NLRB Region 7

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DETROIT REGION CONDUCTS BERNARD GOTTFRIED LABOR LAW SYMPOSIUM

Associate General Counsel **Barry Kearney** and Detroit Regional Director **Stephen Glasser** joined academics and practitioners who spoke at the 15th annual Bernard Gottfried Memorial Labor Law Symposium held at Wayne State University Law School in Detroit on October 24, 2007. The Symposium, conducted by the Detroit Region and Wayne State Law School in sponsorship with the State Bar of Michigan Labor and Employment Section, is held each year in memory of **Bernard Gottfried**, who served as Regional Director of the Detroit Region from 1973 until his passing in 1992. Director Gottfried also taught labor law at Wayne State University Law School as an adjunct professor.

Regional Director Glasser and Law School Dean **Frank Wu** each made opening remarks to welcome an audience that included attorney practitioners from management and labor, academics, Regional personnel and students**. Robert McCormick**, professor at Michigan State University College of Law, spoke to the audience addressing the issue of whether college athletes should be deemed "employees" under the NLRA. The first listed topic for discussion was the impact of the Board's **Oakwood Healthcare** decision and was entitled "Now Who Is a Supervisor?" Senior Field examiner **Craig Sizer** provided an overview to the audience of the **Kentucky River** decision and the Board's decisions in **Oakwood Healthcare, Golden Crest Healthcare Center** and **Croft Metals**. A practitioner from the labor and management side each provided views on the Board's decisions on supervisory issues and their impact on labor law. Field Attorney **Joseph Canfield**, who is also an adjunct professor at Wayne State University Law School, then moderated a spirited discussion between panels of labor and management practitioners regarding the issue of the NLRA and the Employee Free Choice Act and what the 21st century will bring.

Associate General Counsel Barry Kearney

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BOARD USES NEW BALLOT

On September 28, 2007, the Board issued its decision in ***Ryder Memorial Hospital***, 351 NLRB No. 26 (2007) in which the Board revised its official election ballot to include language which asserts the Board's neutrality in the selection process and states that any markings on the sample ballot have not been placed there by the Board. The intent of the language is to prevent a reasonable impression that any marking on the ballot has been placed there by the Board. The Board also stated in ***Ryder*** that by including such language on the ballot it will no longer evaluate on a case by case basis issues of markings on sample ballots. The election ballots have been revised to include the following language:

> *The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.*

GOTTFRIED SYMPOSIUM *(CONTINUED FROM PAGE 1)*

Associate General Counsel Kearney in a luncheon address discussed recent Board cases, including the series of cases issued by the Board in September 2007, (see page four for a discussion of these cases) and also highlighted major issues pending in the Division of Advice. Following the address, the Region conducted three special sessions. Field Examiner **Elizabeth Kerwin** discussed the Board law dealing with the use of e-mail in the workplace, Field Attorney **Donna Nixon** provided an overview of picketing and other secondary boycott activity, and Field Attorney **Linda Hammell** provided an overview of Section 10(j) relief and other remedies.

Left to right, Joseph Canfield, Prof. Robert McCormick, Blair Simmons, Donna Nixon, William Thacker, Dean Frank Wu, Elizabeth Kerwin, Regional Director Stephen Glasser.

The Region 7 Detroit office is located on the third floor of the Patrick V. McNamara Federal Building located at the corner of Michigan Ave. and Cass Ave. in downtown Detroit.

Visitors to the McNamara Building must enter the building from the Michigan Avenue entrance.

The Detroit office is open from 8:15 a.m. to 4:45 p.m. Monday through Friday.
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The Grand Rapids Resident Office handles cases on the west side of the lower peninsula of Michigan.

The Resident Office is located on the third floor of the building located at 82 Ionia, the corner of Ionia St. and Fountain St. in downtown Grand Rapids.

It is open from 8:15 a.m. to 4:45 p.m. Monday through Friday.
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The Resident Officer at the Grand Rapids office is Chet Byerly.

