NATIONAL LABOR RELATIONS BOARD REGION 13 CHICAGO NEWSLETTER

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Facebook, Twitter, and MySpace as the New Water Coolers

By Joseph A. Barker, Regional Director

While water coolers are by no means obsolete, their utility as a gathering place for employees to discuss anything from yesterday's Bears game to tomorrow's "Dancing With the Stars" episode certainly is being infringed upon by the use of electronic media. This is especially true for hot button topics that employees may want insulated from the prying ears of management. Current Board Chairman Wilma Liebman recognized that phenomena in her dissent to the Board's controversial decision related to e-mails in *Register-Guard*, 351 NLRB 1110 (2007), enfd. in part and remanding, 571 F. 3d 53 (D.C. Cir. 2009), crediting Chicago's own Professors Henry Perritt and Marty Malin for the water cooler analogy contained in a prior law review article, *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, published in the University of Kansas Law Review. The creation and proliferation of Facebook, Twitter, MySpace, and other social networking devices has only added to the trend.

With Chairman Liebman now in the majority as a Democratic member of the Board, it is quite likely that the *Register-Guard* decision, which allowed employers to limit the use of their e-mail systems for any non-job-related solicitations, will be revisited. Such a

(See "Electronic Water Coolers," continued on page 11)

Board Modernizes ULP Remedies to Include Electronic Notice Posting and Compound Interest

Beginning to address major issues that have languished for years, the newly reconstituted Labor Board adopted two new remedial policies in separate decisions dated October 22, 2010, adding daily compound interest to backpay and other monetary awards and requiring many employers and unions to notify workers electronically of NLRB orders in unfair labor practice cases. In fashioning these updated remedies, the Board's stated goal was making its remedies more effective and in line with current legal and workplace practices. Former General Counsel Ronald Meisburg and the NLRB Division of Operations Management announced his intent to seek electronic notice postings back in August 2006 and compound interest in May 2007, respectively.

(See "Modernized ULP Remedies," continued on page 14)

Board Member Craig Becker On the Run

By Arly W. Eggertsen, Regional Attorney

On Tuesday, September 21, 2010, Board Member Craig Becker was a Board Member on the run, not from a partisan and divided Congressional committee on his nomination, but between four meetings in Chicago in one day. I caught up with Member Becker a little before his second meeting of the day – a lunchtime presentation for the Labor and Employment Relations Association (LERA) at the John Marshall Law School. Walking into the presentation room, I looked around to find the wild eyed radical that had been the source of so much consternation in Congress over his nomination to the Board. Seeing no such individual, my attention was finally drawn to a gentlemen near the front of the room with a quiet, studious demeanor – Board Member Becker.

A good portion of Member Becker's presentation concerned the status of cases pending before the Board. He noted that there were 296 unfair labor practice cases pending on the Board's docket and 46 representation cases. The backlog of cases was in large part due to the 27-month period when there were only two members serving on the five-member Board. While the two-member Board issued 595 decisions during this 27-month period, a number of decisions involving significant issues or on which the two members could not agree were put on hold. Then on June 17, 2010, the Supreme Court issued its decision in *New Process Steel v. NLRB* (see related article on page 5) finding that the two-member Board had no authority to issue decisions, because the Act required three

Board Member Becker poses with (from left to right) Attorney Josh Ditelberg, RA Arly Eggertsen, ARD Gail Moran, and Law Professor Gerald Berendt

Board Member Craig Becker speaks to LERA members.

actual members to be serving to constitute a quorum. Member Becker pointed out that the fall out from the *New Process Steel* decision has consumed the Board's attention, with the Board's work on the resulting backlog preventing it from acting on new incoming cases. Member Becker expressed his concern about the backlog of cases waiting a Board decision, stating that the Board was not working in "real time." He pointed out a case where the Board conducted an election in 2003 and a Board decision on the validity of the election results did not issue until 2010. Member Becker also pointed out an unfair labor practice case that was tried in 1997, a decision by the Administrative Law Judge issued in 1998, but a Board decision did not issue until 2010.

