



# The Bridge

*Regions 20 and 32, and Subregion 37 of the NLRB, an Agency of the United States Government*

Summer/Fall 2012

Region 20 (415) 356-5130

Region 32 (510) 510-637-3300

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## **REGIONS 20 and 32's TEAMWORK LEADS TO ALJ'S FINDING THAT COUNTRY CLUB ENGAGED IN ILLEGAL LOCKOUT AND OTHER UNLAWFUL CONDUCT**

Oakland, CA – On August 17, 2012, Administrative Law Judge Clifford H. Anderson found that Castlewood Country Club, a private golf club located in Pleasanton, violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act by maintaining an illegal lockout of approximately 61 bargaining unit employees since August 10, 2010; unlawfully subcontracting bargaining unit work; maintaining and enforcing unlawful distribution and access rules; issuing threatening statements to employees through its supervisors and agents; a statement made by the General Manager to employees that they could quit if they did not like Castlewood's bargaining proposals; informing a unit employee that locked-out employees would never be allowed to return to work; and engaging in bad faith bargaining with the union representing bargaining unit employees, Unite Here, Local 2850 AFL-CIO.

Castlewood and the union have been engaged in protracted negotiations for a collective-bargaining agreement since 2009. During bargaining, and subsequent to the lockout, union members have regularly engaged in handbilling or leafleting at Castlewood. The events at issue involve incidents that took place in 2009 and 2010 and were the subject of charges filed by the union with Region 32 (Oakland), upon which Region 32's Regional Director William A. Baudler issued complaint. Judge Anderson's recommended order to the Board requires Castlewood to immediately reinstate the locked-out employees and pay them back wages and benefits from August 2010 onward, an amount that could reach millions of dollars, as it applies to 61 unit employees. Regarding the illegal subcontracting of unit work, Judge Anderson also ordered Castlewood to cease and desist such subcontracting, restore bargaining with the union over that issue, and make whole bargaining unit members for any losses suffered as a result of it. Lastly, Judge Anderson ordered Castlewood to resume bargaining for a successor contract with the union, reinstate tentative agreements reached by the parties in bargaining prior to August 2010 and to cease and desist from further threatening conduct and the maintenance of overbroad rules.

The successful outcome of this case featured the cooperative efforts of agents from Regions 20 (San Francisco) and 32 (Oakland). The unfair labor practice charges were investigated by Region 32 Field Attorneys Yaromil Ralph and Catherine Ventola. Region 20 Field Attorneys Matt Peterson and Carmen Leon tried the case.

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## [Northern California Nursing Home Ordered to Recognize Union and Hire 50 Employees who Worked for Previous Owner](#)

Yuba City, CA – On September 19, 2012, the National Labor Relations Board adopted the recommendations of an Administrative Law Judge and ordered

**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

owners of the Yuba Skilled Nursing Center in Yuba City to hire 50 employees they unlawfully failed to hire after assuming operations of the center in September 2011. Employees at the home had been represented by the Service Employees International Union, United Healthcare WorkersWest, before it was bought by Nasaky, Inc. Under the National Labor Relations Act, new owners of a union facility are obligated to recognize and bargain with the existing union as a successor employer. However, the union alleged in charges with the NLRB that the new owners failed to hire the longtime employees in order to avoid that obligation. After an investigation, Region 20's Regional Director Joseph F. Frankl agreed and issued a complaint.

Following a two-day hearing, Administrative Law Judge Gerald Etchingham issued a decision finding all the allegations to be true and rejected Nasaky's explanations for why it declined to hire most of those who had worked for the previous employer. The ALJ also found that the nursing home unlawfully failed to furnish the union with information it requested and changed employees' terms and conditions in violation of the labor law. Generally a successor employer may set initial terms and conditions of employment, absent certain circumstances, such as in this case, where the nursing home was found to have discriminated in its hiring process in an attempt to avoid its bargaining obligations with the union. The employer did not file exceptions, and the Board adopted the Judge's decision as a final order this week. As a result of the Board's order, Nasaky must immediately recognize and bargain with the union and commence the process of hiring the former employees and making them whole. The amount of backpay and interest is expected to approximate \$1.25 million. Region 20 Field Attorneys David Reeves and Joseph Richardson served as Counsel for the Acting General Counsel in this matter.

