Democracy at Work

NLRB Region 9

Fall 2010 Volume 2, Issue 1

NLRB ATTORNEY LAFE SOLOMON NAMED AS ACTING GENERAL COUNSEL

President Obama has named Lafe Solomon to serve as Acting General Counsel of the Agency. The appointment became effective on June 21, 2010. As the Agency's top investigative and prosecutorial position, the General Counsel has supervisory authority over all Regional offices and guides policy on issuing complaints, seeking injunctions and enforcing the Board's decisions.

Lafe Solomon

Mr. Solomon has worked for the Agency since 1972 when he began as a field examiner in the Seattle region. After taking a break to pursue a law degree, he returned as an attorney in the Office of Appeals. He transferred to the Appellate Court Branch in 1979. Two years later, he left the General Counsel side of the Agency to join the staff of former Board Member Don Zimmerman. He went on to work for another nine Board members. For the last decade he has directed the NLRB's Office of Representation Appeals. A native of Helena, Arkansas, Mr. Solomon received a B.A. degree in Economics from Brown University and a J.D. from Tulane University.

The previous General Counsel, Ronald Meisburg, resigned effective the weekend of June 20, 2010 to join the law firm of Proskauer Rose. His term was to expire in August 2010.

Inside this issue:

Celebrating 75 Years

In celebration of the National Labor Relations Act's 75th Anniversary, the Agency launched a website commemorating the Act's history and its achievements. We encourage each of you to visit http://www.nlrb.gov/75th/index.html for more information.

QUESTIONS?

- General Information: 513-684-3686
- Newsletter: Deborah Jacobson 513-684-3651
- Outreach: Laura Atkinson 513-684-3625

SUPREME COURT RULES TWO MEMBER BOARD LACKED AUTHORITY

On June 17, 2010, the U.S. Supreme Court ruled that that the two member Board composed of Chairman Wilma B. Liebman and Member Peter C. Schaumber was not authorized to issue decisions during the 27 month period when three of the Board's five seats were vacant. The Board operated with only two members from January, 2008 to late March, 2010. During this period it issued about 600 decisions relying on Section 3(b) of the Act and an opinion issued by the Department of Justice Office of Legal Counsel for its authority for doing so.

The case in question, ***New Process Steel, LP v. NLRB***, involved a steel processing plant in Indiana that unilaterally withdrew recognition from the International Association of Machinists as the representative of its employees. The two-member Board ordered the Employer to recognize the Union and bargain.

On July 1, 2010, the Board outlined its plans for handling returned cases following the Supreme Court's ***New Process Steel*** decision. As of July 1, there were 96 two-member decisions pending on appeal before the federal courts: six at the Supreme Court, and 90 in various Courts of Appeals. The Board sought to have each of those cases remanded to the Board. The Board stated that each of the remanded cases would be assigned to a three-member panel which will include Chairman Liebman and then Member Schaumber (whose term expired on August 27, 2010). The other Board members not on the panel would have an opportunity to participate in the decision if they desire.

On August 5, 2010, the Board issued its first decisions in cases that were returned to it by the Courts of Appeals following the ***New Process Steel*** decision. On the same date, the Agency made public a database of all contested cases that were decided by the two-member Board. The list of cases is available on the Agency website at www.nlrb.gov and includes links to original documents and case status updates that will be refreshed daily.

BOARD MAJORITY FINDS ANNUAL RENEWAL REQUIREMENT FOR DUES OBJECTORS UNLAWFUL

The Board ruled in Machinists Local Lodge 2777 (L-3 Communications) 355 NLRB No. 174, (Aug. 27, 2010) that a union violated its duty of fair representation when it required nonmember dues objectors to renew their objections annually despite their express desire to have their objections continue from year to year. The case arose out of the Supreme Court decision Communications Workers of America v. Beck where the Court held that unions may charge members and nonmembers fees relating to the union's collective bargaining and contract administration activities but cannot require nonmembers to pay fees unrelated to collective bargaining. Nonmembers have the right to object and unions must calculate the share of dues money used for collective bargaining and require the nonmember to pay only that share. An employee of L-3 Communications Vertex Aerospace represented by the International Association of Machinists objected to paying full dues. In 2003, he informed the union in writing that he wished his objection to continue indefinitely. The union responded that he had to renew his dues objection each year, and when the employee failed to do so, the union charged him the full dues amount.