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PLEASE BE ADVISED OF THE FOLLOWING:

* On (insert date), your Employer (insert name of Employer) recognized the (insert name of Union) as the unit employees' exclusive bargaining representative based on evidence indicating that a majority of employees in the following bargaining unit desire its representation:
(Insert description of bargaining unit)
* All employees, including those who previously signed cards in support of the Union, have the right to a secret ballot election conducted by the National Labor Relations Board to determine whether a majority of the voting employees wish to be represented by the Union, another union or by no union at all, as provided below.
*Within ***45*** days from the date of the posting of this notice, a decertification petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board for a secret-ballot election to determine whether or not unit employees wish to be represented by the Union. Within the same 45-day period, a representation petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board to determine whether or not unit employees wish to be represented by another union.
*Any properly supported petition filed within the 45-day period will be processed according to the Board's normal procedures.
* If no petition is filed within 45 days from the date of the posting of this notice, then the Union's status as the unit employees' exclusive bargaining representative will not be subject to challenge for a reasonable period of time to permit the Union and your Employer an opportunity to negotiate a collective-bargaining agreement.
*** Contacting the NLRB—**If you are interested in filing a petition for a secret-ballot election or receiving more information about the matters covered by this notice, you should contact the NLRB office.

BOARD ISSUES DECISION ON VOLUNTARY RECOGNITION AS A BAR TO PETITIONS

On September 28, 2007, the Board issued ***Dana Corp***., 351 NLRB No. 28, a 3-2 decision which modified the recognition-bar doctrine and held that an employer recognition of a labor organization does not bar a decertification petition or rival petition for 45 days from the notice of the recognition.

Under the Board's former policy, stated in ***Keller Plastics Eastern, Inc.,*** 157 NLRB 583 (1966), an employer's voluntary recognition of a labor organization based on a showing of the union's majority status barred the filing of a petition for a reasonable period of time. The Board's reasoning was that labor stability necessitated the period subsequent to the recognition during which a decertification petition or rival petitions could not be filed.

In ***Dana***, the Board majority, consisting of Chairman Robert Battista, and Members Schaumber and Kirsanow, found that while the reasons for barring the filing of a petition subsequent to the recognition were sound, they did not warrant an immediate bar to any petition. The Board held that the uncertainty surrounding the employer's voluntary recognition immediately after the recognition as opposed to the certainty from a Board-certified election warranted allowing a rival petition or a decertification petition to be filed within 45 days after the notice of the recognition. The Board stated that to accomplish this notification, the employer must post a notice of the voluntary recognition which will inform employees and rival labor organizations of the recognition and allow for the filing of a petition during this period. The Board stated that such petition must be supported by the traditional 30% showing of interest.

In dissent, Members Liebman and Walsh stated that the majority stated nothing that should cause the Board to change the longstanding ***Keller Plastics*** holding that lawful voluntary recognition will bar a petition for a reasonable period of time.

There have been six ***Dana*** notifications filed with Region 7 since the decision issued. The process by which a ***Dana*** notice is established is the employer and/or union can contact the Regional Office in writing and advise of the voluntary recognition. The notification to the Regional Office must include a copy of the recognition agreement, which must be reduced to writing and describe the unit and the date of recognition. Once notified, the Region will assign the notification a case number (Region number-VR-number) and prepare a ***Dana*** notice to be posted by the employer for 45 days at its facility. After the end of the 45-day posting period, the employer is to provide a certificate of posting. Upon receipt of the certificate of posting, the Region will close the file. Detailed information regarding the ***Dana*** case and the processing of a ***Dana*** notification can be found in Memorandum OM 08-07 issued on October 22, 2007, by the Division of Operations Management.

SEPTEMBER 2007 DECISIONS

In September 2007, just before the end of our fiscal year, the Board issued 61 decisions. Several of these decisions will be addressed below or in other parts of this Region 7 Outreach newsletter. However, given the voluminous number of decisions it will not be possible to discuss each decision. Nevertheless, all the decisions are available on the NLRB's website www.nlrb.gov.