Member Becker suggested that one possible solution to the politicization of the Board, the shifting Board make-up, and shifting Board decisions and standards is in the Board's rulemaking authority. Exercising the Board's rulemaking authority in appropriate circumstances would stabilize standards of conduct for the parties and would be more efficient than case-by-case decision-making, in Member Becker's view. He stated that there are presently six petitions for rulemaking pending before the Board, including a proposed rule that would make it mandatory for employers to post a statement of all rights afforded to employees under the National Labor Relations Act.

Member Becker noted that the Board has requested briefs on cases raising successor bar and recognition bar issues and electronic notices. He stated that under consideration by the Board were *Beck* issues on annual renewal of objections and dues check-off.

Judge Concludes That Burke Automotive Group Committed Multiple ULPs Following Closing of Naperville Jeep/Dodge

By Joyce Hofstra, Field Examiner

The financial troubles of the Big 3 automakers during 2009 have been well-documented, resulting in, among other things, the closing of many auto dealerships throughout the nation, including here in Chicago. The recent closing of Naperville Jeep/ Dodge by the Burke Automotive Group led to an investigation and successful prosecution by Region 13, with Administrative Law Judge Paul Bogus finding that the company committed a multitude of violations of the NLRA when it moved mechanics from that dealership to a different, non-union facility in its group.

Defined in Section 8(d) of the Act, collective bargaining is one of the basic foundations of the NLRA. It requires that an employer meet at reasonable times with the representative of its employees, confer in good faith over wages, hours and other terms and conditions of employment, and put into writing any written agreement. An employer's duty to bargain includes the duty to supply information upon request that is necessary and relevant for the union to carry out its duties as the bargaining representative and to refrain from making unilateral changes in terms and conditions of employment. Upon investigation of a charge filed by Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO on July 8, 2009, the Region concluded that Naperville Jeep/Dodge failed to meet its bargaining obligations.

The investigation revealed that the Employer owned dealerships in Lisle and Naperville that sold and serviced Chrysler products. Chrysler cancelled the Jeep and Dodge franchises in Lisle as a result of Chrysler's bankruptcy proceedings in early 2009; however, Burke Automotive successfully lobbied Chrysler to reinstate the Lisle franchises and instead cancel the Naperville franchise. Then, on June 20, 2009, without notice to or bargaining with Automobile Mechanics Local No. 701, the Employer informed its six unionized mechanics in Naperville that the facility was being closed effective immediately and that the Employer would offer employment to as many of them as possible at its Lisle facility, which at that time employed 14 mechanics in a non-union shop.

Based on the sudden relocation and merger, the Union made a number of requests for information, requested bargaining over the "expanded" unit, and took the position that the unit mechanics were still covered by the collective bargaining agreement. Unconvinced by this argument, the Employer subsequently withdrew recognition from the Union, claiming that the Union no longer maintained majority support.

All of the Naperville bargaining unit mechanics initially accepted employment at the Lisle facility during the week of June 22. However, the Employer did not inform them that they would no longer be covered by the collective bargaining agreement and that they would be working under "new" terms and conditions of employment until a meeting on June 26. The new terms consisted of the same wage rate, but no minimum hours guarantee. This was a significant loss, as the unit employees previously were guaranteed 34 hours a week even during periods when customer-requested repairs were down. Unit employees also lost their Union health benefits, which were replaced by the Employer's

(See "Naperville Jeep/Dodge," continued on page 13)

Board Feverishly Addressing *New Process Steel*

Nearly 600 Decisions At Risk Following Supreme Court Decision

On June 17, 2010, in *New Process Steel v. NLRB*, the U.S. Supreme Court ruled that the National Labor Relations Board was not authorized to issue decisions during a 27-month period when three of its five Board member seats were vacant. The decision resolved a split in the Circuit Courts of Appeals over the question of whether Section 3(b) of the National Labor Relations Act authorizes the Board to act if, after properly delegating its full powers to a group of three Board members, one of the three seats becomes vacant. The Board has taken multiple steps since the decision issued to address the almost 600 cases that were decided by a two-person Board.

