The Bridge

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

Fall 2014 **Region 20 (415) 356-5130** **Region 32 (510) 637-3300**

In This Issue

The Board Awards a Host of Extraordinary Remedies in the latest in the Pacific Beach Hotel Saga

Washington, D.C. -- On October 24, 2014, the National Labor Relations Board issued its long awaited Decision and Order in part two of the HTH Corporation saga.

This case involves the notorious Pacific Beach Hotel, which was, until December 2012, both owned and managed by the HTH Corporation, the Pacific Beach Corporation and Koa Management, LLC, which, according to the Board, operated as a single entity. International Longshore and Warehouse Union, Local 142's (Union's) 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, a Board Decision in HTH I, and two decisions by 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 certiorari was denied.

The decision in HTH II represents the Employer's second full loss before the Board. Citing the sordid history of litigation that has been necessary against this unrelenting Employer, the Board fully agreed with and affirmed the findings and conclusions Administrative Law Judge McCarrick included in his September 13, 2011 decision. It held that the Employer violated the Act when it warned, suspended and terminated a Union bargaining committee member who had just three months prior been reinstated pursuant to Judge Seabright's order in Injunction I; unilaterally changed the terms and conditions of employment by restricting access of Union representatives to the Employer's property; unilaterally increased housekeepers' assignments just three months after being ordered by Judge Seabright to restore the status quo; ceased contributing to the employees' 401(k) plan; failed to provide information to the Union that was relevant and necessary to the performance of its duties as the exclusive bargaining representative of the Hotel employees; placed employees under surveillance while they engaged in Union activity; undermined the Union by telling its employees that the Union agents are barred from the Hotel property; threatened Union agents with removal from public sidewalks because they were passing out Union literature; and intimidated Union representatives while they were engaged in lawful leafletting.

The Board, commenting that "the Respondents still have not complied with the remedial obligations imposed on them during our earlier encounters," awarded in addition to the normal make-whole remedies ordered in the above-referenced unfair labor practices, the following extraordinary remedies requiring Respondents to: 1) pay litigation expenses to the General Counsel and to the Union; 2) pay to

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

the Union its bargaining and other expenses that it incurred as a result of its unlawful access restriction on the Union's representatives; 3) post the Notice to Employees and the Explanation of Rights for a period of three years; 4) mail the Notice to Employees and the Explanation of Rights to all current employees, supervisors and managers who now work and who previously worked for the Hotel, since November 24, 2009; 5) provide all new employees, supervisors and managers who are hired by the Hotel for a three year period with a copy of the Notice to Employees and the Explanation of Rights; 6) separately mail the Board's Decision and Order to all current employees, supervisors and managers and to all new employees hired during the three-year period; 7) publish the Notice to Employees and the Explanation of Rights in two local publications of broad circulation and local appeal twice a week for a period of 8 weeks; and 8) have all of its supervisors, and managers, attend a public reading of the Notice to Employees and the Explanation of Rights; Respondents' CEO, President, and Regional Vice President are ordered to attend at least one meeting each.

Also significant in the Board's decision was its discussion of front pay in lieu of reinstatement for the bargaining committee member who Respondents terminated for a second time. In a footnote, the Board majority commented that although reinstatement is the preferred remedy for an unlawful discharge, it recognized that there may be certain factors that may limit the effectiveness of the preferred remedy and may cause a wronged employee to waive reinstatement, thus rewarding a hostile employer's conduct. However, the Board deferred consideration of its authority to award front pay to future cases where the factual record has been fully developed and where the parties had an opportunity to brief the issue. In addition, the Board wanted to avoid further delay of its decision that would be created if it severed that issue and invited additional briefing on the matter.

Respondents have requested that the D.C. Circuit Court of Appeals review the Board's decision. Although the specific issues that Respondents are requesting to be reviewed have yet to be identified, it is almost certain that Respondents will be asking the Court to review the awarded extraordinary remedies.

