

The Downtowner

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News from and about Region 21

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Regional Perspective

By Victoria E. Aguayo, Regional Director

This is my last opportunity to share Regional developments with you through the pages of The Downtowner. I will be retiring from the Agency on May 3 and thought it appropriate to report on the current state of the Region, its work and its people.

The Region's overall case intake for fiscal year 2007 has increased by over 20 percent from the previous fiscal year. Approximately thirty percent of unfair labor practice charges filed in the Region are identified as exceptional cases, involving allegations most central to the achievement of the Agency's mission and/or affecting significant numbers of employees. These include charges involving terminations and other interference with union organizing campaigns and cases in which the establishment or continuation of collective-bargaining is at stake.

The Region is actively investigating the propriety of Section 10(j) relief in five current situations, including "nip in the bud" discharge cases and a *Gissel* bargaining order situation. We also have a fair number of Section 8(b)(4)(B) charges under investigation and in the process of settlement.

Activities at the Ports of Los Angeles and Long Beach continue to generate interesting issues in charges against employers and unions. In one case involving the closure of an employer facility at the Port in violation of Section 8(a)(3) and (5) of the Act, the Region is seeking special remedies including employee reinstatement at other company facilities, employee and family travel and moving expenses, and backpay from the date of the closure until employees are

reinstated or secure other substantially equivalent employment.

A significant number of filings involve immigrant workers with limited English proficiency. Although most are Spanish-speaking, we have had a few cases involving Mandarin and Vietnamese-speaking witnesses: I predict that the Region will experience an increase in cases requiring a variety of bilingual resources.

The Region is currently staffed to just under its authorized professional "ceiling" (26) and we are keeping pace with the cases before us. This is important to us because the Agency's budget situation will permit little if any hiring this year. The Region is fortunate to have a group of highly talented, hardworking professionals who are dedicated to the work of the Agency and public service. They have cultivated a strong culture of learning, of sharing experience and expertise, and

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Regional Director Victoria E. Aguayo



Ducommun AeroStructures
ADR Resolution
\$786,196 in Backpay

Wayne Jimenez Concrete
Board Settlement with
Special Remedies

Litigation

The Region's trial calendar was quieter the last few months. However, our attorneys are staying busy and there have been significant developments in some of our cases.

In **Ducommun AeroStructures**, a non-Board settlement was reached after the parties participated in the Board's Alternate Dispute Resolution pilot program. The ADR settlement involved the Employer paying \$786,196 in backpay to six employees who were allegedly unlawfully laid-off. The Employer also posted a non-Board notice informing employees of their rights under the Act. This

Comments from the Regional Attorney

settlement resolved a matter that had been pending before the Board for several years on exceptions of an ALJ's Decision. The Charging Party Union, all employees and the Respondent Employer were all satisfied with the outcome. Counsel for the General Counsel in this matter was Field Attorney Alan Wu.

In **Wayne Jimenez Concrete**, the Region held a settlement conference with the parties. A Board informal settlement agreement was achieved after serious discussion. The settlement provided for special remedies in addition to the traditional Board remedies. In this regard, the Employer agreed to pay "front pay" to

employees who were unlawfully discharged. The Employer also provided additional compensation to one employee who had been evicted from his apartment owned by a Company manager. The special remedies also included the reading of the Board's settlement agreement Notice to Employees in the presence of a Board agent. Field Attorney Steve Hernández and Field Examiner Jessica Toton negotiated this novel settlement.

William Pate
Regional Attorney

Board Bits:



1. Which Board member was known as "Mr. NLRB?"
2. Who is the only Region 21 attorney hired by former Region 21 Director Ralph E. Kennedy (1958-1970)?

From the R Case Desk

Nearly three thousand employees have voted in Region 21 conducted elections since the last issue of *The Downtowner*. One Certification of Representative involved a unit of nearly 700 employees. Multiple elections were also conducted pursuant to Consent Election Agreements, allowing for final decisions to be made by the Regional Director.

The Board issued two cases that directly affect representation cases.

The Board issued its long awaited decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (September 29, 2006), implementing the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)

defining the guidelines for supervisory status. The Regional Director recently issued a Decision and Direction of Election in *Rossi Concrete*, Case 21 -RC-20948, applying the *Oakwood* standards and finding that the Employer's foremen are supervisors within the meaning of the Act. The foremen at issue were distinguished from the non-supervisory leads in *Croft Metals*, 348 NLRB No. 38 (September 29, 2006), who did not assign work and did not responsibly direct work with the use of independent judgment. An overview of the Board's *Oakwood* guidelines are set forth in an article on page three of this newsletter.