The *New Process Steel* Decision

In a majority opinion by Justice Stevens, the Court stated that Section 3(b) authorized the Board to delegate all its powers to a three-member group, effective on December 28, 2007. However, the Court held that the language and structure of Section 3(b)—in particular, the language stating that a quorum of the Board is three members—were best given effect by requiring that the three-member group maintain a membership of three to exercise the Board's powers. Accordingly, the Court determined that Chairman Liebman and Member Schaumber, although a two-member quorum of the three-member group, could not continue to act for the Board after December 31, 2007, when the term of the third member of the group expired and the Board's membership fell to two members.

Stevens noted that the Court was "not insensitive to the Board's understandable desire to keep its doors open despite vacancies. Nor are we unaware of the costs that delay imposes on the litigants. If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than be swept aside in the face of admittedly difficult circumstances."

Dissenting, Justice Kennedy concluded that "the objectives of the statute, which must be to ensure orderly operations when the Board is not at full strength as well as efficient operations when it is, are better respected by a statutory interpretation that dictates a result opposite to the one reached by the Court."

EASY ACCESS TO THE STATUS OF ALL TWO-MEMBER CASES

The Agency has made public a database of all contested cases that were decided by a two-member Board. The list of cases is available on a dedicated page of the Agency's website. The list of cases includes links to original documents and case status updates that will be refreshed daily. A full data set of all cases also is available in XML format for download.

Following the decision, Board Chairman Liebman commented: "When the Board went to two members in January 2008, Member Schaumber and I made a difficult decision in difficult circumstances. In proceeding to issue decisions in nearly 600 cases where we were able to reach agreement, we brought finality to labor disputes and remedies to individuals whose rights under our statute may have been violated. We believed that our position was legally correct and that it served the public interest in preventing a Board shut-down. We are of course disappointed with the outcome, but we will now do our best to rectify the situation in accordance with the Supreme Court's decision."

(See "Repercussions of New Process Steel," continued on page 5)

Repercussions of *New Process Steel* (cont.)

Plan Implemented to Consider Two-Member Cases

On July 1, 2010, the Board outlined its plan for addressing *New Process Steel*. At the time of Supreme Court's decision, 96 of the two-member decisions were pending on appeal before the federal courts – six at the Supreme Court and 90 in various Courts of Appeals. In addition, the Board was at full-strength with five members for the first time since December 2007 shortly after the decision issued. The Senate had confirmed Board Members Brian Hayes and Mark Pearce, with Member Craig Becker having previously been recess appointed by President Obama. However, just two months later, Member Schaumber's term expired and the Board was reduced to four members after August 27, 2010. In this interim period, the Board sought remand of the 96 cases from the appellate courts for further consideration by the Board. Certain cases were remanded and decided by a panel of three Board members, including Chairman Liebman and then Member Schaumber, who issued all of the two-member decisions. Consistent with prior Board practice, the additional Board members not on the panel had the opportunity to participate in the case if they so desired. Following the expiration of Member Schaumber's term, a panel of Chairmen Liebman and two additional Board members were to further consider any remaining remanded cases.

On August 5, 2010, or roughly a month thereafter, the Board issued its first decisions in remanded cases.

Hundreds of the other two-member cases were closed through compliance with the original Board decision, settlement, withdrawal, or other means. Still more are in some stage of litigation or compliance stemming from the original decision. It is unclear how many of those rulings can or will be contested.

Region 13 Secures ALJ Judgment Against the Blackstone Hotel

By Ed Castillo, Field Attorney

Between January 20 and August 3, 2009, UNITE HERE Local 1 filed a series of charges in Region 13 alleging that The Blackstone, a Renaissance Hotel located in Chicago, had committed numerous violations of Section 8(a)(1), (3) and (5) of the Act. These allegations arose out of an organizing campaign that the employees of The Blackstone began in late October 2008, after the renovation and grand reopening of this old historic hotel. When a majority of the employees later selected the Union as their collective bargaining representative on December 3, the hotel reluctantly recognized the Union. However, The Blackstone shortly thereafter attempted to seize on the Board's *Dana* decision as a way to rid itself of the Union and also engaged in other unlawful conduct designed to undermine the Union's status as the employees' exclusive bargaining representative.