Although this Board Decision may appear to contain extraordinary remedies, the Respondents' utter contempt for and total disregard for the Administrative Law Judges' and the various federal court Judges' decisions and orders earned Respondents these remedies. During the unfair labor practice hearing before ALJ McCarrick, the Union's Oahu Division Director testified that when he told Respondent's Regional Vice President of Operations that the Respondents' changes to the housekeeping room assignments and unilateral cessation of matching 401(k) contributions to employees violated Judge Seabright's 10(j) order, the Regional Vice President of Operations replied "F_ _ _ the judge. He's wrong. It's not illegal unless I go to jail."

Subregion 37 (Honolulu) field attorneys Trent Kakuda and Dale Yashiki tried the eight charges included in this Board Decision during 16 days in February and April 2011.

ALJ Decides Unlawful Termination Case in EF International Hearing Testimony via International Video Conferencing

San Francisco, CA – The General Counsel brought a complaint against EF International Language Schools, Inc. (EF), alleging that EF terminated the Charging Party because of her protected, concerted activities, and threatened her with unspecified reprisals if she continued to engage in such actions that included her speaking out about teachers' terms and conditions of employment at meetings and in group emails. During the trial, the NLRB for the first time in the Agency's history conducted a trial examination of a witness via international video conferencing. The administrative law judge found that EF violated the NLRA and ordered that it cease and desist from threatening or discharging employees for their protected,

concerted activities. The administrative law judge also ordered that EF offer full reinstatement to the Charging Party and make her whole for any loss of earnings or other benefits suffered as a result of her unlawful termination. Finally, the administrative law judge determined that the witness's testimony obtained via international video conferencing could be evaluated on an equal footing with the testimony of witnesses appearing in person at the hearing. This case was investigated and tried by Region 20 Field Attorney Jason Wong.

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/

Judge Orders Fairfield Toyota to Reinstate Fired Union Supporter, Rescind Unlawful Rules and Arbitration Agreements, and Bargain In Good Faith With the Machinists' Union

San Francisco, CA - On June 3, 2014, ALJ John J. McCarrick issued a decision finding that Fairfield Toyota committed various violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) after a trial was conducted based on a complaint filed by Region 20 of the National Labor Relations Board (the Board). As found by the judge, Fairfield Toyota's automotive technicians voted to be represented by the International Association of Machinists and Aerospace Workers, Automotive Machinists Local Lodge No. 1173, District Lodge 190 (the Union). After refusing to recognize or bargain with the Union until May 2012 when it was ordered to do so by the U.S. Court of Appeals for the D.C. Circuit, Fairfield Toyota finally agreed to recognize and bargain with the Union. In the meantime, Respondent changed technicians' wages, work schedules, and the binding arbitration agreements it required employees to sign without first notifying or bargaining with the Union. It also maintained rules and policies which interfered with the technician's right under Section 7 of the Act to discuss their working conditions amongst themselves and with the media and other outside individuals or groups, and to collectively arbitrate grievances they had against their employer. Finally, Fairfield Toyota fired a technician (discriminatee), the last open Union supporter and member of the Union's bargaining committee, because of his support for the Union and to discourage other employees from supporting the Union, falsely claiming that he had stolen scrap tires when the evidence showed that he had permission to do so, without first notifying or bargaining with the Union or providing the Union with the information it had requested regarding the discriminatee's termination.

Judge McCarrick ordered Fairfield Toyota to cease and desist from engaging in these unfair labor practices, to post and read a Notice to Employees informing them of their rights under Section 7 of the Act and that it would not interfere with those rights, to reinstate the discriminatee to his former position, expunge the termination from his employment record, and make him whole for any loss of earnings and other benefits he suffered as a result of his unlawful termination; and to bargain with the Union for an extra year following the expiration of the certification year. Region 20 sought and obtained an injunction from the United States District Court for the Eastern District of California requiring Fairfield Toyota to reinstate the discriminatee and change its scrap tire policy. The cases were investigated by Region 20 Field Attorney Elvira Pereda and Field Examiner Scott Smith, and litigated by Field Attorneys Matthew C. Peterson and Elvira Pereda. Region 20 Compliance Officer Karen Thompson is handling compliance.

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.

