



BETWEEN THE REGIONS



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Welcome

Regional Directors Jim McDermott and James F. Small



Welcome to the inaugural issue of the *Between the Regions*, the newsletter for Southern California's labor community. Through *Between the Regions*, Regions 21 and 31 will report on recent developments important to workers, employers, unions, and the academic community.

Our two offices cover all of Southern California, ranging from the mountains to the sea. Region 21 stretches from Los Angeles south to San Diego and east through Riverside. Region 31's geographical jurisdiction extends from West Los Angeles north through the Central Valley and east through San Bernardino.

Both Regions have been busy in 2010. Over the past 12 months, our two Regions have collectively handled more than 200 representation cases, investigated over 1,400 unfair labor practice charges, litigated various complaints, and obtained more than \$4.5 million in back pay and trust fund contributions. We also have been active conducting community outreach.

The office of the General Counsel oversees the Regional offices, and in June President Obama appointed Lafe Solomon as the Acting General Counsel. A recipient of the 2010 Presidential Rank Award, Lafe Solomon has actively sought to strengthen and streamline Agency operations; his Section 10(j) injunction initiative is discussed in this issue.

During the summer, chairman Wilma B. Liebman and members Craig Becker, Brian Hayes, and Mark G. Pearce were productive issuing new decisions—including several significant decisions which are discussed in this issue.

Over the next few months, our Regions will be celebrating the 75th anniversary of the National Labor Relations Act. In October, there will be a two-day symposium on the legacy of the Act and its prospects for the future. For more information about Regions 21 and 31 and about the agency in general, go to the agency's website at www.nlr.gov.

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AGENCY DEVELOPMENTS



Deputy Regional Attorney Mori Ruben, Region 31

New Process Steel LP v. NLRB, 130 S.Ct. 2635, 188 LRRM 2833 June 17, 2010)

From January 2008 to April 2010, although the Board operated with only two members, the Board issued almost 600 decisions. However, on June 17, 2010, the Supreme Court ruled in *New Process Steel*, that the two-member Board was not authorized to issue those decisions. Since that time, the Board has been quite busy considering cases that were returned to the Board as a result of that decision. You can review the status of cases affected by *New Process Steel* on our website (www.nlr.gov) and click where it says Information on Two Member Board Decisions in the center of the home page.

Noteworthy Decisions

On August 27, 2010, the Board issued a decision in *Machinists Local Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 that resolved the issue of whether a union violates its duty of fair representation by requiring nonmember dues objectors to restate their position every year, despite an expressed desire to have the objection continue from year to year. In that case, the Board decided that the Union's requirement that dues objections had to be restated annually was unlawful.

Another issue pending before the Board that was recently resolved relates to the practice by unions of displaying large stationary banners. In several recent cases, the Board concluded that the Respondent unions did not violate Section 8(b) (4) (ii) (B) of the Act by displaying stationary banners announcing a labor dispute at a secondary employer's business. See, *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010); *Carpenters Local 1506 (AGC San Diego Chapter)*, 355 NLRB No. 191 (September 22, 2010); and *Carpenters Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB No. 219 (September 30, 2010). In these cases, the Board concluded that the peaceful display of the stationary banners bearing a message directed to the public did not constitute proscribed picketing. The Board found that absent the use of traditional picket signs, patrolling, blocking of ingress or egress, or some other evidence of coercion, the display of banners in [the] case was not coercive and therefore did not violate Section 8(b)(4)(ii)(B). *Carpenters Local 1506 (AGC San Diego Chapter)*, supra, slip op at 3.

The newly-constituted Board has indicated a willingness to revisit important cases previously decided by the Board. For example, the Board has invited parties to file briefs in connection with two cases that raise a *Dana* issue. In *Dana Corp*, 351 NLRB 434 (2007), the Board held that when an employer voluntarily recognizes a union based on signed authorization cards, it must post a notice advising employees that they have a right, within 45 days of the notice, to file a petition for an election to decertify the union or in support of a rival union; if the notice is not posted, the union and employer may not later claim that a contract bars a petition for decertification or by a rival union. The Board also invited interested parties to file briefs in connection with a set of cases that raise the issue of a successor bar doctrine. These cases will provide the Board with an opportunity to reconsider *MV Transportation*, 337 NLRB 770 (2002), which held that a successor employer's obligation to recognize and bargain can be challenged by the employer, employees, or a rival union. Under case law prior to *MV Transportation*, an incumbent union was entitled to a reasonable period of time to bargain without challenge to its status.