On September 9, 2009, following an impartial and thorough investigation by Field Examiner Joyce Hofstra into the charges, Regional Director Joseph A. Barker issued a Third Order Consolidating Cases, Third Amended Consolidated Complaint and Notice of Hearing alleging that The Blackstone had violated the Act as alleged by the Union. Over the next several weeks, Field Attorneys Kevin McCormick and Ed Castillo prepped many witnesses and geared up for trial as it became apparent that the hotel had no desire to settle the case. The trial before Administrative Law Judge Mark Carissimi then began on October 4. It proved to be a very contentious and lengthy hearing lasting a total of 15 days, before the record was finally closed on February 24, 2010.

The Region's collective hard work was rewarded when ALJ Carissimi found that The Blackstone had violated Section 8(a)(1) of the Act by posting a memo encouraging employees to decertify the Union (pursuant to the

(See "Blackstone Hotel," continued on page 16)

Expedited Treatment of Section 10(j) Nip-in-the-Bud Cases Implemented

Acting General Counsel Lafe Solomon Announces New Initiative to Expedite Investigation and Prosecution of Section 10(j) Cases Involving Discharges of Union Organizers During Organizing Campaigns

By Joseph A. Barker, Regional Director

"Effective Section 10(j) Remedies For Unlawful Discharges In Organizing Campaigns" is the title of a recently issued memo (GC Memorandum 10-07) from Acting General Counsel Lafe Solomon, setting up new priorities and timelines for investigating and seeking 10(j) injunctive authorization in these particular types of cases. At the outset, it should be noted that the new timelines do not apply to 8(a)(3) discharges in contexts other than an initial organizing campaign and do not apply to other types of discrimination or discipline less than discharge. Also, the new timelines do not apply to other types of potential 10(j) cases, such as first contract or successorship cases.

However, the Acting General Counsel has made it clear that he considers discriminatory discharges as among the most serious violations of the Act. An unremedied discharge sends to other employees the message that they too risk retaliation by exercising their Section 7 rights. "[N]o other worker in his right mind would participate in a union campaign in this plant after having observed that other workers who had previously attempted to exercise rights protected by the Act have been discharged and must wait three years to have their rights vindicated," quoting from the court's 10(j) decision in *Silverman v. Whittall & Shon, Inc.*, 1986 WL 15735, 125 LRRM 2152 (S.D.N.Y. 1986).

Given that the resumption of union organizing activity is unlikely during the continued absence from the workplace of unlawfully discharged union leaders, their interim reinstatement through 10(j) injunctive relief is critical to prevent an ultimate Board order from being ineffective in protecting rights guaranteed by the Act. Consequently, the goal is to give all unlawful discharges in organizing cases priority action and a speedy remedy. The program covers all stages of case processing—from identification by Regional Offices of cases potentially warranting Section 10(j) relief through Board authorization and litigation of 10(j) cases to trial and decision on the merits of the cases.

Both charging and charged parties, and their legal counsel, need to be aware of these new timelines and their potential impact throughout the entire case handling process, including the investigation, scheduling of trials, and any requests for postponements.

Where possible, Board agents are instructed to take the lead affidavit (presumably, the alleged discriminatee) from the charging party within seven calendar days from the filing of the charge in all nip-in-the-bud discharge cases. Thereafter, the Region will attempt to obtain all the charging party's evidence in support of the charge within 14 days of filing. "Just and proper evidence" regarding the appropriateness of injunctive relief will be taken at the same time in the investigative process.

If the charging party's evidence points to a *prima facie* case on the merits and suggests the need for injunctive relief, the Region will notify the charged party in writing within 21 days of filing that the Region is seriously considering the need for Section

(See "New Timelines," continued on page 15)

By Gail Moran, Assistant to the Regional Director

Board Issues Exploratory Request for Information Regarding Possible Electronic Voting in Elections

On June 9, 2010, the NLRB issued a solicitation seeking industry comments regarding secure electronic voting equipment to conduct remote and onsite representation elections. The Agency specifically sought "a proven solution that supports mail, telephone, web-based and/or on-site electronic voting; that includes the necessary safeguards to ensure the accuracy, secrecy, observability, transparency, integrity, accountability, and auditability of Agency-conducted elections," including insuring that voting is "free from distractions or other interferences, [such as] undue intimidation or coercion."

