The Bridge

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

Fall 2013 **Region 20 (415) 356-5130** **Region 32 (510) 637-3300**

In This Issue

To arrange for a presentation about the NLRB in the Bay Area and throughout Northern California, contact Region 20's Outreach Coordinator, Kathleen Schneider 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.

Following Compliance Hearing, Administrative Law Judge Finds that Hawaii Tribune-Herald Must Pay over $250,000 Plus Interest to Remedy Unfair Labor Practices Dating Back to 2005

Honolulu, HI - On June 6, 2013, Administrative Law Judge Jeffrey D. Wedekind issued a supplemental decision finding that Stephens Media LLC d/b/a Hawaii Tribune-Herald must pay a combined total of $230,901 in backpay plus interest to reporters Hunter Bishop and Dave Smith. ALJ Wedekind also found that the Hilo-based newspaper must pay The Newspaper Guild International Pension Fund $32,752 plus any interest and applicable penalties to make up for contributions it missed on behalf of Bishop and Smith.

This decision is the last chapter in a longstanding dispute concerning Hawaii Tribune-Herald's suspension and termination of Bishop in 2005 and Smith in 2006. In March 2008, following a seven-day hearing in Hilo, ALJ John J. McCarrick issued his decision finding that Hawaii Tribune-Herald violated Section 8(a)(3) and (1) of the Act by suspending and terminating Bishop and Smith. The newspaper filed exceptions and, on February 14, 2011, the Board issued its decision affirming ALJ McCarrick's findings with respect to Bishop and Smith. The Board ordered the newspaper to offer both reporters unconditional reinstatement and to make them whole for any losses suffered as a result of the newspaper's unlawful discrimination against them. On April 20, 2012, the D.C. Circuit Court of Appeals issued its opinion enforcing the Board's decision and order. Hawaii Tribune-Herald requested that the Court of Appeals rehear the case en banc, but this request was denied in June 2012.

Although the newspaper offered both Bishop and Smith reinstatement to their positions, a dispute arose concerning the amount of backpay owed to Bishop and Smith and delinquent contributions due to the Pension Fund. The Regional Director issued a compliance specification on December 21, 2012, and a compliance hearing was conducted in March 2013 before ALJ Wedekind.

Following the issuance of ALJ Wedekind's supplemental decision, the lengthy dispute over Hawaii Tribune-Herald's unlawful treatment of Bishop and Smith came to a close when the newspaper finally made Bishop, Smith, and the Pension Fund whole by paying them the amounts determined by the ALJ. Field Attorney Meredith Burns served as Compliance Officer and Field Attorney Trent Kakuda 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

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/

Employer Unlawfully Withdrew Recognition: ALJ Finds After-the-Fact Evidence of Lost Union Support Irrelevant

Sacramento, CA –On June 19, 2013, Administrative Law Judge Mary Miller Cracraft found that Pacific Coast Supply, LLC d/b/a Anderson Lumber Company (the Employer) unlawfully withdrew recognition from Chauffeurs, Teamsters, and Helpers Local 150, International Brotherhood of Teamsters (the Union). After more than forty years of recognizing and bargaining with the Union, the Employer withdrew recognition based on eight separate written statements submitted by eight unit employees. The issue before the Judge was whether the withdrawal of recognition was lawful pursuant to *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). More specifically, the Judge had to decide whether the eight statements indicated that the eight employees no longer desired Union representation. The Judge found that four of the eight statements relied upon by Respondent did not reflect that those employees no longer wished to be represented by the Union. Thus, the withdrawal of recognition was not based upon proof that the Union had actually lost the support of a majority of unit employees.

Interestingly, despite the legal standard, at the hearing the Employer attempted to offer evidence that unit employees no longer desired Union representation, by having unit employees testify to clarify what they meant by their previously submitted written statements. Under *Levitz*, the relevant inquiry is whether at the time the employer withdrew recognition from the union, the employer possessed evidence of the union's loss of majority status. Under this inquiry, the evidence which was not known to, and relied upon by the Employer as the basis for withdrawing recognition, was found irrelevant and properly rejected. This being the case, the ALJ found that the Employer violated Section 8(a)(5) of the Act by unlawfully withdrawing recognition. The case was investigated by Field Examiner Norma Pizano and tried by Field Attorney Elvira Pereda.

Sutter Delta and California Nurses Association Reach Settlement in Matter Litigated before ALJ

San Francisco, CA – November 2013. Sutter East Bay Hospitals d/b/a Sutter Delta Medical Center (the Employer) and California Nurses Association (the Union) reached a settlement agreement in the successfully litigated case which determined that the Employer violated the National Labor Relations Act by refusing to provide certain information to the Union and unlawfully implementing its last, best, and final offer.