"Nonmembers have the right to object and unions must calculate the share of dues money used for collective bargaining and require the nonmember to pay only that share. "

The Board, noting that this was a case of first impression, stated that as established by the Board in California Saw & Knife Works, 320 NLRB 224 (1995) the legality of union procedures to implement Beck objections is to be measured by using the duty-of-fair representation standard. Chairman Wilma Liebman and Member Craig Becker found that the annual renewal requirement was "arbitrary," but not discriminatory or in bad faith. In their separate opinions Members Schaumber and Hayes agreed that the rule was arbitrary but they would also find it discriminatory. The majority noted that it was "not announcing a per se rule finding an annual renewal requirement to be unlawful" but rather would proceed on a case-by-case basis. In dissent, Member Mark Pearce found that the union had presented reasonable justification for the rule. The decision can be found at the NLRB website, www.nlrb.gov, and click on "Board Decisions."

NLRB RULES THAT UNION "BANNERING" IS PERMITTED

On August 27, 2010, the Board ruled in three cases that "bannering" at a secondary employer was not coercive and does not violate labor law. The cases, involving the United Brotherhood of Carpenters and Joiners of America, Local 1506, in Arizona, arose when union carpenters held 16-foot banners near establishments—two medical centers and a restaurant—to protest work performed for the owners by construction contractors that the union claimed paid substandard wages and benefits. Two of the banners declared "SHAME" while a third urged customers not to eat at the restaurant. The Board majority, Chairman Wilma Liebman and Members Craig Becker and Mark Pearce, found that the bannering was not coercive. Dissenting Members Peter Schaumber and Brian Hayes argued that it was. The cases are Eliason & Knuth, Inc., 28-CC-9555, Northwest Medical Center, 28-CC-956 and RA Tempe Corporation, 28-CC-957, with a citation of 355 NLRB No. 159. The charges were filed in 2003, but vacancies at the NLRB delayed the decision making process. To read the decisions, go to the Board's website, www.nlrb.gov and click on "Board Decisions."

The Board has held that banners, such as this one, are permissible.

BOARD MEMBERS— COMINGS AND GOINGS

On March 27, 2010, President Obama appointed Craig Becker as a recess appointment to the Board. He was sworn in as a Board member on April 5, 2010. Member Becker has served as Associate General Counsel to both the Service Employees International Union and the AFL-CIO. He earned his law degree from Yale Law School. On June 21, 2010, the Senate confirmed the nominations of Mark Gaston Pearce and Brian Hayes as members of the Board. Member Pearce had been recess appointed by the President in April 2010. However, with Senate confirmation his term will expire in August 2013.


Craig Becker

Member Pearce was a founding member of the Buffalo New York law firm of Creighton, Pearce, Johnson & Giroux where he practiced union side labor and employment law. From 1979 to 1994 he was an attorney with the NLRB at its Region 3 Office in Buffalo, New York. Member Pearce received his law degree from State University of New York and his undergraduate degree from Cornell University. Member Hayes served as the Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions. He will fill a term expiring in December 2012. Member Hayes has been in private practice for 25 years representing management clients in labor and employment law. He earned his law degree from Georgetown University and his undergraduate degree from Boston College.

The five-member Board resulting from these appointments was short-lived. On August 31, 2010, Member Schaumber's term expired, leaving the Board with four members: Becker, Liebman, Pearce and Hayes.