In response to the solicitation, certain groups and associations submitted formal written oppositions to the Board proceeding with electronic voting. The National Right to Work Legal Defense issued a press release proclaiming that the "Card-check Lite proposal would undermine the integrity of workplace elections and push more employees into Big Labor's forced dues-paying ranks," and suggested there could be identity-theft. The U.S. Chamber of Commerce opined that important policy considerations were involved, such as whether remote voting could guarantee secrecy, and whether employer free speech rights would be impacted. The American Hospital Association worried in its written response that "laboratory conditions" would disappear or take on one-sided proportions if remote voting were expanded.

Nonetheless, the Board's exploration of electronic voting is understandable, given the now widespread use of electronic voting equipment in national and local elections and our society being immersed in social networking, texting, smart phones, iPads, and e-readers. In addition, the National Mediation Board conducts its representation elections in the rail and airline industries exclusively through electronic means. Finally, one of the goals in any representation election is to enable all employees who wish to vote the opportunity to do so and electronic voting could ease any burden imposed on employees to vote. Although seven vendors expressed an interest in providing the necessary equipment, no further action has been taken as yet by the Board.

Board Has Productive, Eventful Fiscal Year 2010

As of the end of the Agency's fiscal year on September 30, 2010, the Board had issued 351 decisions on contested cases, an increase of 20% over the prior fiscal year. In August alone, with the Board at full strength before Member Schaumber's departure at the end of the month, a record 118 decisions were issued, many of them remands resulting from the Supreme Court decision in *New Process Steel*. Here are some highlights from significant decisions:

- *KenMor Electric*, 355 NLRB No. 173 (Aug. 27, 2010): The Board's oldest unfair labor practice case arrived at the Board in 2001. The Board held that the non-union electrical contractor's association operated a discriminatory job application referral system.
- *Independence Residences*, 355 NLRB No. 153 (Aug. 27, 2010): The Board's oldest representation case, where the election took place in 2003. The Board certified the Union seven years later, despite the Employer's objections that a state law prohibiting the use of state funds for union-related activities interfered with its right to mount an anti-union campaign.
- *Southwest Regional Council of Carpenters*, 355 NLRB. No. 227 (Oct. 7, 2010): The Board deemed peaceful bannering at a secondary employer's location lawful when it is unaccompanied by picketing or other confrontational activity.
- *International Association of Machinists*, 355 NLRB No. 174 (Aug. 27, 2010): The Board found unlawful a union's requirement that objectors to non-representational dues file annual objections under the facts of the case.
- *Rite Aid Store #6473*, 355 NLRB No. 157 (Aug. 27, 2010): The Board granted review to reconsider *Dana Corporation's* treatment of employer grants of voluntary recognition.

RECENT REGION 13 OUTREACH ACTIVITIES

By Dan Nelson, Supervisory Examiner

Staff from the Chicago Regional Office and our Washington D.C. headquarters spent the spring and summer months continuing efforts to communicate to the public about the NLRB, the NLRA, and recent Agency developments .

On April 29, Deputy General Counsel John Higgins spoke at the Chicago Chapter of LERA and gave his presentation on the 75th anniversary of the NLRB. The well-received event was attended by about 50 professionals from the Chicago labor community. (Detailed information about the history of the NLRB and the 75th anniversary of the Agency is available at http://www.nlrb.gov/75th/index.html.)

On May 18, Regional Attorney Arly Eggertsen and Gary Shinners, Deputy Chief Counsel for Board Chairman Wilma Liebman, spoke to the DuPage County Bar Association regarding the Board's alternative dispute resolution and settlement programs.

