The Bridge

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

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

In This Issue

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

NLRB Judge Finds 24 Hour Fitness Arbitration Clause Violates Federal Labor Law

San Francisco, CA –Administrative Law Judge William L. Schmidt issued a decision finding that 24 Hour Fitness USA, Inc. maintained and enforced an unlawful arbitration policy that required employees to give up their federally protected rights to take concerted action.

The California-based corporation, which operates fitness centers across the country, required new employees to agree in writing to submit all employment-related claims to individual arbitration. Employees were also prohibited from discussing such claims with their co-workers.

The employee handbook advised employees they could opt out of the policy by taking a series of steps. However, Schmidt found that the provision was "an illusion" because the process was "convoluted" and because employees would be unable to identify others who had also opted out with whom they could discuss their case.

Judge Schmidt relied on the Board's recent decision in DR Horton, which detailed Appellate and Supreme Court decisions dating back to the 1940s reaffirming the principle that "employers cannot enter into individual agreements with employees in which the employees cede their statutory rights to act collectively."

He rejected the arguments of 24 Hour Fitness and the Chamber of Commerce, which filed an amicus brief in the case, saying they wished "to establish an employer's right to restrict employees, in order to hold a job, from exercising their statutory right to use the full-range of legal remedies generally available to all citizens."

The fitness center operator successfully pursued enforcement of the individual arbitration clause in at least eight lawsuits filed by employees at several California facilities alleging discrimination and wage and hour violations.

In his decision, Judge Schmidt ordered the company to remove the prohibition against class or collective actions from the employee handbook, and to notify all employees of the change. He also ordered 24 Hour Fitness to notify all arbitral or judicial tribunals where it has pursued enforcement of the clause that it desires to withdraw the request. The case was tried by Region 20 Field Attorneys Carmen León and Richard McPalmer.

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:

www.nlrb.gov

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.

Board Decides in Region 32 Case to Reverse Anheuser-Busch Regarding Employer's Duty to Provide Witness Statements upon Request by Union

Oakland, CA – In the Summer/Fall 2012 issue of The Bridge, we reported on Region 32's involvement in American Baptist Homes of the West, d/b/a Piedmont Gardens, in which the Region, on behalf of the Acting General Counsel, had sought to overturn *Anheuser-Busch*, 237 NLRB 982 (1978), which had categorically exempted employers from having to provide unions with witness statements obtained by employers in the course of investigating disciplinary incidents. The issue arose as a result of Piedmont Gardens' refusal to provide the Union with copies of written statements taken from witnesses to an incident that led to the termination of an employee. As reported in the last issue, an administrative law judge had found against the Region on that issue, based on the judge's determination that he was bound to do so by Anheuser-Busch.

Now, however, following Region 32's filing of exceptions to the judge's decision, the Board, in *American Baptist Homes of the West, d/b/a Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 2012), has overturned Anheuser-Busch so as to no longer categorically exempt witness statements from being produced pursuant to union information requests. Thus, the Board ruled that instead of applying a bright line exclusionary rule under Anheuser-Busch, it will now apply a balancing of interests test as articulated by the United States Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), under which the Board balances the need for the witness statements against "any legitimate and substantial confidentiality interests established by the employer." The Board further adopted the Acting General Counsel's argument as to what constitutes a confidential witness statement, with the Board holding that in order for a statement to be deemed confidential, prior to a balancing of interests' analysis, the witness must have received assurances of confidentiality prior to creating the statement. Field Attorney Catherine Ventola investigated this case and Field Attorney Noah Garber litigated the case.

Pacific Beach Hotel Workers Achieve Their First Collective-Bargaining Agreement

Honolulu, HI - After ten years of struggle, the International Longshore and Warehouse Union Local 142 has executed its first collective-bargaining agreement on behalf of the Pacific Beach Hotel employees. Highgate Hotels LP assumed management of the Hotel in January 2012, and almost immediately negotiated and entered into a four-year agreement with the Union, which provides, among other benefits, significant raises for the approximately 335 bargaining unit employees over the life of the agreement.

Until December 2012, the Pacific Beach Hotel was both owned and managed by the HTH Corporation, the Pacific Beach Corporation and Koa Management, LLC, which operated as a single entity, according to the National Labor Relations Board. Union allegations of multiple unfair labor practices spanning its ten year struggle with the owners resulted in rulings adverse to the Hotel in two administrative hearings conducted before Administrative Law Judges James Kennedy and John McCarrick (HTH I and HTH II), two injunction hearings and one contempt of injunction hearing conducted by Judge J. Michael Seabright of the U.S. District Court for the District of Hawaii, one Board Decision (HTH I), and two decisions of the 9th Circuit Court of Appeals (upholding the granting of Injunctions I and II and enforcing the Board's Decision in HTH I). The Hotel attempted to appeal to the U.S. Supreme Court the 9th Circuit Court of Appeal's decision affirming Judge Seabright's granting of Injunction I, but was denied certiorari. Administrative Law Judge

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.

McCarrick's decision in HTH II is currently pending Board review and the National Labor Relations Board is currently working with the owners of the Hotel to ensure that the Board-ordered remedies in HTH I are complied with.

Throughout the lengthy legal battle, the Hotel employees bravely remained steadfast in their support of the Union and their belief in exercising their rights under the National Labor Relations Act. The stalwart members of the bargaining committee, seven of whom were terminated once and one of whom was terminated twice by the Hotel in retaliation for their Union activities, led the fight for employee rights and testified multiple times during the administrative hearings. Some of the bargaining committee members are pictured below casting their ballots during the contract ratification vote.