Administrative Law Judge Finds Employer Maintained Unlawful Arbitration Agreeement

Oakland, CA -- Region 32 has recently seen an increase in cases involving mandatory arbitration agreements that require employees to waive their rights to collectively pursue claims against their employers under *D.R. Horton*, 357 NLRB No. 184 (2012). Recently, the Region successfully litigated a case that extended *D.R. Horton*'s protections for collective action to ostensibly voluntary arbitration agreements. The arbitration provision at issue in *Acuity Specialty Products, Inc. d/b/a Zep, Inc.*, 32-CA-075221, JD(NY)-30-14 (July 21, 2014), tried before Administrative Law Judge Mindy Landow, was not a mandatory condition of employment as in *D.R. Horton*. Instead, the Employer required its employees to agree to individually arbitrate disputes in order to participate in its long-standing annual sales bonus plan. Nevertheless, Judge Landow found the arbitration agreement to violate Section 8(a)(1) of the Act because it constituted an irrevocable waiver of employee rights to engage in collective action, even as to future disputes, and because employees would reasonably interpret the agreement to restrict their right to file unfair labor practice charges with the Board.

Furthermore, in her decision, the Judge dismissed the Employer's attacks on the Board's authority to issue *D.R. Horton* and the decision itself, noting that employees' right to collectively pursue claims against their employer, including through class action litigation, is a cornerstone principle of the Act historically protected by the Board, not a new concept established in *D.R. Horton*. The Judge also rejected the Employer's claims that the Federal Arbitration Act and cases upholding individual arbitration agreements trump the Board's authority to prohibit such agreements, noting that unlike other statutory contexts where class action litigation is treated as a procedural mechanism, collective legal action is a substantive right under the Act and fully within the purview of the Board. Judge Landow also found the Employer's conditioning of employee bonuses on execution of the agreement to independently violate Section 8(a)(1) of the Act.

Judge Landow recommended an expansive, nationwide remedy, which requires the Employer to reinstate sales bonuses for any employees who refused to sign the agreement, to withdraw any pending motions to compel individual arbitration under the agreement, and to move to vacate any orders compelling its employees to arbitrate their claims individually, if such requests can be timely filed and are requested by the affected employees. The cases were investigated by Region 32 Field Attorney's Judith Chang and Jennifer Kaufman and litigated by Region 32 Field Attorney Amy Berbower. The Employer has filed exceptions to the Judge's decision and the case is currently pending before the Board. (Since this decision issued, the Board issued *Murphy Oil USA Inc.,* 361 NLRB No. 72 (2014), reaffirming the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).

Board Affirms ALJ's Findings that Waikiki Hotel Unlawfully Terminated Housekeeper for Engaging in Protected Concerted Activity

Washington, D.C. -- On August 18, 2014, the Board issued a decision finding that Modern Management Services, LLC d/b/a The Modern Honolulu committed various violations of Sections 8(a)(1) and (5) of the National Labor Relations Act. The Board's decision affirmed the findings of ALJ William L. Schmidt in his decision, dated January 23, 2014. UNITE HERE! Local 5 filed the initial charges against the Hotel in 2012 based on the housekeeping director's actions towards bargaining-unit employees represented by Local 5. The Board unanimously adopted the ALJ's findings that the Hotel violated Section 8(a)(1) when the director interrogated her employees and conducted an investigatory interview after ignoring an employee's request for a Weingarten representative. The Board, with one member dissenting,

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.

also agreed with the ALJ that the Hotel violated Section 8(a)(1) when the director and a housekeeping department supervisor engaged in surveillance of employees' union activities and gave employees the impression that their union activities were under surveillance.

A majority of the Board also adopted the ALJ's conclusion that the Hotel unlawfully terminated a turndown room attendant for engaging in protected concerted activity during a department meeting in December 2011. The Board concurred with the ALJ's finding that the discriminatee was engaged in protected concerted activity when she attempted to ask the director about gossiping after the director opened the meeting for employee questions. Gossiping was subject to disciplinary action under the Hotel's rules and was also an issue the director had previously raised with employees. The Hotel claimed that it terminated the discriminatee for acting insubordinately towards the director during the meeting, but the ALJ and the Board disagreed. Accordingly, the Board adopted the ALJ's finding that the Hotel violated Section 8(a)(1) when it terminated the discriminatee. A few months after the discriminatee was terminated, Local 5 designated her as its agent to service bargaining-unit employees, but the Hotel immediately barred the discriminatee from the premises. In agreement with the ALJ, the Board concluded that this act violated Section 8(a)(5) and (1).