On June 8, Regional Director Joe Barker participated as a panel member in an ABA Section of Labor & Employment Law's "A Discussion on the Hot Topics in Immigration in Employment by Government Agencies," organized by the Task Force on Regional Program & Immigration Law Committees. Representatives from the NLRB, Department of Labor, Equal Employment Opportunity Commission, and the Department of Homeland Security shared their unique insight on immigration issues in employment, including discrimination, compliance, and enforcement. The presentation was attended by about 50 people, many of whom engaged in a lively discussion on the topic.

On June 9, Regional Director Joe Barker participated as a panel member in a program sponsored by the College of Labor & Employment Lawyers. This presentation was held at the training facilities of the Department of Education and was open to all government attorneys, with about 100 people attending.

On June 15, five members of the Region 13 staff presented to about 50 people at the monthly meeting of LERA. The presentation was titled "How to Handle an Unfair Labor Practice Case Before the NLRB," and included the following topics: Basic C case processing & investigations, Division of Appeals, Division of Advice, Injunction Litigation, and Priority Charges.

On August 17, Supervisory Examiner Dan Nelson presented to a business class of about 25 students at Kendall College. The presentation covered the basics of the National Labor Relations Act and its application in the hospitality industry.

On August 31, Attorney Lisa Friedheim-Weis spoke at a lunchtime panel of government attorneys at Chicago-Kent College of Law, sponsored by the Labor & Employment Law Society.

On September 6, Regional Director Barker spoke to the Chicago Bar Association's Labor & Employment Section at their first meeting of the year. The presentation was titled "Developments & Initiatives by the New Acting General Counsel and the Board."

On September 7, Supervisory Examiner Dan Nelson spoke to the staff at the U.S. Department of Labor's Office of Labor Management Standards to educate them on what areas of labor law our office covers in order to insure appropriate referrals to members of the public they encounter.

NEED AN NLRB SPEAKER?

If you are a business, union, law firm, community group, university, high school, or any other organization and are interested in having a presentation regarding any NLRB-related topic, please call either of the Region's Outreach Coordinators, Charles Muhl or Paul Prokop, at 312-353-7570 and a presentation with Region 13 staff members will be arranged.

What's Happening in Region 13

By Paul Prokop, Field Examiner

NEW EMPLOYEES

Cristina Ortega, our newest field attorney, previously served as a U.S. Marine in Quantico, Virginia for four years. While serving her country as a legal clerk, she completed her undergraduate studies at Mary Washington University, where she majored in a Bachelor of Professional Studies with an emphasis in Management and Leadership. Upon completing her tour of duty with the Marine Corps, Ms. Ortega returned to her home state of Illinois and worked as an office manager. Ms. Ortega pursued her juris doctorate at Northern Illinois College of Law and graduated in May 2010 magna cum laude. Ms. Ortega's interest in labor law was first ignited through her undergraduate studies and her personal experience. She decided to pursue a career with the NLRB due to the positive influence and impact of her law school labor law course and legal externship with Region 13. Ms. Ortega is excited to be here and looks forward to this challenging endeavor.

Nathan Wilmers began a six-month stint as a Co-Op student with Region 13 on June 21, 2010. Nathan is a student at the University of Chicago, where he is completing an undergraduate degree in philosophy. He has a longtime interest in worker rights, spurred originally by his family's involvement with unions and by his own experiences working in high school. In college, Nathan began working with employees on campus—and abroad, in Lesotho—to advocate for better working conditions and stronger union representation. He came to the NLRB hoping to learn more about the labor law enforcement that provides the context for these organizing efforts.

DEPARTURES

Region 13 lost one of its kindest, most respected, skilled, and longest-tenured field attorneys when **Rich Andrews** retired in July 2010. During his over 23-year career at Region 13, Rich successfully prosecuted numerous major trials and frequently volunteered to mentor newly-hired and less experienced attorneys, providing them with invaluable advice and counseling on what it takes to be a successful attorney. Rich had a knack for being able to resolve through settlement almost any case he was assigned to, no doubt due in part to the mutual respect he shared with local labor bar attorneys on both the management and union sides. Prior to working at Region 13, Rich served as an attorney at the U.S. Department of Justice. Before he became a lawyer, Rich was an air traffic controller with the Federal Aviation Administration, a career that ended when President Reagan terminated controllers who went on strike in the 1980s. On a lighter note, Rich started the annual tradition in the Region of holding a "Cheer Room," in December, giving employees the chance to convene, enjoy food brought in by the staff, and celebrate the holidays. To finish off his distinguished career, Rich went out in style, securing an ALJ victory in his final trial involving numerous ULPs committed by *Naperville Jeep/Dodge*. In his retirement, Rich will continue to serve in his position as Mayor of Indian Head Park, Illinois.