Toering Electric Co., 351 NLRB No. 18. In this "salting case" the Board, in a 3-2 decision, held that an applicant for employment must be genuinely interested in seeking to establish an employment relationship with an employer in order to qualify as a Section 2(3) employee and thus be protected from hiring discrimination based on union affiliation or activity. The Board further held that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to go to work for the employer. Members Liebman and Walsh, dissenting, would have retained without modification the standard for litigating hiring discrimination cases set forth in ***FES***, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

Jones Plastic & Engineering, 351 NLRB No. 11. In this strike replacement case the Board, in a 3-2 decision, held that the employer's issuance of an "at-will" disclaimer informing employees hired as strike replacements that their employment was for "no definite period" and that they could be terminated for "any reason" and "at any time, with or without cause" did not detract from the employer's showing that the employees were permanent replacements under the Act. The Board overruled ***Target Rock***, 324 NLRB 373, 374 (1997), enfd. 172 F.3d 921 (D.C. Cir. 1998) to the extent it was inconsistent with the Board's holding.

BE & K Construction Co., 351 NLRB No. 29, In this allegedly retaliatory lawsuit case the Board, in a 3-2 decision, held that the filing and maintenance of a reasonably based lawsuit does not violate the National Labor Relations Act, regardless of the motive for bringing the suit. Members Liebman and Walsh, dissenting, would have remanded the case for further litigation to evaluate whether the employer's suit was retaliatory because it was brought to impose litigation costs on the union or as part of a broader pattern of conduct unlawful under the Act.

Anheuser-Busch, Inc., 351 NLRB No. 40. In this make-whole remedy case the Board, in a 3-2 decision, reaffirmed its 2004 holding that the National Labor Relations Act prohibits the Board from granting a make-whole remedy to employees disciplined or discharged for misconduct discovered as a result of unlawful conduct by their employer. Members Liebman and Walsh, dissenting, asserted that a make-whole remedy for the employees is necessary to repair the damage that Anheuser-Busch's unlawful unilateral changes caused to the union's status as the employees' bargaining representative and to deter future unlawful unilateral changes.

St. George Warehouse, 351 NLRB No. 42, In this backpay case the Board, in a 3-2 decision, held that once a respondent produces evidence of the availability of substantially equivalent jobs for a discriminatee, the burden shifts to the General Counsel to produce evidence concerning the discriminatee's efforts to find interim employment. Members Liebman and Walsh, dissenting, asserted that the majority modified the current procedure and observed that the existing rule had been followed for more than 40 years and was supported by the weight of judicial authority.

SPEAKERS AVAILABLE

Members of the Region's staff are available to make presentations before any employer or union group, classroom group, legal services clinic or service agency, and labor relations association, to describe the Act's protections, how the Region investigates and resolves unfair labor practice charges, processes representation petitions, or any NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please do not hesitate to telephone Regional Outreach Coordinator Patrick Labadie at (313) 226-3213.

BOARD FINDS EMPLOYEES HAVE NO STATUTORY RIGHT TO USE EMPLOYER'S E-MAIL SYSTEM FOR SECTION 7 COMMUNICATIONS

In a 3-2 decision in ***The Guard Publishing Company, d/b/a The Register Guard,*** 351 NLRB No. 70 (December 16, 2007), the National Labor Relations Board held that an employer did not violate Section 8(a)(1) by maintaining a policy that prohibited employees from using its e-mail system for any "non-job-related solicitations." The Board majority also announced a new standard for determining whether an employer violated Section 8(a)(1) by discriminatorily enforcing its policies.

The employer's "Communications System Policy" (CSP) prohibited the use of e-mail for non-job related solicitations. Employees used e-mail regularly for work-related matters. A unit employee used the e-mail system on three separate occasions. She sent one e-mail "setting the record straight" regarding a previously held union rally; she sent a second one requesting employees wear green in support of the union's bargaining positions; and a third e-mail requesting employees participate with the union in an upcoming local community parade. The employer issued her two warnings covering the three e-mail communications. The complaint alleged, in part, that the CSP was overly broad, the employer discriminatorily enforced the policy, and the two disciplines violated Section 8(a)(1) and (3) of the Act.

