-27):

> When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? ****
>
> [W]e have no doubt that Congress had constitutional authority to

safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.

And the rest is history!

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.nlrb.gov/

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 20
901 MARKET ST – SUITE 400, SAN FRANCISCO CA 94103-1735