Acting GC Solomon Streamlines Federal Injunction Process

On September 30, NLRB Acting General Counsel Lafe Solomon announced an initiative to strengthen and streamline the Agency's response to charges filed when employees are fired in the midst of a union organizing campaign. Going forward, in all cases found meritorious the General Counsel's office will consider seeking a federal injunction that would compel an employer to offer reinstatement to the fired workers pending litigation of the underlying unfair labor practice case. In addition, new timelines and procedures have been created to speed up the process.

"Firing an employee in the middle of a union organizing campaign can quickly destroy the campaign by creating a climate of fear in the workplace. Clearly, it can also have a devastating effect on the employee's life. We need to ensure that the statutory rights of unlawfully fired employees are restored in real time," said Acting General Counsel Solomon in making the announcement. "These cases go to the very essence of our enforcement responsibilities."

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AGC Solomon Streamlines Election Process

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Under Section 10(j), which was added to the National Labor Relations Act as part of a set of reforms in 1947, the Agency is authorized to seek preliminary injunctions from federal courts to protect victims of unfair labor practices pending litigation.

The new initiative streamlines the process from beginning to end to ensure more timely court filings. Regional Directors are required to immediately investigate allegations of unlawful firings in organizing cases and, if merit is found, to submit them to the General Counsel's office with a short memo, ideally within a week of their findings. Under NLRB processes, the General Counsel must obtain authorization from the Board before seeking a 10(j) injunction.

The NLRB began posting case names and status updates for all 10(j) injunction cases authorized by the Board on its web-site, www.nlrb.gov, on October 5.

Voluntary Recognition Agreement and Successor Employer Update

On August 31, 2010, the Board issued a Notice and Invitation to File Briefs in two sets of cases involving significant issues before the Board. In one set of cases, Rite Aid Store #6473 and Lamons Gasket Co., the Board may reconsider the 2007 decision in Dana Corp. 351 NLRB 434. In Dana, the Board majority held that when an employer agrees to voluntarily recognize a union, 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. If the notice is not posted, the union and employer may not later claim that their contract bars a petition by a rival union or a decertification petition.

Pursuant to the Dana decision, as of August 18, 2010, the Agency has received 1,111 requests for voluntary recognition notices. In connection with those requests, 85 petitions were filed, which resulted in the Board conducting 54 elections. In 39 of the elections, the voluntarily recognized union prevailed. In 15 elections, the employees voted against the voluntarily recognized union, including 2 instances in which a petitioning union was selected over the recognized union. In the other 31 petitions, one is blocked and the other 30 have either been withdrawn or dismissed. In each of the cases before the Board, at least one party has asked the Board to reconsider the Dana decision or its application to the particular facts. The parties and amici are invited to file briefs addressing the issues raised in the cases, including whether the Board should modify or overrule Dana. The briefs must be filed by November 1, 2010, with responsive briefs due by November 15.

National Labor Relations Board Seal

In the second set of cases, UGL-UNICCO Service Company and Grocery Haulers, Inc., the Board may reconsider its 2002 decision MV Transportation, 337 NLRB 770 on the duty of a successor employer—one that takes over its predecessor's business and hires primarily from its workforce—toward an incumbent union. In MV Transportation, the Board held that an incumbent union in a successorship situation is entitled to only a rebuttable presumption of continuing majority status, which does not bar a decertification, rival union or employer petition or other valid challenge to the union's majority status. Prior Board law had held that a union in a successorship situation was entitled to a reasonable period of time for bargaining without challenge to its majority status. In UGL-UNICCO Service Company the Intervener has asked the Board to reconsider its decision in MV Transportation and return to the successor bar doctrine. In Grocery Haulers, Inc., the Intervener has, among other things, questioned whether MV Transportation applies in a "perfectly clear" successor situation. The parties and amici are invited to file briefs addressing the issues raised in the cases, including whether the Board should reconsider or overrule MV Transportation and how the Board should treat the "perfectly clear" successor precedent. The briefs must be filed by November 1, 2010, with responsive briefs due by November 15.