A week after the Board issued its decision, the Hotel filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit, where the case remains pending. Stay tuned! Subregion 37 Field Attorney Trent Kakuda tried this case.

Board Adopts ALJ's Finding that Pajaro Valley Golf Club Unlawfully Failed to Pay Employees' Health and Pension Benefits and Failed to Remit Employees' Membership Fees to Unite HERE!, Local 483

Washington, D.C. – On July 29, 2014, the Board adopted Administrative Law Judge William L. Schmidt's June 12, 2014 decision and order finding that the Employer, Pajaro Valley Golf Club, violated Section 8(a)(1) and (5) of the Act by failing to adhere to its obligations under its expired collective-bargaining agreement with Unite HERE! Local 483 (the Union). Specifically, Judge Schmidt found that the Employer's acts of failing to pay unit employees' health benefits, which caused them to lose healthcare coverage; failing to pay employees' pension benefits; and failing to remit employees' Union membership fees to the Union – "constituted a material and substantial change" in violation of Section 8(a)(5) of the Act. Citing to the Board's long-established principle that an employer risks violating its obligations under Section 8(a)(5) of the Act when it acts unilaterally with respect to the terms and conditions of employment of employees represented by a section 9(a) bargaining agent (see generally, *Fresno Bee*, 339 NLRB 1214 (2003)), Judge Schmidt acknowledged the severity of the effects of the Employer's unilateral change:

> Because of its failure or refusal to pay its bills, the [Employer's] represented employees no longer have health insurance coverage, no longer receive service credit toward their pensions, and face financial liability exposure to their bargaining agent for the dues [the Employer deducted] from their wages but failed to pay to [the Union]. For this group of employees, all of whom earn under $15 per hour, the impact of [the Employer's] conduct here is well beyond material and substantial; it is potentially catastrophic.

Accordingly, the Judge issued an Order requiring the Employer to reimburse the pension and health and welfare funds for all past-due contributions and to otherwise make the unit employees whole for any other losses they suffered as a

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.

result of the Employer's unlawful conduct. This case was investigated and tried by Region 32 Field Attorney Noah Garber.

Board Overturns ALJ and Orders Reinstatement and Backpay For Striking Workers

Washington, D.C. – On August 28, 2014, the Board issued a decision and order finding that Newman Livestock-11 Inc., violated Section 8(a)(1) of the National Labor Relations Act when it discharged 15 employees in retaliation for exercising their Section 7 right to strike. The Board found that the Employer terminated these employees for concertedly refusing to return to work until the Employer paid them the back wages it owed them. In so holding, the Board reversed a decision by Administrative Law Judge Gerald Wacknov to dismiss the case on jurisdictional grounds, finding that the General Counsel had elicited equivocal testimony from a witness which could be read as establishing that the Employer did as little as $35,000 of annual business with a particular customer, which did not meet the Board's $50,000 across state lines non-retail standard. The General Counsel excepted to this conclusion, noting that the Judge had ignored the fact that in its Answer, the Employer also admitted that it did an additional $25,000 in annual business across state lines with another customer, thereby easily meeting the $50,000 standard. The Board agreed with the General Counsel's exception on this point and reversed the Judge's dismissal of the Complaint. Although not necessary to its finding of jurisdiction, the Board also observed that this finding was confirmed by additional jurisdictional evidence submitted by the Employer to the Judge after the record had been closed, as argued by the General Counsel in her exceptions.

In its decision, the Board also reversed the Administrative Law Judge's finding that even if jurisdiction was established, the unlawfully discharged employees were not entitled to reinstatement and backpay because they had failed to offer to return to work. In reversing the Judge on this point, the Board found that given that the discharged striking employees did not quit their jobs or engage in unprotected misconduct, their unlawful discharges converted their status from economic strikers to discriminatees, thus entitling them to reinstatement, backpay, and a notice even absent their making an unconditional offer to return to work. Contrary to the Administrative Law Judge's suggestion that the discharged employees' remedy would be limited to a notice-mailing, the Board held that the employees were entitled to a complete remedy.

