

Labor Relations in the New Century: A Conversation with NLRB Regional Director Celeste Mattina

by Matt Bodie

Celeste Mattina is the Regional Director for Region 2 of the National Labor Relations Board. The NLRB is a federal agency charged with enforcing the National Labor Relations Act, the landmark 1935 statute establishing collective bargaining rights for employees. Like many federal agencies, the NLRB has a prosecutorial wing and an adjudicatory wing. The prosecutorial side, headed by the agency's General Counsel in Washington, investigates charges filed by either employers, unions or employees relating to collective bargaining. Investigations are carried on by members of the General Counsel's regional staff, and if the region's director determines that a charge is supported by probable cause, the region's attorneys will litigate the charge before an administrative law judge of the NLRB's adjudicatory wing. The ALJ's ruling can be appealed to the five-member Board, and thereafter to a federal circuit court and the U.S. Supreme Court. The NLRB also conducts representation elections, through which employees choose whether to be represented by a union. The regional directors resolve questions regarding these elections, such as the scope of the proposed bargaining unit, and the regional staff then runs the elections. Post-election challenges are vetted before the regional director; these issues can also be challenged before the Board and the federal courts.

Region 2 of the NLRB covers the geographical area of Manhattan, the Bronx and Rockland, Westchester, Orange and Putnam Counties. Ms. Mattina was born in New York City, but was raised in Puerto Rico. After graduating from the University of Puerto Rico School of Law, she returned to New York to get a master's degree in labor relations from New York University. After a year at NYU, she joined the NLRB as a field attorney in the Newark regional office. She was later promoted to Supervisory Field Attorney of that office. She then moved to the headquarters office where she served as a Deputy Assistant General Counsel and an Assistant General Counsel in the Division of Operations Management. As Assistant General Counsel, she supervised regional offices across the northeast, and also worked with the General Counsel in a number of pro-

jects and program areas. She chaired a number of committees that revamped procedures used to resolve representation questions to ensure that elections were conducted within reasonable time frames. The Agency earned a Hammer Award under Vice-President Gore's Reinvention Program for the improvements in performance brought about by this initiative. In September 2000 she was appointed Regional Director for Region 2.

In November Ms. Mattina spoke with Matt Bodie at the NLRB's office in Manhattan. Prior to joining the faculty of the Hofstra University School of Law, Professor Bodie worked as a field attorney for Region 2.

Q: Could you begin by providing a brief explanation of NLRB's mission?

CELESTE MATTINA: I see the core mission of the National Labor Relations Board as designed to protect employees' rights to join together with other employees in an attempt to improve their working conditions, and to decide whether or not they want to be represented by a union. And what we do in order to implement that core mission is we prohibit certain conduct by employers and unions, and we provide a mechanism for employees to determine whether or not they want to be represented by a union through a secret ballot election and free of any coercion.

Q: Can you tell us a little about Region 2, for example how it differs from other regions you've had experience with?

CM: I think one factor that really influences the types of cases that we handle is the fact that we are in a very highly organized area. I was reading some statistics recently that suggested that New York State has the highest percentage of unionized workers nationwide. Of course, that includes also public employees and it includes employees in areas that are serviced now by Region 29 [which covers Brooklyn, Queens, and Long Island]. But in any event, I think in general, as compared to other regions,

we do serve a population that is highly organized. And that translates into certain cases.

For example, we handle a lot of cases where there are bargaining disputes between the parties, and we have to determine whether either the union or the employer is bargaining in good faith or whether they're bargaining over issues that they're required to bargain about. These are very difficult cases to resolve. We also have many disputes about the duty to furnish information, and we have cases where issues are raised as to whether we should defer to the contractual deferral procedures or lawsuits. We also have a lot of cases challenging employer recognition or assistance to a union.

Another type of case that we get is where there are changes in the bargaining unit. We have a lot of representation cases where there are disputes about whether a new classification or a classification that has undergone substantial changes is included or excluded from the unit, and I think in terms of organizing what we're seeing in this area is that employees who maybe have not traditionally been organized are being organized, such as residents in health care institutions and also teaching assistants in educational institutions.