In another situation, the Board in a 3-2 decision in *Truserv*

Musings by the ARD

Corp., 349 NLRB No. 23 (2007), returned to a standard expressed in *Passavant Health Center*, 278 NLRB 483 (1986), overruling *Douglas-Randall, Inc.*, 320 NLRB 431 (1995), and progeny. In *Truserv*, the Board held that "absent a finding of a violation of the Act, or an admission by the employer of such a violation, there is no basis for dismissing a petition based on a settlement of alleged but **unproven** [emphasis added] unfair labor practices." Since the decision, Region 21 has not had a petition raising this issue.

James Small
Assistant to the
Regional Director

Just Who Is a Supervisor Anyway?

The Board interprets terms within the Act's definition of a "supervisor"

In *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), the Board interpreted the terms "assign," "responsibly to direct" and "independent judgment," as those terms are used in Section 2(11) of the Act, where the term "supervisor" is defined.

Assign

"[D]esignating an employee to a place (such as location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant duties, i.e. tasks, to an employee."

Responsibly to direct

"If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided the direction is both 'responsible'...and carried out with independent judgment."

For direction to be "responsible," the individual must be accountable, i.e. subject to adverse consequences for his or her decision.

Independent Judgment

"[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."

These definitions will now be applied by the Board. To assist the public in fully understanding the new definition, the Region included a session on "supervisory status" at a recent "Coffee with the Board" information seminar. The Region also arranged for a presentation on the topic at an Orange County Labor and Employment Relations Association (formerly OCIRRA) dinner meeting.

**Field Attorney
Robert MacKay**

Board Bits:



3. *Which Downtown Los Angeles building and historic landmark, seen in several movies, was once home to Region 21?*
4. *Which Region 21 senior attorney has never lost a trial?*
5. *Which Region 21 agent has worked in five regional offices?*

Cont'd.

Regional Perspective

regularly collaborate on assignments when "all hands on deck" is the order of the day in the Regional office. Over half of our professional staff and two of our support staff are bilingual, and they generously bring their language skills to the Region's work.

In my view, the Region is in a strong position to effectively serve the Southern California public and to carry on the important work of the Agency in the years ahead.

Managing the Region's varied, complex and ever changing cases over the last 21 years has been tremendously rewarding. I also take with me vivid memories of passing out ballots and back pay checks to employees, and working with parties to forge meaningful settlements.

It has been a privilege to work for the NLRB and to serve as Region 21's Director. Although I will miss the good people of Region 21, I know that they will continue to do great things and be among the Agency's finest. I commend them to you and bid you all a fond farewell.

**Victoria E. Aguayo
Regional Director**

D.C. Circuit Finds Prohibition Against Employee Fraternization Unlawful




On February 2, 2007, the D.C. Circuit declined to enforce part of the Board's decision in *Guardsmark*, 344 NLRB No. 97 (2005) that the Employer's rule prohibiting employees from fraternizing with co-employees or employees of Respondent's customers did not violate the Act. The Court disagreed with the Board and concluded that employees could understand the rule to prohibit activity protected by the Act as well as personal entanglements.



Nuts and Bolts

Procedural Tips

When a charge is filed, a charged party can choose to respond and cooperate in the investigation or the charged party can choose to not respond, compelling the Region to rely upon the charging party's version of events. We encourage charged parties to afford themselves the opportunity to fully cooperate in an investigation. We want to consider the charged party's evidence before making a decision in a case. Here are some hints for responding to and providing evidence in unfair labor practice charges:

-  When a charge is first filed, the Board is an impartial investigator. A charged party's full cooperation in the investigation ensures all evidence will be considered before a decision.
-  Submit a completed commerce questionnaire in a timely manner, or provide appropriate commerce information. Don't just say: "We stipulate to jurisdiction."
-  Full cooperation in the investigation entails providing sworn witness affidavits. Position statements do not amount to full cooperation .



Position statements, received early in an investigation citing relevant case law, or supplementing affidavits, can be helpful. Copies of relevant documents are helpful.



Be prepared to submit evidence in a timely manner. Investigations are completed in accord with the General Counsel's impact analysis standards for the timely processing of cases. Be responsive to the Board agent's request for your evidence, remembering that position statements are not a substitute for affidavit testimony.



If you require more time to respond, specify your reasons and make it a reasonable time frame.

