NLRB, Region 20 Roundup

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In This Issue

Board Finds Pacific Beach Hotel Engaged in Multiple Unfair Labor Practices, and Ninth Circuit Upholds Federal Injunction Issued Against Hotel

Honolulu, HI – On June 14, 2011, the National Labor Relations Board found that Pacific Beach Hotel (HTH Corp.) violated the National Labor Relations Act in numerous respects--the latest episode in a 10-year effort by the Longshore Workers Union to secure a collective-bargaining agreement for approximately 500 employees at the prominent Waikiki hotel. The case dates back to 2002, when Local 142 of the International Longshore and Warehouse Union (ILWU) sought to organize about 565 hotel staff members. Results of the initial election, which the union lost, were set aside by the Board because of objectionable conduct by the hotel. The ILWU prevailed in a second election, held in 2004. However despite dozens of negotiating sessions, the two sides failed to reach agreement on a contract.

In September 2009, following a 13-day hearing, an administrative law judge (ALJ) ruled that the hotel had committed numerous unfair labor practices against the union over the intervening years. This prompted the Board to seek an injunction under Section 10(j) of the Act in the United States District Court for Hawaii, pending its decision on the employer's exceptions to the ALJ's decision. In March 2010, the court ordered the hotel to recognize the union, bargain in good faith for a contract, and reinstate five union activists who had been fired. Additionally, the court ordered the parties to resume bargaining from the point where negotiations had broken off and to have hotel managers read the court's order to all employees.

The Board's June 14, 2011, order requires the hotel, among other things, to offer reinstatement to the unlawfully fired employees, resume bargaining, and make employees whole for their losses. In addition, as a relatively rare remedy, the Board directed the hotel to reimburse the union for its negotiating expenses and to have a responsible corporate official publicly read a remedial notice to employees. Commenting on the Board's order, NLRB Hawaii Officer-in-Charge of Sub-Region 37 Tom Cestare said, "This order is the latest step in what has regrettably become a war of attrition against an employer that appears to be determined to thwart the employees' legitimate rights to bargain collectively through representatives of their own choosing. We remain steadfast in our resolve to see this case through to a just conclusion."

Meanwhile, the federal court 10(j) case has continued as Regional Director Joseph F. Frankl, on behalf of the Board, has alleged in civil contempt proceedings that the Hotel and its principal manager have failed to comply with the District Court's 2010 order. On July 13, 2011, the U.S. Court of Appeals for the Ninth Circuit upheld the District Court's 2010 order. The three-judge panel of the Ninth Circuit found that the hotel's unfair labor practices were serious and required immediate injunctive relief. The Board and federal court proceedings have been litigated by Field Attorneys Dale K. Yashiki and Trent K.

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.

Kakuda, under the supervision of Regional Attorney Olivia Garcia, Deputy Regional Attorney Jill H. Coffman and Cestare. The Region and Sub-Region have also received invaluable guidance from the Agency's Injunction Litigation Branch throughout these proceedings. The text of the decisions are available at Pacific Beach Hotel Board Decision and Pacific Beach Hotel 9th Cir.

ALJ Finds that Neil-Med Unlawfully Refused to Deal with Union Rep.

Santa Rosa, CA – On July 11, 2011, an administrative law judge (ALJ) issued a decision in *Neilmed Products, Inc.*, finding that the health products manufacturer violated Section 8(a)(5) of the Act by denying Teamsters Local 624, International Brotherhood of Teamsters, Change to Win Coalition (the Union) Business Agent access to its facility. The Business Agent was a former employee of the employer, who, while an employee, was terminated for his picket line conduct during a strike which took place between May and November 2010, amidst negotiations for a first contract. Upon his termination, the union then hired the employee as a Business Agent. Following his suspension and subsequent termination, the Business Agent continued to participate in bargaining through the contract's ratification in November 2010, and in subsequent meetings. The employer contended that it could not allow the Business Agent access to its facility because employees feared him as a consequence of his prior picket line conduct while an employee. However, the ALJ found that there was no persuasive evidence that the former employee's presence at the facility now employed by the union as a union Business Agent would create ill will and make good faith bargaining impossible. The ALJ relied on the parties reaching a first contract, and the fact that the Business Agent was not excluded from any bargaining sessions following his termination.