In finding the CSP lawful, the Board majority (Chairman Battista and Members Schaumber and Kirsanow) equated the employer's e-mail system with its telephone system, bulletin board, or copier. That is, according to this majority, the employer's e-mail system is the employer's equipment and, under Board precedent, employees have no statutory right to use an employer's equipment for Section 7 purposes as long as there is no discriminatory purpose for the restrictions. ***Mid-Mountain Foods,*** 332 NLRB 229 (2000). The majority rejected ***Republic Aviation Corp. v. NLRB,*** 324 U.S. 793 (1945), as controlling because ***Republic Aviation*** involved only face-to-face solicitation, not the use of employer equipment. The majority rationalized that the use of e-mail "has not changed the pattern of industrial life at the respondent's facility to the extent that the forms of workplace communications sanctioned in ***Republic Aviation*** have been rendered useless … consequently, we find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications."

The Board majority then turned to the question of whether the employer violated the Act by discriminatory enforcement of the policy. In practice, as the dissent observed, the employer honored the CSP in the breach. Employees, supervisors, and managers used the e-mail system for various nonwork-related e-mails, such as baby announcements, party invitations, jokes, offers of sports tickets, poker games, community events, and solicitations for services such as dog walking. There was no evidence that the e-mail was used to solicit for any outside cause or organization other than the United Way (the employer conducted an annual campaign).

In finding that the employer did not unlawfully discriminate in the application of the CSP, the majority adopted the reasoning of the U.S. Court of Appeals for the Seventh Circuit in ***Fleming Companies v. NLRB,*** 349 F3d 968 (7th Cir. 2003), denying enforcement of 336 NLRB 192 (2001) and ***Guardian Industries Corp. v. NLRB,*** 49 F3d 317 (7th Cir. 1995), denying enforcement of 313 NLRB 1275 (1994). The Seventh Circuit distinguished between personal nonwork-related postings on employer bulletin boards such as "for sale" notices, wedding announcements, and group and organizational postings such as union materials. The majority clarified that "discrimination under the Act means drawing a distinction along Section 7 lines." The Board further elaborated that "rather than existing Board precedent, [the Seventh Circuit's analysis] better reflects the principle that discrimination means unequal treatment of equals." In adopting the Seventh Circuit's approach, the majority overruled the Board's decisions in ***Fleming, Guardian Industries,*** and other similar cases to the extent they were inconsistent with its decision in ***Register Guard.***

Applying this new standard, the majority found that because the employer had never permitted e-mails soliciting support for a group or organization, the discipline issued for the wear green and parade e-mails, which the majority deemed solicitations for the union, did not discriminate along Section 7 lines and was not unlawful. The discipline for the setting the record straight e-mail, however, was unlawful because the e-mail merely communicated facts concerning a recent union event, and was not a solicitation.

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E-MAIL AND SECTION 7 COMMUNICATIONS (CONTINUED FROM PAGE 5)

Members Liebman and Walsh took the majority to task for making the NLRB the "*Rip Van Winkle* of administrative agencies," citing ***NLRB v. Thill, Inc.,*** 980 F2d 1137, 1142 (7th Cir. 1992). "Only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace. In 2007, one cannot reasonably contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper." The dissent equated the e-mail with face-to-face communication and, thus, relied on ***Republic Aviation*** and ***Beth Israel Hospital v. NLRB,*** 437 U.S. 438 (1978). Liebman and Walsh observed that it is the Board's job in cases involving employee-to-employee communication in the workplace to balance the employees' Section 7 right to communicate with one another against the employer's right to protect its business interests. "Where an employer has given employees access to e-mail for regular, routine use in their work," a ban on "all nonwork-related solicitations is presumptively unlawful absent special circumstances." Inasmuch as the employer established no special circumstances, the maintenance of the CSP violated Section 8(a)(1) of the Act.

The dissent would follow Board precedent and also find the enforcement of the policy unlawful. The dissent considered the analysis adopted by the Board majority seriously flawed because the essence of the discriminatory enforcement violation is interference with employees' Section 7 rights, and discrimination, when present, "is relevant simply because it weakens or exposes as pretextual the employer's business justification for prohibiting the activity."