Lisa McNeill
Field Attorney

Other News

The **San Diego Resident Office** consists of Resident Officer Steven Sorensen, Field Examiner David Selder and Field Attorney Robert MacKay. Resident Officer Sorensen continues his involvement with the San Diego Chapter of LERA, formerly IRRA. SDRO Sorensen, and agents Selder and MacKay all regularly engaged in outreach activities in the San Diego County area, including speaking before several organizations and college classes. Several representation petitions were processed by the Resident Office in recent months. The SDRO staffers also regularly investigated and prosecuted a myriad of unfair labor practice charges, including charges involving the news media, the longshore industry and numerous janitorial companies. SDRO staffers were also frequently in the Regional office assisting on casehandling matters.

Recent support staff changes in Region 21 include the appointments of Linda Barbee as Assistant Office Manager; Sedy Galvez as Secretary to the Regional Director; Mildred Washington as Secretary to the Regional Attorney; and Alvaro Medina as Election Assistant.

Region 21 and Region 31 agents met with representatives of the **Agricultural Labor Relations Board** to discuss continued interagency cooperation in future election matters.



Answers to Board Bits:

1. *Howard Jenkins, Jr. who served from 1963-1983*
2. *Regional Attorney William Pate, who began his NLRB career in 1969.*
3. *Eastern Columbia Bldg. at 849 S. Broadway*
4. *Julie B. Gutman has a perfect record after 10 years of trial work.*
5. *ARD James F. Small has worked in five offices in his 30 year career.*

Contributors to this issue:

- Victoria Aguayo
- James Small
- William Pate
- Tirza Castellanos
- John Hatem
- Irma Hernández
- Robert MacKay
- Lisa McNeill
- Steve Sorensen
- Hector Martinez, *photographer*



Recent Developments: GC and Board Update



10(j) Panel Presentation at Symposium: (Left to Right) management attorney Mark Robbins, Region 21 DRA Neil Warheit, AGC Judy Katz and union attorney Jay Smith.

Ninth Circuit and DC Circuit Weigh In on State Neutrality Laws

After an en banc hearing, the Ninth Circuit found that a California law prohibiting employers that receive more than \$10,000 in state funds from using those funds to "assist, promote or deter union organizing" is not pre-empted by the NLRA and does not violate the First Amendment. *Chamber of Commerce v. Lockyer* (September 21, 2006). The majority opined that the law does not interfere with the NLRA or First Amendment because employers remain free to assist or dissuade unionizing efforts as long as they refrain from using state funds for these activities. On December 5, 2006, the Second Circuit issued a decision in *Healthcare Ass'n of N.Y. State Inc. v. Pataki* which concluded that the NLRA may pre-empt a New York State neutrality statute. The Court remanded the case for resolution of disputed fact. The majority stated that Section 8(c) of the Act not only protects the constitutional free speech of employers but also embodies a congressional policy to preserve an employer's ability to participate in campaigns. The Chamber of Commerce has filed its petition for certiorari with the Supreme Court in the *Lockyer* case, and it is likely that pre-emption and First Amendment issues raised by these cases will be decided by the Supreme Court.

Board Holds Oral Argument in Case Involving the Use of E-Mail at Work

Oral arguments were heard on March 27, 2007 to examine the question of whether employees have the right to use their employer's e-mail system to communicate with each other concerning union or other concerted, protected matters. See *The Guard Publishing Company, d/b/a The Register-Guard*, JD(SF)-15-02. The employer, a newspaper publishing company, forbids the use of its e-mail system "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." In 2002, an ALJ found this policy was not an

overly broad no-solicitation/no distribution rule. The Board will consider the arguments concerning whether employees have the right to use the employer e-mail to discuss union matters, whether the Board should apply traditional rules regarding solicitation and distribution to employee use of e-mail, whether the workplace location matters, and whether the use of company e-mail is a mandatory subject of bargaining.

Annual LA County Bar Labor Law Symposium

The 27th Annual Labor and Employment Law Symposium was held on March 8, 2007 at the Millennium Biltmore Hotel, Los Angeles. A morning plenary session entitled "Traditional Labor Injunctions: Secret Weapon in the NLRB's Arsenal" was moderated by Region 21 Deputy Regional Attorney Neil Warheit. Judy Katz, NLRB Assistant General Counsel and Chief of the Injunction Litigation Branch (ILB), presented the Board's view on the appropriateness of 10(j) and other injunctions. Ms. Katz pointed out that the Board continues to authorize 10(j) injunctions at the same level that it has authorized them for the last several years and that 10(j) permits interim relief while a meritorious charge wends its way through the administrative process. Ms. Katz argued that Section 10(j) provides the Board with a very powerful tool in remedying unfair labor practices. The panel included two renowned labor practitioners, one representing labor and one representing management. Many attendees complimented the quality of the presentations at the Symposium as being particularly informative this year.