Pregis Corporation Dispute Comes to a Close

Some cases are bigger than others. In terms of the volume of information reviewed and the range of allegations considered, the charges involving Pregis Corporation handled by Region 9 this year were about as big as any we've had. The good news is that all charges were ultimately resolved without the need for litigation.

Pregis operates several facilities throughout the country including its operations in Wurtland, KY, where it manufactures micro-foam, a protective packing material. The plant employs over 60 employees represented by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. In October 2009, the *Continued on Page 5*

Pregis Corporation Dispute Comes to a Close

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parties commenced negotiations for a new collective-bargaining agreement. In January 2010, the first of several unfair labor practice charges were filed. The Employer filed charges claiming that the Union engaged in delaying tactics, bargained in bad faith, and filed frivolous grievances in order to avoid a good faith impasse. The Union filed charges claiming that the Employer engaged in bad faith bargaining, refused to provide requested information related to the bargaining, unlawfully transferred bargaining unit work, implemented unilateral changes, discharged a negotiating committee member, prematurely declared impasse and unlawfully implemented its final offer.

During the investigation, assigned to Field Examiner David Morgan, boxes of documents were provided by both parties supporting their positions. As a result of the investigation, the Region determined that a complaint was warranted regarding certain of the Employer's conduct including the declaration of impasse and implementation of the final offer (which included a substantial reduction in wages and increased employee contributions for health insurance). The Region and the parties engaged in settlement discussions and the parties entered into a private agreement. The Employer agreed to rescind its final offer, make all employees whole for their losses resulting from the unilateral implementation (estimated at over $300,000 in back pay), and return to the bargaining table. The Regional Director approved the Union's withdrawal requests, conditioned on the Employer's compliance with the private agreement.

The happy ending to this story is that after returning to the bargaining table, the parties reached agreement on a new collective bargaining contract. The amicable resolution of all issues in this wide-ranging dispute is a testament to the benefits of collective bargaining.

Region 9 News

Board Decisions

o In Classic Fire Protection, 9-CA-44812 et. al. (April 16, 2010) the Board affirmed the Administrative Law Judge's findings that the employer violated Section 8(a)(1) of the Act when it discharged employees for engaging in union activity.

o In Local Union No. 71 International Brotherhood of Electrical Workers (Capital Electric Line Builders, Inc. and R.B. Jergens Contractors, Inc., 335 NLRB No. 24 (April 16, 2010), the Board affirmed the hearing officer's finding that the employees represented by Electrical Workers are entitled to perform the installation of highway signalized traffic control systems at the Ohio Department of Transportation Project 090248.

o In Klosterman Baking Co., 9-CA-45396, the parties entered into a formal settlement on April 16, 2010, approved by the Board on June 17, 2010.

o In light of New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010), the Board affirmed its prior decisions: (i) FOLA Coal Company LLC, 354 NLRB No. 60 (2009), at 355 NLRB No. 75 (August 9, 2010); and (ii) Diversified Enterprises, Inc., 353 NLRB No. 120, at 355 NLRB No. 88 (August 13, 2010); Kentucky River Medical Ctr., 354 NLRB No. 42, at 355 NLRB No. 114 (August 24, 2010).

o In E.I. DuPont De Nemours – Louisville Works, 355 NLRB No. 177 (August 27, 2010), the Board affirmed the Judge's decision finding that Respondent violated Section 8(a)(1) and (5) by unilaterally changing the terms of employees' benefit plan when the parties were negotiating a bargaining agreement and were not at impasse.

o In Kentucky River Medical Center, 355 NLRB No. 129 (August 27, 2010), the Board affirmed the Judge's decision in part, finding that Respondent unlawfully suspended one registered nurse in violation of Section 8(a)(1) and (3) but did not unlawfully suspend and discharge another registered nurse.

o In Kentucky River Medical Center, 356 NLRB No. 8 (October 22, 2010), the Board held that interest on backpay will henceforth be compounded on a daily basis.