Region 13 also thanks Senior Community Service Employment Program Participant **Carol Contreras** for over six years of dutiful service. Carol ably assisted our Region during a period of a very low number of support staff employees. She covered the Reception Desk and worked in the Mail, File, and Records department, going wherever she was needed. Carol's send off on October 14, 2010 was a great success.

Labor History: Women at the early NLRB

As part of his speech to honor the NLRB's 75th Anniversary, excerpted below, Deputy General Counsel John Higgins detailed the discrimination suffered by female NLRB attorneys—called the "Review Section Nine"—at the hands of a U.S. Congressional committee in the late 1930s, shortly after the Agency's creation.

The Board in the 1930s was a true equal opportunity employer, at least as far as women were concerned. Three of the original 21 Regional Directors were women, and so were 9 of the attorneys working in the Review Section – the predecessors of what are today the Board-side staff attorneys. In those pre–Taft-Hartley days, the Review Section attorneys worked for the Board as a whole, not for individual members as today's Board-side staff attorneys do. Although that change did not come about until 1947, the seeds for this change were planted in 1939 by a committee of the House of Representatives known as the Smith Committee—a majority of whom were anti–New Deal congressmen who really had it in for the NLRB.

Members of the "Review Section Nine"

The Review Section—and particularly its women attorneys—became a target for the Smith Committee. In fact, the first six Review Section attorneys called to testify before the Committee were women, and the impression the Committee majority sought to create was that these women were in way over their pretty little heads. You are looking now at a picture of three of these women published in a Detroit newspaper on the occasion of their appearance before the Committee in 1939.

The testimony of these women under fire wasn't the worst of it. At one point, Harry Routzohn, a member of the Committee, insulted a female Review attorney by first noting that she had been "serving as a professional lady" since her employment with the Board, and then snidely adding, "We have all sorts of professional ladies." (James A. Gross, The Reshaping of the National Labor Relations Board (SUNY Press 1981), p. 183.) The attack continued on the floor of the House of Representatives, where one congressman delivered the following speech blaming the perceived shortcomings of the Board specifically on the gender of the Review Section Nine:

"Now, if you will go over to the caucus room in the Old House Office Building where the Committee is doing such a good job, the Smith Committee, and take a look at the reviewing attorneys, you will understand why there has been so much trouble. Those girls who are acting as reviewing attorneys for the Board are fine young ladies. They are good looking; they are intelligent appearing; they are just as wonderful, I imagine, to visit with, to talk with, and to look at as any like number of young ladies anywhere in the country, but the chances are 99 out of 100 that none of them has ever changed a diaper, hung a washing, or baked a loaf of bread. None of them has had any judicial or industrial experience to qualify her for the job they are trying to do, and yet here they are—after all—good looking, intelligent appearing as they may be, and well groomed all of them, writing opinions on which the jobs of hundreds of thousands of men depend and upon which the success or failure of an industrial enterprise may depend and we stand for it."

The Review Section Nine were, of course, highly educated women with law degrees. They included Ida Klaus, who became the Board Solicitor in 1948 and at that time, the highest-ranking female lawyer in the federal government. They also included Fannie Boyls, who became a Board Appellate attorney and ultimately an NLRB administrative law judge. Both of whom, you see some years after the Smith Committee.

As we look at the Review Section Nine and sense them looking back at us, what do they see? What questions are posed by their gaze? Perhaps questions like these: "What would you be willing to endure for the sake of the Act and of workers' rights? Is your work at the NLRB just a job? Are you just graying bureaucrats waiting to maximize your pensions? Or are you here because your heart is in it, and would you stay here despite adversity?" Would you, like us, endure public attacks in the halls of Congress for the sake of the Act and for what it stands? Challenging questions for all of us from the Review Section Nine.