The dissent also split with the majority on the alleged unlawful bargaining proposal prohibiting all union-related e-mails. Contrary to the majority, the dissent found that the evidence established insistence, and the proposal was the illegal codification of a discriminatory practice allowing e-mail access for a broad range of nonwork-related matters, but prohibiting union-related messages.

The Board unanimously affirmed the judge's finding that the employer violated Section 8(a)(1) by maintaining an overly board rule in the absence of special circumstances, prohibiting employees from wearing or displaying union insignia while working with the public.

BOARD DELEGATES LITIGATION AUTHORITY TO THE GENERAL COUNSEL AND AUTHORIZES TWO MEMBER QUORUM TO ISSUE DECISIONS AND ORDERS

On December 20, 2007, the Board, anticipating the loss of two members when Congress adjourned in January, 2008, unanimously delegated temporarily to the General Counsel authority on all court litigation matters that would normally require Board authorization. As a result, the General Counsel will have full and final authority to initiate and prosecute injunction proceedings under Section 10(j) or Section 10(e) and (f) of the Act.

At the same time, the Board delegated its authority to Members Wilma Leibman, Peter Schaumber and Peter Kirsanow. Chairman Robert Battista's term expired on December 16, 2007. The terms of Board members Dennis Walsh and Peter Kirsanow, both of whom were recess appointments, expired with the adjournment of Congress in January 2008. Members Liebman and Schaumber, as a quorum of the remaining members on the Board, will issue decisions and orders in unfair labor practice cases and representation cases. The Board used this practice in 2005 to issue decisions as a two-member quorum.

The temporary delegation to two members will be revoked when the Board returns to three members. The Board took the above action pursuant to Section 3(b) of the Act, which permits the temporary delegation of authority by the Board.

On January 18, the Board issued its first two-member panel decision, ***Aluminum Casting & Engineering Co.,*** 352 NLRB No. 1 (Jan. 18, 2008). In the decision the Board affirmed a backpay compliance specification and noted at footnote 7 of the decision that pursuant to the delegation of authority, that Members Liebman and Schaumber constitute a quorum of the Board members who delegated the authority.

GOING TO HEARING IN A REPRESENTATION CASE—WHAT HAPPENS?

Say you are an employer, labor organization or an individual petitioner with a pre-election petition pending and you have made every effort to reach an election agreement and have been unsuccessful. The Board agent tells you that the parties will have to go to hearing. What does that mean???

When a petition is filed with the NLRB, a Board agent is assigned to the case. He or she speaks to the parties and makes every effort to reach an election agreement. Sometimes, however, despite the good faith efforts of all, there are issues, such as supervisory status of employees, the community of interest of certain classifications, or, in limited situations, whether the Board has jurisdiction, that cannot be resolved. Under Section 9 of the National Labor Relations Act, the Regional Director can conduct a hearing at which the parties can present evidence regarding such issues. After the parties present their evidence, the Regional Director will issue a decision regarding those matters.

Hearings are usually held in the Regional Office. However, if the petition involves an employer whose location is distant from the Regional Office, the Regional Director may exercise his discretion and conduct the hearing out of the Regional Office.

The Board agent originally assigned to the case will usually serve as the hearing officer. The hearing officer is not an advocate of any position and must be impartial in his/her rulings. An official reporter will be there to make the official transcript of the proceedings. The sole objective of the hearing officer is to clarify the positions of the parties concerning the issues raised and to develop a complete record for the Regional Director so that he may issue a decision. To do that, the hearing officer will ask questions of the witnesses, call witnesses, and, if necessary, explore areas of inquiry not raised by the parties.

Usually documents will be introduced and placed into the record as exhibits. All parties at the hearing may ask questions of the witnesses to clarify and expand on issues, if necessary. Parties can object to questions or a line of questions. Parties can also make motions to the hearing officer and they may be stated orally on the record or submitted in writing.

The parties can also request subpoenas from the hearing officer to compel the testimony of witnesses or the production of documents at the hearing.

During the hearing, the parties can enter into stipulations, which are agreements regarding facts. This shortens the hearing. The hearing officer will seek to have the parties enter into stipulations, *inter alia*, that the employer is engaged in commerce, that unions participating are labor organizations within the meaning of Section 2(5) of the Act, and the history, if any, of collective bargaining at the facility or facilities at issue. The hearing officer will also seek to have the parties enter into stipulations regarding the eligibility of certain employees, in particular whether certain employees are supervisors under Section 2(11) of the Act.