Region 32 is now working with the 15 discriminatees to ensure that they are awarded the backpay they rightfully earned. The case was investigated by Region 32 Field Examiner Paloma Loya and tried by Region 32 Field Attorney Angela Hollowell-Fuentes.

ALJ finds Steve Zappetini & Son, Inc. Unlawfully Terminated Shop Steward

San Rafael, CA -- On May 8, 2014, Administrative Law Judge Mary Cracraft found Steve Zappetini & Son, Inc. (Respondent) violated Section 8(a)(1), (3), and(4) of the National Labor Relations Act by effectively discharging a 10-year employee (discriminatee) because he was affiliated with International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 790 (the Union) and because the Union had filed a bankruptcy claim and an unfair labor practice charge on the employee's behalf.

Although Respondent and the Union had a collective-bargaining relationship for about 50 to 60 years, sometime in 2010 or 2011, Respondent ceased making contributions to the Union's trust funds. From January 2012 until he was discharged, the discriminatee served as the Union's shop steward and was involved in certain protected activities. Sometime in the summer of 2013, the discriminatee complained to the Union that Respondent was not paying employees for breaks. Respondent called the discriminatee a "chicken shit" for complaining to the Union. The Union also filed a proof of claim in Respondent's bankruptcy case, to claim for medical expenses incurred by the discriminatee as the result of Respondent no longer making contributions to the Union's trust fund. The Union also filed a charge with the NLRB alleging that Respondent failed to make Union trust fund contributions.

Two days after the filing of the NLRB charge, while referencing the NLRB charge, Respondent either told or asked the discriminatee whether they had a conflict of interest, and then required the discriminatee to bring in a doctor's note in order to continue working. A few days later the discriminatee provided a doctor's note. Respondent believed the note was insufficient. However, it never informed the discriminatee the note was deficient, nor did it tell him he could return to work.

Although Respondent defended on the ground that it never discharged the discriminatee but merely asked him to bring in a doctor's note releasing him to work, the General Counsel argued, and the ALJ found, that the imposition of a mandatory doctor's release to return to work was, in effect, a discharge. The ALJ found that absent this employee having engaged in Union and other protected activities as described above, Respondent would not have required the doctor's note. Therefore, by insisting that he produce a doctor's note releasing him to work, which was substantially motivated by Respondent's animus towards the discriminatee's protected activities and its belief that he was involved in the filing of the NLRB charge, the ALJ found that Respondent in effect discharged him in violation of the Act. This case is currently pending before the Board based on exceptions filed by the parties requesting that the Board review the Administrative Law Judge's decision. Field Attorney Yasmin Macariola tried this case.

Federal Employees Give Back!

Oakland, CA - Bay Area federal attorneys and employees, including Region 20 attorneys and field examiners, remain committed to pro bono and other volunteer activities. Most recently, as members of the Bay Area Federal Employees Pro Bono Committee, NLRB employees volunteered with a youth restorative justice program operated by Centerforce Youth Court in Oakland, California. On September 23, 2014, volunteers donned a judge's robe to preside over Youth Court. Youth Court is a diversion program offered to first-time juvenile offenders, to allow them to make legal amends and erase their records. Youth defendants are presented, counseled, prosecuted, and sentenced by teen volunteer peers. Statistics show that this type of restorative justice is successful and effective. More than 90% of the youths who go through this program do not re-offend the next year, compared to only 65% for those that stay in juvenile hall. One volunteer expressed, "It was a great experience to witness the students participate in the proceedings." Another volunteer stated, "Being involved in this program is very rewarding because you see kids regret committing a crime and their peers encouraging them to learn from their mistake." There are other exciting volunteer and pro bono activities with Youth Court and other civic organizations scheduled for the remainder of 2014 and for 2015. Please contact Christy Kwon, Supervisory Attorney of Region 20, if you are interested in partnering with the Bay Area Federal Employees Pro Bono Committee, or for more information on upcoming pro bono and other volunteer events.