And we're also dealing with new organizing techniques – neutrality agreements and campaigns designed to obtain recognition not through the Board but through other means. And all of that, obviously, has an impact on the kinds of cases that we consider.

Q: So you've seen an increase in neutrality agreements and representation outside the Board processes?

CM: Yes. That is a technique that has been used here in this area, and we've had some issues involving raising the impact of those neutrality agreements on an employer's bargaining obligation. For example, if there's a breach of the neutrality agreement, is it a breach that can be resolved through our processes? And also we've seen some cases that have raised issues as to what impact this has on our representation proceedings. Should we defer to these agreements when there is some kind of agreement between the parties, even when the Board's processes are ongoing through the filing of a representation petition?

Q: What has the Board said about a neutrality agreement that breaks down? How are the parties situated after that? Is that an unfair labor practice?

CM: That issue has not been decided. In the cases that we've had, one of them was resolved informally, and the other one is an open case where the issue has been raised in the context of a representation case, and the issue is what impact this neutrality agreement has on the objections and the obligations of the parties.

Q: Could you speak a little about some of the representation cases that the Board has handled regarding the teaching assistants that you mentioned, the graduate students?

CM: Well, the seminal case was issued by this region prior to the time when I came as a director, and that's the NYU case. And after I came in as a director, the Board announced its decision upholding the Region's determination, and we actually opened the ballots and counted them and ultimately certified the union. The parties in that case have entered into a collective bargaining agreement.

And since then we've had another case involving Columbia University where, again, the issue of whether teaching assistants are employees was raised, and in addition to that, we had other issues raised as to whether research assistants were employees, and what's the appropriate scope of the bargaining unit. How should units be defined in this area? That case was appealed after a decision was issued by us, and is pending before the Board along with several cases issued by Region 1 in Boston involving Tufts University and Brown University.

Q: Could you briefly summarize the Region's decision on the Columbia case?

CM: Our decision was basically consistent with the NYU decision in that the Board has held that teaching assistants could be considered employees even though they were also students. We applied that precedent and determined that in this case not only the graduate assistants but also the research assistants were employees.

Q: And could the research assistants organize as well?

CM: If they're employees, they have a right, then, to organize and we would conduct the election. The election was conducted, the ballots were impounded, and we're just awaiting the Board's decision on this issue.

Q: What are some of the other issues that Region 2 has dealt with recently?

CM: You know, one case that has had a substantial impact on us is the Supreme Court's decision in *BE & K*, which basically holds that lawsuits do not interfere with employee rights unless they're baseless. And in the past we had relied on the simple dismissal of those lawsuits in order to argue that the lawsuit has no reasonable basis in fact, and for some reason there have historically been a significant number of charges that have been filed in this office alleging that lawsuits have been unlawful. And in fact, one of them, I think, arose out of a case that you litigated.

Q: That's right.

CM: That case [involving the New Silver Palace Restaurant in Chinatown] has now been remanded to us to determine whether, under *BE & K*, the lawsuit is still unlawful. And we have several other cases raising that issue which are pending in our office. We have a libel lawsuit filed by an employer against a union challenging statements made in their campaign literature. There was also a grievance filed by the union alleging that the employer was still operating and refusing to comply with a collective bargaining agreement. So in all of these cases, we have to reanalyze in light of this new case, and we're in the process of doing that.

Q: How about the court's recent *Hoffman Plastics* decision? [In its March 2002 *Hoffman Plastics* decision, the U.S. Supreme Court ruled that undocumented workers were not entitled to back pay relief under the NLRA for violations of their collective bargaining rights.] Has that affected the Board and the region?

CM: We have a major case that raised significant issues with respect to whether or not the employer had met its burden in showing that the individual workers were undocumented, and assessing to what extent we would require proof of their immigration status. Fortunately, the



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parties agreed to exchange information about the documentation, and we were able to resolve most of those issues without extended and protracted litigation.