Central to the administrative law judge's findings was the incident that led to the individual's termination while an employee. During this incident, a supervisor drove his vehicle through a picket line causing the now-Business Agent to fall across the hood. As the supervisor continued to drive, the now-Business Agent hit the vehicle's windshield, causing it to break. Although finding that the Business Agent recklessly moved into an area of danger, the ALJ noted that "no pack of wild dogs, no approaching train, no assault at gunpoint" prevented the supervisor from stopping the vehicle, and thus the supervisor had provoked the incident by driving the vehicle into the line of picketers. In so finding, the ALJ relied on the provocation, and the fact that the Business Agent "continued to effectively serve on the negotiating committee following the incident" to distinguish the instant case from *King Soopers, Inc.*, 338 NLRB 269 (2002) and instead analogized the case to *Claremont Resort and Spa*, 344 NLRB 832 (2005), and find that there was no persuasive evidence that the Business Agent's presence created ill will or made good faith bargaining impossible. Field Attorney Carmen Leon appeared as Counsel for the Acting General Counsel. The text of the decision is available at NeilMed ALJD.

Administrative Law Judge Finds Hotel Frank and Hotel Metropolis Engaged in Multiple Unfair Labor Practices

San Francisco, CA – On July 6, 2011, an administrative law judge found that the Hotel Project Group (HPG), doing business as the Hotel Frank and the Hotel Metropolis, engaged in multiple unfair labor practices. The judge determined that HPG was a successor employer under the National Labor Relations Act, and as such, had a duty to bargain in good faith with the collective-bargaining representative of its employees, UNITE HERE! Local 2. Ordinarily, barring certain exceptions, a successor employer is free to set employees' initial terms and conditions of employment without bargaining over those matters with the

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.

employees' union. The judge concluded, however, that HPG exceeded its authority to set initial terms by adopting employment manuals that had virtually no limit concerning the hotels' discretion as to employees' probationary periods. In this regard, the judge found that HPG engaged in bad faith bargaining by extending employees' probationary period without providing notice and an opportunity to bargain to the union.

The judge also concluded that HPG unlawfully issued written warnings to six employees for engaging in activity protected by the Act, when they concertedly refused to clean all of their assigned rooms. In reaching this conclusion, the judge determined that the room cleaners were not engaged in a partial work stoppage or slowdown, activity that is not protected under the Act. Rather, the judge found that the employees engaged in a single work stoppage in protest over their working conditions, constituting concerted activity that is protected by labor law. In addition, the judge determined that HPG committed additional unfair labor practices by banning employees from wearing union insignia and photographing employees while they were engaged in protected union activity. Finally, the judge found that the employer unlawfully terminated a union activist, finding that the employee's persistent support of the union was what motivated the employer to fire him. Field Attorneys Kathleen C. Schneider and Sarah M. McBride appeared as Counsel for the Acting General Counsel in this case. The text of the decision is available at Hotel Frank ALJD.

Build.com Settles Charge of Unlawful Discharge for Comments Posted on Facebook

San Francisco, CA – On April 27, 2011, Regional Director Joseph F. Frankl of approved a settlement agreement between Build.com, a web-based home improvement retailer operating out of Chico, California, and a former employee whom the employer discharged after she posted comments about the company to her Facebook page.

The former employee filed a charge with the NLRB on February 28, 2011, alleging that she was terminated in retaliation for having posted the comments about Build.com and possible state labor code violations, which drew responses from other employees who were "Facebook friends" of the charging party. Under the National Labor Relations Act, employees have the right to discuss wages and other conditions of work with their co-workers. The employees in this case were not represented by a union. After the charge was filed, build.com immediately offered to engage in settlement discussions with the NLRB. The former employee declined the right to reinstatement to her position but will be made whole by the company for lost earnings. The employer will also post a notice at the workplace for 60 days stating that employees have the right to post comments about terms and conditions of employment on their social media pages, and that they will not be terminated or otherwise punished for such conduct. Commenting on the settlement, Regional Director Frankl said, "I am pleased that the parties have agreed to resolve this dispute amicably, without the need for costly litigation, and that the employer has recognized the rights of its employees to use social networking sites to comment about their working conditions. Field Attorney Carmen Leon handled the investigation in this case.