Deputy Regional Attorney Mori Ruben, Region 31

From the Desk of the General Counsel: A Revamp of Section 10 (j)

On September 30, 2010, Acting General Counsel Lafe Solomon announced an initiative to strengthen and streamline the Agency's Section 10(j) injunction program with respect to allegations of discriminatory discharges in the context of an organizing drive. General Counsel Memorandum 10-07, which is available on the Agency website, describes the new enhancements to the Agency's Section 10(j) injunction program. In this GC Memo, Acting GC Solomon explains the seriousness of discriminatory discharges that occur in the context of an organizing drive. He describes these violations as "the most serious 'nip-in-the-bud' violations of the Act." As noted by Acting GC Solomon, unremedied discriminatory discharges can have the following consequences: a message is sent to other employees that they too risk retaliation if they exercise their Section 7 rights; remaining employees are deprived of the leadership of active union supporters; discharged employees are likely to no longer desire reinstatement with the passage of time; and the ultimate Board order would be ineffective to protect rights guaranteed by the Act. Under this new Section 10(j) initiative, the General Counsel's office will consider seeking a federal injunction in all "nip-in-the-bud" discharge cases found to be meritorious. The injunction would compel an employer to offer reinstatement to fired workers pending litigation of the underlying unfair labor practice case.

New timelines and procedures have been created to expedite the processing of these cases. Pursuant to the directive of GC Memo 10-07, Regions are to immediately investigate allegations of unlawful discharges in connection with organizing drives and, if merit is found, to promptly submit them to the office of the General Counsel. Under the NLRB processes, the General Counsel must obtain authorization from the Board before seeking a 10(j) injunction. Chairman Wilma Liebman has indicated that the Board is examining its procedures for reviewing these requests in an effort to expedite their process as well.

Our Regions are putting into place procedures that will ensure compliance with the requirements of this new initiative. Accordingly, the Regions will be seeking to take the lead affidavits within seven calendar days from the filing of a "nip-in-the-bud" discharge case and to obtain all of the charging party's evidence within 14 days from the filing of the charge. Therefore, Charging Parties in these cases should be prepared to present their evidence in these cases at the time they file their charges. In cases where the charging party's evidence points to a prima facie case on the merits and suggests the need for injunctive relief, the Regions will promptly notify the charged party that the Region is considering 10(j) relief and will seek a position statement from the charged party with respect to the appropriateness of Section 10(j) relief, in addition to the Region's request for evidence and a statement of position concerning the merits of the charge. It is important that all parties cooperate by timely submitting their evidence and statements of position in these cases.



SOUTHERN CALIFORNIA

Deputy Regional Attorney Neil Warheit, Region 21

Action by the Regional Offices in Federal Court: 10 (j) Activity

On August 27, 2010, Region 21 issued an administrative complaint in Case 21-CA-39296 against Southern California Permanente Medical Group and Kaiser Foundation Hospitals (Employers) alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The complaint asserts that the Employers unlawfully eliminated certain terms and conditions of employment, including a scheduled wage increase, tuition reimbursement, and providing time for shop-steward training, after SEIU-UHW was replaced by NUHW as the employees' bargaining representative.

Region 21 sent the matter for review by the Acting General Counsel of the NLRB in Washington, D.C., and the Acting General Counsel recommended to the National Labor Relations Board (Board) that it authorize the seeking of interim relief under Section 10(j) of the Act. That section of the Act authorizes the Board to pursue temporary relief in federal district court for alleged violations of the Act, while the merits of the administrative complaint are being litigated. The goal of Section 10(j) relief is to prevent frustration of the remedial purposes of the Act, due to the time taken to complete the administrative process.