General Counsel Seeks Injunctive Relief

The General Counsel continues his practice of seeking 10(j) injunctive relief in appropriate cases. In *Process Development Corp.*, 30-CA-17470, *et al.*, the Board authorized the GC to seek 10(j) interim relief requiring an employer to reinstate 14 employees and/or place them on a preferential recall list. The GC concluded that in addition to discriminatorily discharging and/or laying-off the employees, the employer engaged in an anti-union campaign threatening employees with plant closure, discharge, and numerous other unlawful conditions. In another distinct case, the GC is seeking Board authorization for 10(j) relief to reinstate a teacher and teacher's aide in a private school. The two employees were discharged following a staff meeting where concerns were raised about working conditions.

Irma Hernández
Field Attorney



Field Examiner John Hatem (left) and Field Attorney Robert MacKay after their talks at the most recent *Coffee with the Board* outreach presentation.

Outreach by Region 21

On March 7, 2007, Region 21 hosted another in its series of *Coffee with the Board* outreach presentations. Field Attorney Robert MacKay conducted an informative presentation on the topic of "Just Who is a Supervisor Anyway?" explaining the Board's decision in *Oakwood Healthcare*. Field Examiner John Hatem concluded the presentation with a nuts and bolts discussion of the "Top Ten" objections to elections and how to avoid them. Several Region 21 staffers dropped in for portions of the program. ARD James Small organized this successful event.

Agents from Region 21 and Region 31 were recognized at a reception on March 16, 2007, by the California Federation of Teachers for participation in the Los Angeles Unified School District—UTLA cooperative program known as the Collective Bargaining Education Project. Agents assisted high school students in gaining an appreciation of the collective bargaining process and the NLRB's role in resolving bad-faith bargaining charges. Both Regions will continue their involvement in this worthwhile program, and other classroom presentations, this spring and during the upcoming school year.

Region 21 will be coordinating outreach events and activities with the Department of Labor and Equal Employment Opportunity Commission in coming months.

NLRB agents are eager and willing to participate in meetings, conferences and seminars with employer associations, labor organizations, professional associations, student groups, non-profit entities, community organizations and members of the public. The NLRB is happy to provide a speaker for your event.

25th Annual Labor & Employment Law Conference

Jointly Sponsored by
NLRB Region 21—OCIRRA—FMCS

One of the BEST one day conferences in
the WEST!

SAVE THE DATE: July 11, 2007
Anaheim, CA

Region 21 has co-sponsored this outstanding seminar for the last quarter century. Harold J. Datz, Chief Counsel to the NLRB Chairman, has been confirmed as the luncheon speaker. Mr. Datz, one of the NLRB's most accomplished attorneys and one of the country's foremost labor scholars, presented the first luncheon address 25 years ago. It is only fitting that Mr. Datz join us for the 25th anniversary event as the luncheon speaker. Mr. Datz has a unique perspective and invaluable experience to share. Many of the original founders of the Labor Law Conference will be present and honored at the luncheon. Other portions of the program will include plenary sessions on immigration issues in the workplace and an arbitrators' forum. Attendees will have a choice of one morning and one afternoon workshop from a group of six stimulating offerings.

- Registration is only \$265. Federal Government employees and OCIRRA members only \$225.
- Six hours of MCLE credit is provided
- Registration is limited - the conference often sells out
- At Sheraton Park Hotel, 1855 S Harbor Blvd., Anaheim, California - the traditional Conference location

For more information visit www.ocirra.org, or email to NLRBRegion21@nlrb.gov, or SBolander@octa.net.

In the fall of 2007, The Region will be hosting a no-cost informational meeting for employers doing business in downtown Los Angeles. Representatives of the Department of Labor, State Labor Commission, and EEOC will join us in providing orientation to employers regarding workplace rights and responsibilities. Attorney Alan Wu of our office will be spearheading the effort. If you are interested in more information, please contact the Region. Our Regional Office outreach team can be reached at NLRBRegion21@nlrb.gov or call 213/894-5210. One or more speakers can be arranged from Region 21, our sister Region 31 office, or our national NLRB office. We are dedicated to promoting awareness of the NLRB and its role in the workplace.

**Field Examiner
Tirza Castellanos**