o In The Artglo Company, 355 NLRB No. 184 (September 17, 2010), the Board granted the Acting General Counsel's motion for default judgment, holding that the company violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with requested relevant information.

o In DHL Express, Inc., 355 NLRB No. 224 (September 30, 2010), the Board affirmed that Respondent violated Section 8(a)(1) when it: (i) distributed a memo to employees stating if they chose the Union all wages/benefits would be frozen; (ii) told employees they would not get a wage increase if parties were in contract negotiations; (iii) threatened an employee with stricter enforcement of tardiness rules; and (iv) threatened that employees would gain nothing in collective bargaining. *Continued on*

Region 9 News

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ALJ Decisions

o In Sportservice, Inc. d/b/a Great American Ballpark, JD-17-10 (March 22, 2010), Judge Arthur Amchan found that since the beginning of the 2009 major league baseball season, the employer violated Section 8(a)(1) and (5) of the Act by refusing to remit dues and fees deducted from its employees' paychecks to the Joint Board, as the employees' exclusive collective bargaining representative of its vendor and concessions employees.

o In Danite Sign Company, JD- 46-10 (August 9, 2010), Judge Amchan found that Respondent violated Section 8(a)(1) and (5) by: withdrawing recognition, ceasing contributions to its pension fund, unilaterally reducing the hours and changing an employee's wage rate, engaging in direct dealing, reviving the "Moving Forward Team" to deal directly with employees; and violated Section 8 (a)(2) by reinstituting and operating the "Moving Forward Team."

o In Hausfeld's Salon & The Spa, JD- 58-10, (October 18, 2010), Judge Paul Buxbaum found that the company discharged two hair stylists for engaging in protected concerted activities, threatened an employee with reprisal, and interrogated employees about others' protected concerted activities, in violation of Section 8(a)(1) of the Act.

Regional Director Decisions

o Recall Secure Destruction Services, Inc., 9-RC-18285, April 5, 2010. The Regional Director found that an employee was a supervisor pursuant to Section 2(11) of the Act and dismissed the petition because the Board will not certify a unit consisting of one member.

o OCSEA/AFSCME Local 11, 9-UC-00494, April 8, 2010. The Regional Director found the position at issue was a newly created position, possessed sufficient indicia to be a supervisor within Section 2(11) of the Act, and that the existing bargaining unit would not be clarified to include this position.

o DHL Express (USA), Inc., 9-RD-02196, April 13, 2010. The Regional Director found the international and local union were the joint representatives of employees in the unit.

o APL Logistics Warehouse Management Services, Inc., 9-RD-02144, May 11, 2010. The Regional Director found: (i) the decertification petition was timely; (ii) service of the petition was sufficient; (iii) and the alleged unfair labor practices were insufficient to establish taint of the petition.

o Cabell Huntington Hospital, 9-UC-00495, June 2, 2010. The Regional Director found the hospital and surgery center to be a single employer but there was insufficient community of interest between the two entities to warrant accretion of the surgery center employees into the existing bargaining unit.

o Champion Window Manufacturing Supply Co., 9-RC-18299, June 25, 2010. The Regional Director found that Champion Doors and ESI (Enclosure Suppliers, LLC) are a single employer, but that employees of both do not possess a sufficient community of interest to compel their inclusion in the same unit.

o Amano Cincinnati, Inc., 9-RC-18323. The Regional Director found that an election should be conducted to determine if the employer's employees wish to be represented by IUE-CWA Local 84755, after incumbent IUE-CWA Local 774 disclaimed interest.