**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.**

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**[Ninth Circuit Enforces Board Order that Hawaii Hotel Engaged in Multiple Unfair Labor Practices and Affirms Section 10\(j\) Injunction Against the Hotel in a Separate Case](#)**

Honolulu, HI – In a published opinion that issued on Thursday, September 6, 2012, the Ninth Circuit Court of Appeals enforced the Board's Order finding that the employer, a Hawaii hotel, unlawfully engaged in bad faith bargaining, withdrew recognition, discharged seven union activists, and violated the Act in other respects. The Court's opinion also affirmed a district court's issuance of an injunction under Section 10(j) of the Act against the employer in a separate case. After two elections were thrown out due to employer misconduct, the Board certified the union's victory in a third vote in late 2005. Throughout 2006, the parties bargained, but the employer stymied progress for the entire year by insisting on three clauses: (1) a recognition clause allowing the employer to "unilaterally and arbitrarily" change all terms and conditions of employment; (2) the right to "manage its workforce at will," including firing, hiring, and discipline, and (3) a grievance procedure granting management the right to make final adjustment. In 2007, the employer contracted with a company to employ and manage the workforce, and that contractor assumed the bargaining obligation; however, the employer retained control over the terms of any collective bargaining agreement. After another year of bargaining, the contractor and the union came close to reaching a collective-bargaining agreement without the objectionable language—almost immediately, the employer fired the contractor and reassumed responsibility for directly employing the workforce. The employer then withdrew recognition from the union, claiming that a majority no longer supported it, unilaterally changed numerous terms of employment, and forced all employees to reapply for the jobs, refusing to

## 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.

rehire seven employees on the bargaining committee. In response, the union urged a boycott of the employer's hotel, and the employer warned employees against participating, threatening that it would hurt business and cause job loss.

As noted, the Board found that the employer violated the Act in numerous respects, and the Court agreed. First, the Court acknowledged that an employer bargains in bad faith by "insist[ing] on provisions that 'would exclude the [union] from any effective means of participation in important decisions affecting the terms and conditions of employment of its members,'" and affirmed the Board's finding that the employer thusly violated Section 8(a)(5) of the Act. Second, analyzing the employer's withdrawal of recognition and its subsequent unilateral changes, the Court agreed with the Board that the employer showed no objective evidence of the union's loss of majority support, and that the evidence it did offer—"testimony from a handful of employees concerning the reaction of other employees to the Union boycott"—"amount[ed] to no more than evidence of the employees' subjective assessment of the situation and is therefore insufficient." Finally, the Court found that substantial evidence supported the Board's conclusion that the employer acted on antiunion animus in refusing to rehire the seven negotiating committee members and in unlawfully threatening job loss. The Court also held that the Board acted within its discretion in devising remedies for the employer's serious unfair labor practices. In so finding, it endorsed extending the certification period by one full year to give the parties time to negotiate, awarding the union bargaining costs and expenses given that the union "wasted resources over a period of years during which [the employer] had no intention of reaching an agreement," and issuing a broad cease and desist order. Finally, the hotel paid the attorneys' fees and costs award ordered by the District Court in a separate related contempt proceeding, totaling roughly \$250,000.



(Subregion 37's Officer in Charge, Tom Cestare, posing with the check for attorneys' fees and costs.)

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**Region 32 on Forefront of Efforts to Change Board Law in Two Cases**  
Oakland, CA – Two recent cases had Region 32 in the forefront of litigation challenges to extant Board law. In *Loomis*, Teamsters Union locals

## 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.

representing guards in several units across California filed charges alleging that their employer withdrew its long-standing voluntary recognition of these unions upon the expirations of their respective collective-bargaining agreements. In withdrawing recognition, Loomis relied on *Wells Fargo Corp.*, 270 NLRB 787 (1984), where the Board had held that the employer in that case was privileged, following the expiration of its collective-bargaining agreement, to withdraw its voluntary recognition of a union that admitted to its membership both guards and non-guards. The Board in *Wells Fargo* based its decision on an interpretation of the Congressional intent underlying Section 9(b)(3) of the Act, which prohibits the certification of a union as the representative of a unit of guards if it also admits to its union membership employees other than guards. *Wells Fargo* and its progeny have provoked a long history of Board dissents in which Board members have argued that this holding allowed employers to withdraw recognition from unions that enjoyed the support of a majority of the unit employees without any concrete evidence that an impermissible conflict of interest existed. In line with that dissenting view, the Acting General Counsel decided to use the *Loomis* cases as a vehicle for overruling *Wells Fargo*. The matter is currently before the Board on exceptions filed by Region 32, following a decision by an administrative law judge who, finding himself bound by the Board's decision in *Wells Fargo*, concluded that Loomis was legally entitled to withdraw recognition after its contracts with the Teamsters locals expired. In its exceptions, Region 32 is asking, on behalf of the Acting General Counsel, that the Board find that the *Wells Fargo* rationale allowing the employer to withdraw recognition, merely because the current contract has expired, impermissibly interferes with the employees' rights to union representation and the Act's goal of securing industrial peace. The *Loomis* cases were investigated and litigated by Region 32 Field Attorney Gabriela Alvaro.

