

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 94-62

July 19, 1994

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: William G. Stack, Associate General Counsel

SUBJECT: Claiming Priorities for Backpay in Bankruptcy Cases
NLRB v. Walsh (In re Palau Corp.), 18 F.3d 746
(9th Cir. 1994)

Section 10610.3(d) of the Compliance Manual (Casehandling Manual - Part Three) describes priorities which the Regions should claim when filing proofs of claims in bankruptcy cases filed by respondents. The Compliance Manual instructs that first (administrative) priority should be claimed for backpay which accrues subsequent to the filing of the bankruptcy petition. However, the Ninth Circuit's decision in NLRB v. Walsh (In re Palau Corp.), 18 F.3d 746 (9th Cir. 1994), now prohibits the Board from claiming administrative priority, in cases within the Ninth Circuit, for backpay accruing post-petition where the unfair labor practice was committed pre-petition.

Section 503(b)(1)(A) of the Bankruptcy Code, 11 U.S.C. §503(b)(1)(A), states in relevant part: "there shall be allowed administrative expenses . . . including -- (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case" Briefly, in Palau the Court rejected the Board's argument that backpay accruing post-petition should be treated like other wages earned post-petition. The Court reasoned that the terms "actual, necessary costs and expenses" and "wages . . . for services rendered" mean that claims for wages may only receive administrative priority when actual services were performed post-petition, and that paying backpay to an individual who did not work post-petition does not "preserve the estate." The Ninth Circuit rejected the Board's argument that the term "including" in the statute means that costs and expenses, beyond those specifically enumerated, may also qualify as administrative expenses. The Court further rejected the argument that the Supreme Court's decision in Reading Co. v. Brown, 391 U.S. 471 (1968), allowing administrative priority even without a benefit to the estate, supports allowing administrative priority for post-petition backpay. The Court reasoned that the conduct which caused the expenses in Reading occurred post-petition, while the unfair labor practice in Palau occurred pre-petition.

The Board decided not to seek certiorari in Palau. Nevertheless, the Board will continue to litigate the issue, and may seek certiorari in an appropriate case in the future.

Accordingly, for bankruptcy cases within the Ninth Circuit, the Regions should no longer assert administrative priority for post-petition backpay where the unfair labor practice was committed pre-petition. While other courts have issued decisions similar to Palau,¹ this is the only decision issued by a circuit court. Regions with claims in bankruptcy cases outside the Ninth Circuit should continue to assert administrative priority for post-petition backpay where the unfair labor practice occurred pre-petition. Special Litigation will continue to litigate the issue in appropriate cases when objections are filed. Pursuant to Section 10610.3(c) of the Compliance Manual, any objections to the Board's claim should be submitted immediately to Special Litigation for preparation of the Board's response.

In addition, all Regions should continue to assert administrative priority for backpay where the unfair labor practice is committed subsequent to the filing of the bankruptcy petition. Backpay in such cases is not for actual services rendered. Nonetheless, the Court in Palau, by distinguishing Reading on the basis that the case there involved post-petition conduct, suggested that backpay resulting from a post-petition unfair labor practice may be entitled to administrative priority. Finally, the Regions should also continue to assert third priority under 11 U.S.C. §507(a)(3), for backpay accruing within the 90 days prior to the filing of the bankruptcy petition. The statute provides a \$2,000 maximum claim per individual for this priority. The Ninth Circuit in Palau declared that such priority should be accorded to the employee's pre-petition wage claim.


W. G. S.

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¹ See Kapernekas v. Continental Airlines, Inc. (In re Continental Airlines, Inc.), 148 B.R. 207 (D. Del. 1992); In re Wheeling-Pittsburgh Steel Corp., 113 B.R. 187 (Bankr. W.D. Pa. 1990), vacated as moot, 141 LRRM 2274 (1992); NLRB v. Greyhound Lines, Inc. (In re Eagle Bus Mfg., Inc.), 158 B.R. 421 (S.D. Tex. 1993) (settlement pending).