We've also had another case that settled with a formal settlement agreement and conditional restatement; the restatement was conditional on the individuals establishing that they meet the immigration documentation requirements. The settlement contained a number of special remedies, but no back pay for the individuals who were not lawfully in this country at the time. And we've had other cases that have been resolved informally. Right now we don't have any open cases, but we are anticipating that the immigration status of employees will become an issue in future cases.

Q: Has the decision led either you or the INS to seek to consult with one another on these types of issues?

CM: Well, we have done it informally at the local level, only to get guidance with respect to certain issues. I don't know whether there have been recent discussions about this at the national level.

Q: What has the agency done in terms of increasing public awareness about their rights under the National Labor Relations Act?

CM: Well, we have an active outreach program. I have been invited to speak to management groups, labor groups and groups that combine elements of both. I've also actually met with the bar associations, and our staff is encouraged in general to speak to outside groups. The General Counsel has encouraged regions to meet regularly with local labor-management panels to discuss issues and address common concerns.

Q: If someone were interested in either finding out more about the NLRB or bringing a charge to this region's attention, how would they go about doing that?

CM: Well, they can either call or visit our office. Because we cover a very small territory, relatively speaking, we have a lot of people who actually come in and visit the office. They get to speak to the information officer on duty who basically listens to what they have to say and provides them with guidance with respect to whether there may be other agencies that may be able to assist them, or whether there appears to be a basis for filing a charge or a petition and what the general requirements of that are. And there are also guides that describe the Agency's processes in non-legalistic terms and are printed in Spanish and in English for anybody that requests them.

Q: One thing that I felt was very useful when I was working with the Board was the information office and its ability to kind of direct people with a variety of different claim issues to a variety of different state and federal agencies. Is there any discussion, either at the regional level or at the national level, of some system of more communication or cooperation between the variety of agencies who cover the rights and responsibilities of employees?

CM: I do know that several regions - and this is something that maybe we may want to explore - have had people from other agencies come in and update us as to what, you know, the basic rights for people under the statutes that they enforce so that we can appropriately refer members of the public who visit our office. So to that extent, there is that level of cooperation. And we certainly are available to speak to people in other agencies about our processes.

Q: You just mentioned that due to the high union density in this region that you often get a lot of union-related issues, including duty of fair representation charges, which

are where a union member believes that they've been discriminated against by their union and seeks redress through the NLRB. One thing I found as an agent was that a lot of these cases didn't have merit, because the standard is very high. There has to be real discriminatory reasons for a union's action - for example, not taking a grievance to arbitration because of the member's support for a rival faction. But it's difficult to dismiss those cases out of hand. I'm wondering, why do you think so many union members file duty of fair representation charges, and is there anything the Board might do to better educate union members about the very limited nature of their rights?

CM: Often it's the question of lack of communication between the member and elected representatives. Perhaps there is not full awareness of what the union's discretion is in handling these cases. But to the extent that union members come to us, I think we serve an important public function. We are a channel for increased communication between the member and the union. There are times when the grievances are resolved or the union communicates their intentions with respect to those grievances throughout the NLRB process, which have not been communicated before, and ultimately in many cases, employees actually gain a better understanding of the basis for the union's decisions and the discretion that unions have in deciding what they must do. I know that that's an area that there's been a lot of debate about.

Q: Well, that actually does point up an area where the NLRB may serve a role. It may not show up in the numbers in your litigation successes, but I think you're right to point out that a lot of times the NLRB can just improve communication between the union and the member, and provide, maybe, a better explanation of what happened. Or maybe if it makes the union just check again to see if there's been a problem, so there is kind of a check, even though there's a very small range of illegality going on.

CM: Right.

Q: Most of these cases don't involve illegality. They may involve miscommunication or perhaps some inefficiencies that the Board just has to resolve.

CM: That's also true, probably, in many other types of charges.