In *Piedmont Gardens*, Region 32 took up the Acting General Counsel's decision to test the continuing viability of *Anheuser-Busch*, 237 NLRB 982 (1978), in which the Board held that, while an employer is legally obligated to provide its employees' union representative, upon request, with the names of witnesses relevant to a grievance being pursued by the union, the employer could lawfully refuse to turn over witness statements. On April 16, 2012, an Administrative Law Judge issued his decision in *Piedmont Gardens*, finding that the Employer had violated the Act by refusing to turn over the names of the witnesses requested by the union, but the Judge, relying on *Anheuser-Busch*, found that it was not unlawful for the employer to refuse to provide the union with their witness statements. As the Judge concluded, "Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board," and that he lacked the legal authority to overturn Board precedent. On May 11, 2012, the Region, on behalf of the Acting General Counsel, filed exceptions to the latter portion of the Judge's decision, which urge the Board to apply the *Detroit Edison* test under which the party asserting that witness statements are confidential bears the initial burden of establishing that it has a "legitimate and substantial" confidentiality interest. If this burden is met, then an accommodation must be sought between the need for the information and the justified confidentiality concerns. Field attorney Catherine Ventola investigated this case for the Region, and Field Attorney Noah Garber served as counsel for the Acting General Counsel.

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## Subregion 37 Completes Contempt Proceedings against Union

Honolulu, HI – In *SMWIA Local 293*, the Honolulu Subregional Office completed the successful pursuit of contempt of a district court order enforcing a subpoena for hiring hall records. The district court held the

To learn more about the National Labor Relations Board and the National Labor Relations Act, please visit the Agency's website at:

<http://www.nlr.gov>

To arrange for a presentation about the NLRB in the Bay Area and throughout Northern California, contact Region 20's Outreach Coordinator, Micah Berul at: 415-356-5130 or Region 32's Jeff Henze at 510-637-3300,

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

union in contempt on October 4, 2011, and issued an order requiring the union's custodian of records to produce the requested documents and answer questions about the documents during a deposition. The Honolulu staff handled the deposition in a highly professional manner, despite the union's attorney's disruptions. The Board's attorneys were compelled to terminate the deposition and seek monetary contempt sanctions against the union and its counsel. On January 19, 2012, the court found the union and its attorney to have engaged in "more than reckless[]" conduct and assessed fines of \$200 per day (totaling \$21,500), as well as compensating the Board for its attorneys fees (\$4,500), costs (\$805), and fines of \$2,500. The court premised its fines on the Federal Rules of Civil Procedure, 28 USC sec. 1927, and the court's inherent authority. The court also imposed an unusual (maybe unique) order on Local 293's attorney, requiring him to limit objections in future depositions to ten words or less – or be fined \$100 for every word in excess of that amount. After a brief effort to appeal, the union retained new counsel and fully complied with the subpoena, enabling the Region to complete its investigation.

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### [ALJ Finds Grocery Chain Engaged in Unlawful Subcontracting](#)

Oakland, CA – On February 9, 2012, Administrative Law Judge Eleanor Laws found that Mi Pueblo Foods, which operates a chain of retail grocery stores in Northern California and a distribution center in Milpitas, California, violated Section 8(a)(5) of the Act by unilaterally: subcontracting out some of the work that its delivery drivers had previously performed; implementing changes to the delivery drivers' routes and schedules; and laying off six delivery drivers, without notice to or affording the International Brotherhood of Teamsters, Local 853, which represents the delivery drivers, an opportunity to bargain over these decisions and their effects. The Judge's recommended order requires that the grocer rescind its subcontracting, restore its drivers routes and hours as they existed prior to the unilateral changes, to offer full reinstatement to the laid off drivers and to make them whole. The Judge's decision is notable for its long and thorough discussion of the applicable legal precedents concerning whether an employer has a duty to bargain with a union regarding its decision to subcontract out bargaining unit work. In finding that the employer in this case was obligated to bargain with the union, the Judge concluded that the grocer had merely substituted an outside group of workers for bargaining unit employees to do the same work. The ALJ also found, contrary to the contention of the employer, that the employer's decision to subcontract the work was at least in part based on labor costs and that it did not represent a change in the scope or direction of the enterprise and did not amount to a shutting down of a part of its business. The unfair labor practice charges were investigated by Region 32 Field Examiner Victor Sella-Villa, and Field Attorneys Gary Connaughton and Gabriela Alvaro tried the case.

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### [Jeff Henze Named Deputy Regional Attorney in Region 32](#)

Oakland, CA – On August 21, 2012, Supervisory Attorney Jeff Henze was promoted to the position of Deputy Regional Attorney in Region 32. Originally from Buffalo, New York, Jeff worked in a variety of industries, including steel mills and paper plants before enrolling at Golden Gate University School of Law, where he graduated as the valedictorian of his law school class in 1987. Jeff has worked for Region 32 since that time, and during his tenure as a field attorney litigated a number of Region 32's high profile cases. In his spare time, Jeff enjoys playing tennis, rock concerts and volunteering at the San Francisco Food Bank, where he met his wife, Aiko Kurokawa. Jeff and Aiko's son, Garrett, is a sophomore at UC San Diego, majoring in chemistry. Congratulations to Jeff on his promotion.