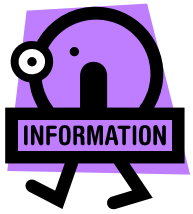
Pre-election hearings are investigatory proceedings. Although it is not required that the rules of evidence and trial proceedings be strictly applied, they serve as a guide for helping the hearing officer conduct the hearing and develop a sound record.

The hearing officer does not make any recommendations or participate in any phase of the decisional process. Parties may file briefs with the Regional Director dealing with the issues litigated at the hearing. A copy of the brief must also be served on the other parties. Usually the briefs are due seven days after the close of the hearing unless an extension is granted.

There are certain issues that may not be litigated at a pre-election hearing. Some of those issues are matters which would constitute unfair labor practices, the showing of interest in support of the representation petition and the manner in which it was obtained, and the mechanics of the election to be conducted.

A valuable resource for the participants at a representation hearing is the Agency's ***Guide for Hearing Officers in NLRB and Section 10(k) Proceedings***. It provides a wealth of information regarding the hearing process and issues to be explored at a hearing. The guide is available for viewing at the NLRB website at www.nlrb.gov under "Publications."

AN INTRODUCTION TO THE FREEDOM OF INFORMATION ACT (FOIA)



The FOIA is an Act of Congress, originally passed in 1966, and amended in 1974, 1986 and 1996. The purpose of the FOIA, since its inception, has been "… to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[1] The disclosure of "[o]fficial information that sheds light on any agency's performance of it statutory duties falls squarely within that statutory purpose."[2]

The FOIA has two automatic disclosure provisions-5 U.S.C 552(a)(1) and (a)(2). The first provision requires the publication in the Federal Register of basic information regarding how the agency transacts its business, including its rules and regulations, statements of procedure and its organization and structure. The second automatic disclosure provision requires the creation of conventional and electronic reading rooms, where certain categories of documents are routinely made available for public inspection and copying, unless the materials are promptly published and copies are offered for sale. Reading room documents consist of: final opinions and orders made in the adjudication of cases, agency statements of policy and interpretations which are not published in the Federal Register, administrative staff manuals and instructions that affect the public, and copies of records which have become or are likely to become the subject of subsequent FOIA requests.[3] All of these documents must be indexed to facilitate public inspection.

The FOIA's other disclosure provision, 5 U.S.C. 552(a)(3), is the most commonly utilized portion of FOIA and allows any person access to those records which are not automatically disclosed, as noted above, or which are exempt under one of nine specific exemptions. These requests require search, including by electronic means, and review by Agency personnel prior to disclosure to the requester in the form or format preferred by the requester, including electronic format, where the records are readily producible in that format. This subsection also requires that each agency promulgate administrative regulations regarding the time, place, fees and procedures to be followed in making a FOIA request.

The NLRB has promulgated Subpart K, Section 102.117 of its Rules and Regulations, which sets forth the Agency's administrative FOIA procedures. Subparagraphs (c) and (d) set forth the administrative procedures that a FOIA requester must follow in making a FOIA request to the Agency, filing an administrative appeal, and exhausting administrative remedies within given time constraints. They also provide for fee category placement, assessment of costs and the standards for determining whether a fee waiver will be granted. Subparagraph (e) incorporates the nine FOIA exemptions by reference and grants the General Counsel and the Board the right to make discretionary FOIA disclosures.

[1] ***NLRB v. Robbins Tire & Rubber Co.,*** 437 U.S. 214, 242 (1978).

[2] ***U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press,*** 489 U.S. 749, 773 (1989).

[3] While Regions may maintain a "reading room" which generally refers to its library and files (such as charges, petitions and complaints) which are subject to public inspection and copying, it is not required that each Region or Resident Office maintain a reading room or dedicated computer for access to reading room material. The Agency's home page www.nlrb.gov contains most of the reading room documents. Access to a computer and website does not have to be provided by the Regional Office.