Q: Have there been any unexpected problems or difficulties that you've found as a regional director that you didn't anticipate coming into this?

CM: To some extent, some of it was anticipated. I mean, I understood that I was coming into a region that had a substantial backlog of unfair labor practice cases and that presented challenges in terms of trying to see that we decided and implemented decisions within a reasonable time frame. I should say that the backlog was clearly the result of a number of very time-consuming cases that were being litigated by the region some years ago.

There were also the unanticipated challenges, such as the effect of the World Trade Center attack on our region. Our region was closed for a number of weeks and we had no phone service and problems with our computers. The staff was extremely dedicated in trying to do our work in the face of these tremendous challenges. We had to continue processing a number of substantial cases, including a major case where we were seeking injunctive relief and another one where we were trying to conduct a mail ballot election for thousands of employees, and we had to operate under very difficult circumstances. And we actually got praise from both the management and the labor bar for our efforts, for the extraordinary efforts of the region. So I'm very proud of that.

I had expected and have not been disappointed in the wide range of cases and difficult legal issues that are part of our caseload. We also have had very competent counsel on both sides of these issues. And the staff, again, I had heard very good things about them and they have exceeded, if anything, my expectations.

Q: How have the region and the agency as a whole been doing with backlog at this point in time?

CM: I think we've made tremendous strides, not only in the area of unfair labor practices in terms of getting a decision implemented within a reasonable time frame, but also in the area of conducting elections within reasonable time frames, which I think is really essential for our mission.

And at the national level I know that significant reductions in backlog had been achieved at the Board

level. The problem, of course, is that the Board has been functioning primarily through recess appointments. The full Board has recently been confirmed, but it has not been sworn in, and that, of course, has an effect on the ability of the Board to tackle the backlog and resolve cases.

Q: Have you felt the Board turnover at the local level? Has that affected the processing of some cases here?

CM: Well, it stands to reason, because of the limited time that they are there serving on a recess basis that it's going to have an impact on their ability to address the more serious issues that are pending before the Board. Although I understand that recess appointees felt that they should tackle those very serious issues, just by virtue of the limited time that they are serving in those positions that becomes very difficult. It's very difficult to deal with cases like Columbia and Brown, where there are thousands of pages of transcripts and lengthy briefs and substantial policy questions are raised. So we're anticipating that with a full Board there will be a better opportunity to address those issues.

Q: When was the new General Counsel appointed?

CM: About a year and half ago.

Q: Has the new General Counsel come to the region, and do you get a sense of what, if any, the new priorities are for him?

CM: The General Counsel was actually here shortly after we became more fully operational following the World Trade Center attack, and he came here basically to thank us for all the work that we had done during that extraordinary period, so his visit was very appreciated. He certainly has emphasized the importance of outreach and communication with outside parties, and we know that he favors the establishment of committees that can provide an avenue for the parties on both sides to discuss processes and concerns. He's also interested in emphasizing quality performance through both regional and national training programs.

Q: Are you still feeling the effects of September 11th, the World Trade Center attack, here?

CM: I think that we're in a better place now. I mean, I think that it's something that one cannot totally eradicate, but I think we're committed and focused on doing our work, and to that extent I think it's behind us.

Q: Were some of the staff able to see the attacks from their office?

CM: Yes, from their offices they were able to see the towers, and they had to, obviously, evacuate the building and some of our staff members gathered at the homes of others who lived in the city, some of our employees were stranded in the city for a period of time and had to walk long distances in order to get to their homes.

Q: How has the region used the injunctions provided by Section 10(j) of the Act? Has there been any change in focus on that either at the regional level or the national level?

CM: The General Counsel has reemphasized the fact that he supports the use of 10(j) in appropriate cases. And we certainly have recommended it where we feel it's appropriate. Most of our cases have settled. We actually had a huge formal settlement agreement involving two major 10(j) cases here. A maintenance contractor had been replaced, and there were issues as to whether or not the union that represented the employees that were previously employed there should be recognized. We have a formal settlement agreement in that case that obtained a full remedy, leaving the issues of how much back pay was left to a compliance proceeding.