Region Issues Complaint Against Teamsters Local 2785

San Francisco, CA – On June 30, 2011, the Acting General Counsel, by Regional Director Joseph F. Frankl, issued a complaint and notice of hearing against Teamsters, Local 2785. The complaint alleges that the union violated Section 8(b)(1)(A) of the Act by refusing to furnish an employee with a copy of

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

and click below to access Region 20's webpage.

To arrange for a presentation about the NLRB in the Bay Area and throughout Northern California, contact Region 20's Outreach Coordinator, Mark Berman, or Field Attorney Carmen Leon at: **415-356-5130**

or visit us online at the Internet address above and click on the speakers link.

For questions about *NLRB, Region 20 Roundup*, contact Newsletter Editor, Field Attorney Micah Berul at:

415-356-5169

the out of work list maintained in conjunction with the union's exclusive hiring hall. (An exclusive hiring hall, by agreement of the parties, serves as the sole source of referral for employees to employers.) Such conduct by the union, the Region alleges in its complaint, restrains and coerces employees in the exercise of their rights guaranteed under the National Labor Relations Act. A hearing in this matter is scheduled for September 15, 2011, before an administrative law judge. This case was investigated by Field Attorney Christy Kwon, who will also appear as Counsel for the Acting General Counsel at the hearing.

Board Finds SFO Good-Nite Inn Unlawfully Withdrew Recognition from Union, Clarifying Effect of Unlawful Employer Involvement with Employees' Petition

Washington, D.C. – On July 19, 2011, the Board affirmed the administrative law judge's decision that SFO Good-Nite Inn, a South San Francisco hotel engaged in multiple unfair labor practices, including unlawfully withdrawing recognition from the UNITE HERE! Local 2 as the collective-bargaining representative of its employees.

As the Board explained, an incumbent union enjoys an irrebuttable presumption of majority support of the bargaining unit during the first year after its certification by the Board or the first three years of a collective-bargaining agreement. At other times, that presumption is rebuttable, and an employer may withdraw recognition from a union upon proof that the union no longer enjoys majority support. Such proof often takes the form of a petition signed and dated by a majority of bargaining unit employees stating that they no longer wished to be represented by the union.

In *SFO Good-Nite Inn*, the Board agreed with the limited exceptions to the administrative law judge's decision filed by Counsel for the General Counsel that make clear that an employer's withdrawal of recognition is *per se* unlawful if it unlawfully assisted, supported, or otherwise encouraged the petition, "even absent specific proof of the misconduct's effect on employee choice." Field Attorney Micah Berul and former Region 20 Field Attorney John Ontiveros served as Counsel for the General Counsel in this case. The text of the decision is available at SFO Good-Nite Inn Board Decision.

Region 20 Bids Warm Farewell to RD Secretary Maryanna Bettencourt

San Francisco, CA – On August 3, 2011, the Region bade a warm farewell to Maryanna Bettencourt, who retired after 44 years of distinguished service to the public. Maryanna worked for five Regional Directors during her career, eventually being promoted to Secretary to the Regional Director. Her outstanding administrative skills were put to excellent use in many ways, especially case activity tracking. Widely acknowledged as one of the Agency's experts in its original computerized Case Handling Information Process System (CHIPS), Maryanna provided valuable input into the early development of the Agency's next case database, the Case Activity Tracking System (CATS). As she prepared to embark on the next stage of her life, with her typical dedication to the Agency, Maryanna helped the Region prepare for the roll out of the Agency's next electronic case tracking system, NxGen. The Region held a retirement luncheon in Maryanna's honor on August 3, 2011, followed by speeches, song and fun celebrating her career. The Region wishes Maryanna all the best in her future endeavors.