On October 1, 2010, the Board authorized the pursuit of a Section 10(j) injunction in this case. The petition for relief was filed by Region 21 in the United States District Court for the Central District of California, on October 4, 2010. By that petition, the Board is seeking to have the Court order the interim reinstatement of the wage increase, tuition reimbursement, and leave for steward training, pending the Board's consideration of the merits of the administrative complaint. At present, the Court is reviewing the parties' proposed stipulation on a briefing schedule and an appropriate date for the hearing in federal court.

Meanwhile, the hearing on the underlying administrative complaint concluded on October 19, 2010, in Los Angeles, California, before an Administrative Law Judge (ALJ) of the Board. Post-hearing briefs are due in November 2010. The ALJ has been asked to issue an expedited decision in the administrative case, in light of the pending court action.



SOUTHERN CALIFORNIA

Deputy Regional Attorney Neil Warheit, Region 21

Regional Action in Appellate Court

In July 2010, the Ninth Circuit Court of Appeals (Ninth Circuit) upheld an injunction issued by the United States District Court for the Central District of California (District Court) against the Operative Plasterers' and Cement Masons' International Association Local 200 (the Plasterers), enjoining them from pursuing lawsuits against general contractor Standard Drywall, Inc. (SDI), that were filed for the purposes of forcing SDI to assign certain plastering work to employees represented by the Plasterers. The case is reported as *Small v. Operative Plasterers' and Cement Masons' Intl. Assn. Local 200*, 611 F.3d 483 (9th Cir. 2010). And on September 28, 2010, the Ninth Circuit denied the Plasterers' petition for a rehearing en banc.

The case initially arose over a dispute between two unions – the Plasterers and the United Brotherhood of Carpenters and Joiners of America (the Carpenters)—as to which of them should carry out certain plastering work being performed by SDI on various projects in Southern California. In pursuit of their efforts to gain the work, the Plasterers filed two lawsuits against SDI in California state court, alleging, among other things, violations of state wage-and-hour laws and tortious interference with contract. When SDI considered assigning the work to the Plasterers in order to avoid further litigation, the Carpenters, who had been performing the work, threatened to strike SDI if the work was taken from them and reassigned to the Plasterers.

In response, SDI filed an unfair labor practice charge under Section 8(b)(4)(D) of the National Labor Relations Act (the Act) in Region 21 of the National Labor Relations Board (the Board), located in Los Angeles. Pursuant to Section 10(k) of the Act, which gives the Board exclusive jurisdiction to award disputed work to a particular union, the Board awarded the plastering work at issue to the Carpenters. The Plasterers, however, continued to pursue their lawsuits, prompting SDI to file further unfair labor practice charges with Region 21. The Board issued a second 10(k) award, which also concluded that the Carpenters were entitled to perform the work in dispute. Despite these two adverse rulings, the Plasterers continued their state-court litigation.

Subsequently, Region 21 issued an unfair labor practice complaint alleging that the Plasterers state-court lawsuits had an unlawful object. After a hearing before an administrative law judge, the lawsuits were found to be unlawfully coercive. Region 21 then sought an interim injunction in the District Court under Section 10(l) of the Act to halt the state-court proceedings while the unfair labor practice case was pending on appeal before the Board in Washington, D.C.

After review of the pleadings and a hearing on the issues, the District Court granted the Region's request for an interim injunction, prohibiting the Plasterers from pursuing their state-court lawsuits, and from attempting in any manner or by any means to force or coerce SDI to assign the disputed work to the Plasterers. The Plasterers appealed the District Court's decision to the Ninth Circuit, and also moved the District Court to modify the broadly-worded injunction as being contrary to public policy and a potential violation of the First Amendment of the United States Constitution. The District Court granted the latter motion, and modified its order to strike the broad prohibition against the Plasterers, while at the same time questioning its jurisdiction to do so when the order was already on appeal before the Ninth Circuit.

The Ninth Circuit reviewed the District Court's granting of the injunction for abuse of discretion, and concluded that the injunction was "just and proper" under the legal standards established in its jurisdiction.

Further, the Ninth Circuit found that inasmuch as the Plasterers' lawsuits had the unlawful objective of attempting to force SDI to assign work to their members in contravention of the Board's earlier orders awarding the work to employees represented by another union, the lawsuits were not protected by the First Amendment. Finally, the Ninth Circuit vacated the District Court's modification of its original injunction and reinstated the full scope of the injunction prohibiting the Plasterers from attempting to coerce SDI to reassign certain plastering work in any manner or by any means. This broad prohibition will remain in full force and effect until such time as the Board reviews the underlying unfair labor practice case.