Region Obtains Injunction in DaNite Case

The Region obtained an injunction under Section 10(j) of the Act in a case against DaNite Holdings Ltd., d/b/a DaNite Sign Company. The company had recognized Sheet Metal Workers International Association Local Union 24 and International Brotherhood of Electrical Workers, Local Union No. 683, as joint representatives of their production employees and adopted the contract that was in effect when it purchased the facility from a predecessor. Following the expiration of this agreement in May 2009, the Unions and the Employer met on half a dozen occasions for the purpose of negotiating a successor agreement. The Unions made multiple proposals for a new agreement, but the Employer made only a single partial proposal. The Unions made their last comprehensive proposal for a new agreement in the middle of February 2010. The Employer responded in early March, not with a counterproposal, but by withdrawing recognition from the Unions. The parties were not at impasse. When it withdrew recognition, the employer unilaterally ceased deducting dues and contributing to the pension plan, and issued a revised employee handbook which deleted recognition of the Unions. The employer's principal defense was merely that a minority of bargaining unit members were dues paying members of the Unions at the time of withdrawal of recognition under the expired agreement's "open shop" provision.

Region Obtains Injunction in DaNite Case

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The Unions filed unfair labor practice charges, and the Region found after an investigation that the withdrawal of recognition was unlawful. Other unfair labor practices found by the Region included unilaterally reducing an employee's wages and working hours, establishing an employer-dominated committee to deal with concerning employees' wages, hours and working conditions, and prohibiting employees from talking to each other about their wages or other terms and conditions of employment.

Shortly after an administrative hearing was held, the Board authorized the Region to seek a 10(j) injunction to require the company to restore the union's representative status so that the effectiveness of an eventual remedy would not be undermined by the passage of time. The District Court judge agreed to decide the matter based on the record of the administrative proceeding, and the parties filed briefs. Field Attorney Eric Taylor handled the 10(j) petition as well as the administrative hearing on behalf of the Region.

Less than a month after the 10(j) petition was filed, the Judge issued an order granting all of the relief sought by the Region. The company was required to rescind its withdrawal of recognition of the unions, recognize and bargain in good faith with the unions, rescind its unilateral changes, restore the employee's wages and working hours, and disband the employer-dominated committee. The restoration of the employee's wages and working hours was significant because the affected employee was one of two long-term stewards for the Unions.

A favorable administrative law judge decision issued shortly after the 10(j) order, but the company has filed exceptions to the decision. The matter remains pending before the Board. In the meantime, however, the 10(j) order has restored employees' collective bargaining rights and has rolled back the Employer's unilateral changes to wages, hours, and other working conditions, thus maintaining the Unions' status as an effective representative for bargaining on behalf of a unit that it has represented for over 30 years.

Comments or Questions?

In addition to the topics we may choose to feature, we would like to invite your comments and suggestions concerning specific items of interest, regional policies, practices, or procedures that you would like to see discussed, or whether you would prefer a Spanish version, an electronic format or to be deleted from our mailing list altogether. We can make it happen and your comments would be greatly appreciated. Please contact Deputy Regional Attorney Deborah Jacobson at deborah.jacobson@nlrb.gov or by phone at 513-684-3651

Speakers Available!

Members of the Region's staff are available to make presentations before any unions, employer organizations, social service organizations, high school or college classes and others to describe the Act's protections, how the Region investigates and decides unfair labor practice cases and processes representation petitions, and other NLRB topics of interest.

If you hare interested in having a member of the staff speak to your group, please contact Assistant to the Regional Director Laura Atkinson by e-mail at laura.atkinson@nlrb.gov or by phone at 513-684-3625

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WE ARE AT YOUR SERVICE

For assistance in filing a charge or a petition, call the Regional Office at (860) 240-3522 and ask for the information officer. The information officer will discuss the situation and assist you in filling out a charge or petition. Information is available during office hours, Monday to Friday, 8:30 a.m. to 5:00 p.m., or at www.nlrb.gov

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Para asistencia de someter una carga o petición
Llame la oficial de información en oficina regional a
(513) 684-3686.
La oficial de información discutirá su situación y le ayudará si desee Someter una carga o petición. Información esta dispuesta a usted mientras las horas de servicio - lunes a viernes, 8:30 a.m. to 5:00 p.m, o www.nlrb.gov

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