On November 19, 2012, the Union filed a charge alleging that the Employer violated the National Labor Relations Act by conduct that flowed from bargaining between the Union and the Employer over terms for a successor collective-bargaining agreement. During those negotiations, the Employer made proposals to reduce Registered Nurses' compensation and benefits, claiming that such reductions were needed due to the passage of the Affordable Care Act (ACA). The Union requested that the Employer provide information to substantiate its claim that implementation of ACA would compel ther Employer to cut costs. The Employer refused to provide the requested information to the Union, declared that the parties had reached impasse, and unilaterally implemented proposals contained in its last, best and final offer to the Union that implemented the cuts that the Employer had proposed. The Union claimed that by refusing to provide information that was necessary and relevant for the Union to fulfill its role as employees' bargaining representative, the Employer had bargained in bad faith, and that the Employer's unilateral changes to the Registered Nurses' terms and conditions 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.

employment were thus illegal.

On July 23, 2013, Administrative Law Judge Jay R. Pollack issued his decision in which the Employer was found to have violated the National Labor Relations Act. The administrative law judge found that the Employer violated the NLRA and ordered it to cease and desist from refusing 1) to bargain collectively by unilaterally implementing terms and conditions of employment, and 2) to furnish the Union with information relevant and necessary for the purposes of collective bargaining. The administrative law judge further ordered that the Employer meet and bargain with the Union, rescind any unilateral changes that it had implemented to its employees' terms and conditions of employment, and make whole all employees for any losses that they suffered as a result of its unilateral changes.

On November 6, 2013, the Union withdrew the charge on which the case was based following the parties' settlement of the matter and the ratification of a new collective-bargaining agreement in October 2013. This case was investigated by Field Attorney Cecily Vix and tried by Field Attorney Jason Wong.

Individual Arbitration Agreement Found Unlawful under *D.R. Horton*

San Francisco, CA - Region 20 obtained a complete victory in *GameStop Corp.*, et al, No. 20-CA-80497, JD(SF)-42-13 (Aug. 29, 2013). *GameStop*, which was tried before Administrative Law Judge Gerald M. Etchingham, is yet another in the growing body of administrative law judge decisions considering the impact of *D.R. Horton* on individual arbitration clauses in employment agreements that purport to offer employees an opportunity to opt out of arbitration altogether. Region 20 attorneys first presented this issue to an administrative law judge in *24-Hour Fitness*, 2012 WL 5495007, No. 20–CA–035419, JD(SF)-51-12 (Nov. 6, 2012), obtaining a complete win. That case is currently pending before the Board.

The arbitration provision at issue in *GameStop* included an opt-out clause that only applied to the employer's California-based employees. The Judge examined the arbitration provision's effect on employees inside and outside of California separately, but ultimately concluded that the arbitration provision was unlawful as applied to both groups. In doing so, Judge Etchingham considered and rejected various challenges both to the authority of the Board when it decided *D.R. Horton* and to the merits of the *Horton* decision itself. Judge Etchingham also discussed several administrative law judge decisions that have come out since *24-Hour Fitness*, siding with the majority of decisions that have found individual arbitration clauses to be unlawful even though they contain some form of opt-out provision. The judge also found that the arbitration clause could be read by a reasonable employee to preclude access to the Board's processes, and that the confidentiality clause in the arbitration agreement independently violated the Act.

Judge Etchingham recommended a comprehensive remedy for these violations, including requiring GameStop Corp. and its affiliated entities to withdraw any motions to compel individual arbitration now pending in any judicial or arbitral forum, and to request that courts vacate any orders to compel arbitration if such requests can be timely filed. Field Attorneys Carmen León and Richard McPalmer investigated while Field Attorney Joseph Richardson briefed this case to the ALJ, who decided it based on a stipulated record submitted by the parties.

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.

Letter Signing Ceremony with Mexican Consulate Launches Outreach Events to Promote Education and Training on the Act

On July 23, 2013, Acting General Counsel Lafe Solomon and the Ambassador of the United Mexican States signed a letter of agreement to foster a closer relationship between our Agency and the Mexican consulate offices in the US for purposes of information sharing, outreach, education and training. Regions 20 & 32 hosted a viewing of the ceremony and reception with representatives of the Bay Area Mexican consulate offices. The first of the events promoted by this agreement was the San Francisco Consulate's annual Labor Rights Week which took place during the week of August 26, 2013. Region 20 participated by staffing an informational table during their resources fair and giving a brief introduction on the NLRB to the public awaiting services from the Consulate.

Left to right: Region 20 Regional Director Joseph F. Frankl, San Jose Mexican Consulate Representative Nuria Marine, San Francisco Mexican Consulate Representative Adriana Gonzalez, Region 20 Field Attorney Carmen León, Region 32 Field Attorney Brenda Rosales, Region 32 Regional Director William Baudler.