Working Together

Field Examiner Kristen Scott, Region 21

With Regions 21 and 31 covering such large jurisdictional areas, it is sometimes necessary for the Regions to collaborate in order to successfully effectuate the purposes and policies of the Act. This partnership holds especially true when it comes to conducting representation elections. On many occasions, the Regions depend on each other for assistance in conducting large or multi-location elections.

In January 2010, Region 21 conducted elections for three units of employees at Kaiser Permanente facilities in Southern California. The National Union of Healthcare Workers (NUHW) was certified to represent over 2000 employees. The elections are part of the ongoing campaign between the NUHW and the Service Employees International Union/United Healthcare Workers-West (SEIU-UHW) to represent thousands of healthcare workers throughout California. At that time, it was decided by the Regional Directors that Region 21 would handle its two petitions as well as the petition from Region 31 in order to save time and expenditures by all concerned at different hearings on the same issues.

Particularly noteworthy, on October 6 and 7, 2010, agents from Regions 21 and 31 assisted the Oakland Regional Office (Region 32) with a historic mail ballot election of approximately 43,000 employees at Kaiser Permanente facilities throughout Northern and Southern California. This was the largest union election in some 70 years conducted by the Board; it is certainly the largest mail ballot election conducted by the Board. There were approximately 45 Board Agents from Regions 20 (San Francisco), 21, 31, and 32 that assisted with the counting of the mail ballots in the election and the issuance of the Tally of Ballots. The agents from Regions 21 and 31 included Roufeda Ebrahim, Jerry George, Alaina Gibson, John Hatem, Katherine Mankin, Alvaro Medina, Mary Ann Pacacha, Kristen Scott, Liz Valtierra, and Anne White.

Yet another example of inter-regional cooperation in conducting elections is in KAG West, LLC, Case 21-RC-21215. In that election, 13 Agents from Regions 21 and 31 assisted with conducting the election involving 17 polling sites on August 13 and 16, 2010 throughout Southern California.

The Board Invites Filing of Briefs in Two Dana Corp. Related Cases

Assistant Regional Director Tom Chang, Region 31

On August 27, 2010, the Board, with Members Schaumber and Hayes dissenting, granted the parties' Request for Review in Rite Aid Store #6473, Case 31-RD-1578, and Lamons Gasket Company, A Division of Trimas Corporation, Case 16-RD-1597, as to whether the Board should modify or overrule Dana Corp., 351 NLRB 434 (2007) and return to the recognition bar doctrine as set forth in Keller Plastics Eastern, Inc., 157 NLRB 583 (1966). On August 31, 2010, the Board issued a Notice and Invitation to File Briefs to the parties and interested amici in order to afford them the opportunity to address the issues raised in Cases 31-RD-1578 and 16-RD-1597. In each of the two cases, at least one party has asked the Board to reconsider its decision in Dana or its application to particular facts.

On September 17, 2010, after the Board invited the filing of briefs to the parties and interested amici in Cases 31-RD-1578 and 16-RD-1597, the Board issued an Order granting the Employer's motion to withdraw its Request for Review of the Regional Director's dismissal of the petition in Case 31-RD-1578 without a hearing.



A Discriminatee's Guide to Searching for Work and Record Keeping



Supervisory Field Attorney Brian Gee, Region 31

In 2007, the Board issued two decisions affecting the responsibilities held by employees unlawfully discharged under the National Labor Relations Act (referred to in this article as "discriminatees").

In *Grosvenor Resort*, 350 NLRB 1197 (2007), the Board held that, if a discriminatee does not begin her search for interim employment promptly, she risks being deemed ineligible for back pay during part of the back pay period. In general, the Board stated that a discriminatee should begin her job search within two weeks of her discharge. In *St. George Warehouse*, 351 NLRB 961 (2007), the Board held that the General Counsel now has the burden of proving that each discriminatee made a reasonable effort to find replacement work. In general, discriminatees should look for work at least once per week.