"This is the best outcome for the Pacific Beach Employees for which we could have hoped" commented Thomas Cestare, Officer-in-Charge of Subregion 37 in Honolulu.

Pacific Beach employees and bargaining team members submitting their votes for contract ratification. Left to right: Darryl Miyashiro, Cesar Pedrina, Alan Ah Yo, Guillerma Ulep, Keith Kapena Kanaiaupuni, Jacqueline Taylor-Lee, Ruben Bumanglag, and Virginia Recaido.

At-Will Employment Clause Found Lawful

Oakland, CA – On October 31, 2012, the NLRB's Division of Advice found in a case filed with Region 32 that an at-will clause is not unlawful. The charge was filed against Rocha Transportation, a trucking company located in Modesto, California, which maintained an at-will employment clause in its employee handbook. The clause stated that employment is at-will, that it may be terminated at any time without notice, and that only the president of the company has the authority to alter this policy. The handbook also contained an "Acknowledgement of Receipt" that employees were required to sign, which reiterated the at-will employment clause.

Applying the *Lutheran Heritage Village-Livonia*, 348 NLRB 646 (2004) test respecting unlawful workplace rules to the at-will employment clause in this case, Advice first found that the rule did not explicitly restrict Section 7 activities.

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.

Moreover, it found no evidence that the rule was either promulgated in response to union activity or had been applied to restrict protected activity. Accordingly, the legality of the rule depended on whether employees would reasonably construe it in context to restrict Section 7 activity. Advice found that the clause did not require employees to refrain from seeking to change their at-will status or to agree that their at-will status could not be changed. Rather, the provision prohibited the Employer's own representatives from entering into employment agreements that provide for other than at-will employment. Moreover, the provision explicitly permits the Employer's president to enter into written employment agreements that modify the employment at-will relationship and, thus, encompasses the possibility of a potential modification of the at-will relationship through a collective-bargaining agreement that is ratified by the Company president.

In reaching this conclusion, Advice distinguished a February 1, 2012, decision by an Administrative Law Judge in *American Red Cross Arizona Blood Services Region* (Case 28-CA-23443), because in that case the clause stated that the at-will employment relationship could not be amended, modified or altered in any way. The clause at issue in Rocha Transportation did not include such a restriction. Region 32 Field Examiner Helen Yoon investigated this case.

Employer Must Bargain with Newly Certified Union Before Implementing Discipline

Washington, D.C. - On December 14, 2012, the Board issued its decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), finding that an employer must bargain with a newly certified union before implementing discretionary discipline against unit employees. The Board ruled that Alan Ritchey, Inc. ("the Employer") was required to give newly elected ILWU Local 6 ("the Union") notice and an opportunity to bargain before taking certain disciplinary action against unit employees because it retained substantial discretion in whether and how to discipline employees.

The decision followed a lengthy history of litigation. In April 2000, a majority of Alan Ritchey, Inc.'s Richmond, California employees selected the Union as their bargaining representative. Prior to certification, the Employer maintained a five-step progressive disciplinary system which the Employer conceded permitted it to exercise discretion over whether to impose discipline and how much. Following the Union's certification, a charge was filed with Region 32 after the Employer disciplined an employee without first notifying or bargaining with the Union.

In April 2002, Administrative Law Judge Burton Litvack issued a recommended decision and order finding that the Employer violated the Act by failing to bargain in advance about disciplinary actions. In September 2009, a two-member Board issued the first decision in Alan Ritchey, Inc., 354 NLRB 628 (2009), relying upon an earlier Region 32 decision in Fresno Bee, 337 NLRB 1161 (2002) which the Board viewed as dispositive. The two-member Board found that the Employer did not violate Section 8(a)(5) of the Act by failing to notify and bargain with the Union before issuing discipline, as there had been no change to the Employer's disciplinary policies or practices. The Union filed a petition for review of the Board decision with the U.S. Court of Appeals for the Ninth Circuit. The case was remanded to the Board for further consideration based on the U.S. Supreme Court's decision in *New Process Steel LP v. NLRB*, 130 S.Ct. 2635 (2010). On remand, the Board found that long-established legal doctrine requiring notice and bargaining on discretionary issues should apply to discretionary discipline. Accordingly, an employer will now be required to bargain before imposing discretionary discipline in the form of a discharge or analogous sanction, and after the imposition of lesser discipline such as a warning.

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.

You can also visit us online at the Internet address above and click on the speakers link.

For questions about The Bridge, contact Newsletter Editor, Field Attorney Carmen León at: 415-356-5130

In so holding, the Board distinguished between disciplinary actions such as suspension, demotion, and discharge that have an "inevitable and immediate impact" on employee livelihoods and earnings, and less severe forms of discipline, which have a lesser impact and may be effectively addressed in bargaining after the employer has taken action. The Board found that to "permit employers to exercise unilateral discretion over discipline after employees select a representative—i.e., to proceed with business as usual… would render the union …impotent." 359 NLRB No. 40, slip op. at 10. Former Region 32 Field Attorneys Jo Ellen Marcotte and Thomas Bell tried the underlying case.

Region 20's Own Vintage Base Ball Players

Region 20 Supervising Field Examiner Daniel Owens and Field Attorney Matt Peterson have a rather quirky past-time: vintage base ball. Their team, the San Francisco Pelicans, participates in a vintage base ball association. The teams play strictly by the rules of the game circa 1886, including uniforms and equipment. (Base ball was changed to one word after the 1880s.) Owens and Peterson are in their first year playing for the new team. Go Pelicans!

Field Attorney Matt Peterson at bat. Photo: James Tensuan, The Chronicle

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