Q: Who were the parties in this case?

CM: Planned Building Services (PBS, the building maintenance contractor) and Local 32B-J of the Service Employees International Union (SEIU).

Q: So it's janitorial services and the like?

CM: Right. We also had another case involving undocumented workers that I think I mentioned before, where we obtained a formal settlement agreement and special remedies. So I think we've had a number of Section 10(j) cases that have settled short of litigation.

Q: What are some of Region 2's other recent litigation successes?

CM: We have an interesting case involving Lincoln Center where the administrative law judge found that the employer had unlawfully banned the union, Local 100 HERE, from distributing leaflets on the Columbus Avenue sidewalk. That case has been remanded, though, by the Board, to hear some additional evidence. The record closed recently and additional briefs will have to be filed. We have a number of very significant cases that have been litigated but are pending before either the administrative law judge or the Board. We have a number of cases involving PBS with allegations similar to the one we just settled and other allegations of unlawful recognition and assistance. Duane Reade, which was decided by the administrative law judge in our favor, is now pending before the Board, and also involved allegations of unlawful recognition and assistance at several locations.

Q: Have you noticed any issues common in the various cases, or do these cases represent the Board's traditional 8(a)(1) and 8(a)(3) cases?

CM: No. In fact, the bulk of them do not involve the traditional organizing drive retaliation case, or what we call "nip in the bud" cases. Most of them, like I said before, involve situations where there's an incumbent union, and something happens that raises the question as to whether that union should represent the employees.

Q: So are many of these non-AFL-CIO unions?

CM: No, many or most are AFL-CIO unions.

Q: When you say there's a question whether the union represents the employees, do some people say they want –

CM: Well, this can occur if there is a change in the identity of the employer, for example – either a replacement with a new contractor or the employer has undergone some kind of change in business or in its organization, and then there's an issue as to whether or not the union should represent those employees.

Q: Do you think some of these cases stem from the downturn in the economy, particularly maybe the restaurants?

CM: It really - It's hard for me to determine, actually, what accounts for this.

Q: When [former president] Gus Bevona left Local 32B-J and a new administration came in, there seemed to be kind of a revived sense of mission at 32B-J, and we had a number of cases involving it. Has that continued?

CM: Yes. They've been very active in the PBS cases. They've been very active, actively organizing in this area, as well as in New Jersey and in Brooklyn.

Q: How about your personal priorities as a regional director? Is there anything that you are particularly proud of in your two years?

CM: Well, I'm particularly proud of the improvements that we have made in terms of getting things decided and elections conducted within a reasonable period of time. So that's an area that I think we have made substantial progress. Consistent with the General Counsel's emphasis on quality, we're also developing a regional training program and emphasizing the importance of close supervision and providing constructive feedback to people in that area.

And the other thing that I think I'm focused on both within the staff as well as in terms of my outside relationships with the bar is to be open and promote an environment where people feel free to call me or come in to discuss their issues and concerns.

Q: It must take a lot of time.

CM: It does, it does. But it's worth it.

Q: What do you think will be the role of the NLRB, particularly Region 2, in the future? Do you think that the national trends of gradually decreasing unionization will affect this region, and if so, how do you think that'll affect the region's mission?

CM: You know, I don't think the importance of our role should be really affected by the percentage of the workforce that is unionized. I think we have a very significant role to play irrespective of how many employees actually end up choosing representation. That is, to guarantee the employees' rights to determine whether or not they want to be represented without coercion. I mean, one could argue that if, in fact, a substantial percentage of the workforce is not unionized and does not have the protection that a contract might afford them, they need even more the protection of the agency in terms of ensuring that they're not discriminated against or discharged unlawfully and that they do have the right, should they so desire, to select a union.

Matt Bodie is an Associate Professor at the Hofstra University School of Law. Prior to joining the Hofstra faculty, Professor Bodie worked as a field attorney for the NLRB, Region 2.

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