So what do these decisions mean for discriminatees? Discussed below is some guidance.

Search for Work. Discriminatees should begin searching for replacement jobs within two weeks of discharge, unless there are special circumstances justifying delay. During the time period in which a discriminatee may be owed back pay, he should search for work at least once each week.

Keeping Good Records of the Job Search. The first thing employees should know is what activities count as job searches. To count as a job search, the activity doesn't need to be formal, such as the submission of a written application. Rather, the Board generally finds the following activities to amount to job searches:

- Looking at online job sites, such as Yahoo Hot Jobs or USAJOBS.GOV
- Looking at newspaper job advertisements
- Asking friends and family members if they know of any jobs
- Registering with temporary employment agencies
- Registering with the Employment Development Department (EDD)
- Applying for jobs in writing
- Applying for jobs in person



Secondly, discriminatees should keep a written log of all of their job search efforts. The Regional office overseeing the discriminatee's case will send a "Claimant Expense, Interim Earnings, and Search for Work Report" on which to keep track of all job searches, interim earnings, and expenses incurred in looking for a replacement job.



Reaching Out to High Schools Across Southern California

Compliance Officer Travis Williams, Region 31



Of the hundreds of events that both Region 21 and 31 have participated in during the last several years, some of the most rewarding experiences have come from the Regions' participation in the United Teachers of Los Angeles (UTLA) Collective Bargaining Education Project.

The purpose of the project is to expose Los Angeles High School students to labor and employment issues they might encounter when they enter the workforce, such as wages, working conditions, collective bargaining, and contract negotiation. Students are divided into teams of four or five and assigned a role as either management or the union. One management and one union team will then engage in collective bargaining in negotiating a one-year employment contract for a fictional employer over five issues: wages; medical benefits; career ladder; child care; and health and safety. Each participating student on each team is given one of the issues to present and negotiate during the face-to-face meetings with their opposing counterparts. Student teams are coached by the volunteer union, business and government representatives.

The result is a high energy and fun learning experience as students delve into their roles as management and union representatives fighting to maintain their interests in the collective bargaining process. After a few hours of tense debate, impassioned presentations and pragmatic analysis, student teams usually manage to agree on a contract and walk away with a handshake and a new found understanding of labor and employment issues that affect millions of workers in America.

Speaker Request

Interested in having a representative of the Regional Offices address your group?

Region 21 and 31 agents are readily available to make presentations before any type of group. Speakers can cover a variety of topics, including general presentations on the mission of the Agency and protections afforded by the Act, Regional procedures for the investigation of unfair labor practice charges and representation petitions, or any other NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please contact Region 21 Supervisory Examiner Tirza Castellanos at (213) 894-5411 or Region 31 Compliance Officer Travis Williams at (310) 235-7424. You may also request a speaker on the NLRB's Web site: http://www.nlr.gov/about_us/speakers.aspx.



Viva Las Vegas! The Western States Labor and Employment Law Conference

December 12, 2010, Las Vegas, NV

NLRB Regions 20, 21, 28, 31 and 32, along with the Federal Mediation and Conciliation Service (FMCS) is proud to present its first joint conference designed for public and private sector labor and employment practitioners. Don't miss this great opportunity to learn about:

- How the NLRA impacts both Unionized and non-Unionized Employees
- Regional Best Practices from NLRB Regional Directors
- Hot Topics for the Obama Board
- Employee Free Speech vs. Employer Property Rights
- Effective Arbitration and Mediation Techniques from the Experts
- The Impact of Social Networking on the 21st Century Workplace
- And much more....

For further information, contact Region 21 Field Attorney Ami Silverman by at (213) 894-5223 or by email at ami.silverman@nlrb.gov.

ABA Practice and Procedure Committee to Meet with Representatives of Both Regions

On November 2, 2010, the ABA Labor & Employment Law Section, Committee on Practice and Procedure under the National Labor Relations Act will hold its Seventh Annual Practice and Procedure Gathering and the Committee's West Regional Subcommittee Meeting at the offices of Region 31. Members of the Committee will discuss issues they would like to raise with Regional management. These issues will then be discussed during a question and answer session with Regional Directors James McDermott and James Small. In addition, managers from both Regions will discuss recent developments.

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