ELECTRONIC WATER COOLERS (cont.)

reconsideration no doubt will have implications for employer monitoring of and attempts to control employee use of other social networking devices.

The relative newness of social networking has meant there are few cases that practitioners can draw upon when analyzing whether employers or employees have gone too far, certainly in the context of the National Labor Relations Act. The Board has dealt with discipline of employees based on website statements relating to terms and conditions of employment and/or a labor dispute, and found such unlawful. *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-54 (2007).

Register-Guard dealt with the balance between the use of the employer's equipment or media for e-mails and the right of employees to communicate regarding protected, union-related activities. Employees' use of social networking may also involve the employer's computers and hand-held multi-media devices, but just as likely may be done by employees at home with their own devices.

Chairman Liebman's dissent in *Register-Guard* makes it clear that she would tip the balance in favor of employees' right to communicate about work issues in analyzing the use of employer e-mail at the workplace. Likewise, it would seem probable that employee use of equipment provided by the employer to access Facebook and the like would receive favorable treatment, especially if the employer allows employees to use their computers for other types of non-work-related activities.

The water cooler analogy is useful in considering an employer's efforts to control information on social networks. Thus, if as a result of organizing activity at the workplace, an employer passed a rule that talking about the union around the water cooler would not be allowed, there is no doubt the Board would consider that an unlawful infringement on Section 7 activity. Even if an employer tried to be more magnanimous and prohibit not just talk of the union, but all talk, such would be unlawful if it only occurred as a result of union activity. The logic would apply to attempted restrictions on Facebook under similar circumstances. Furthermore, any discipline based on such a rule would be unlawful.

However, what if an employer passes a rule not in the context of any union or other protected activity by employees, but instead aimed at either protecting against the dissemination on social networks of its confidential or propriety information or that of its customers, clients, or suppliers, or to prevent disparagement of its own products or services? Since the rule does not explicitly restrict protected activities, it would only be unlawful upon a showing that employees would reasonably construe the language to prohibit Section 7 activity. *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). Clearly, any reasonable reading of the rule as described could not be considered to include union or protected activity. This would be true even if it were broadened to shield the employer against lawsuits or liability by prohibiting explicit sexual references, obscenity, and profanity, or disparagement of any race, religion, gender, sexual orientation, disability, or national origin.

Rules that ban disparagement of the company's leadership, employees, or business strategy on Facebook, etc. are a bit trickier. Within the last year, the NLRB's Division of Advice found that, although in isolation such a rule might go too far because it could be reasonably viewed by employees to encompass discussion of terms and conditions of employment, it would not be unlawful if viewed in the context of a set of rules involving plainly egregious conduct, such as described previously. See *Sears Holdings (Roebucks)*, Case 18-CA-19081, G.C. Advice memorandum dated December 4, 2009.

The memo in *Sears* contrasted the Board's decision in *Claremont Resort & Spa*, 344 NLRB 832, 836 (2005), where the employer's rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its context and potential chilling effect on protected activity.

("Electronic Water Coolers," continued on page 12)

ELECTRONIC WATER COOLERS (cont.)

However, there is a risk with placing too much reliance on the *Sears* memo. That advice came during the term of former General Counsel Ronald Meisburg, which may not carry as much weight with current Acting General Counsel Lafe Solomon. Also, the memo relied principally upon the Board's decision in *Lutheran Heritage* in deciding to dismiss the charge against Sears. However, Chairman Liebman (at the time Member Liebman) dissented, along with a fellow Democratic member, from the Board's decision in *Lutheran Heritage.* In that case, the Board had found, when viewed in their context, rules against "verbal abuse," "abusive or profane language," or "harassment" could not reasonably be read to discourage Section 7 activity. However, in the dissent's view, an employer's use of words like "abusive" and "harassment" is highly subjective, and one person's abuse may be mere annoyance to another and no bother at all to a third.

Regardless of where the Board goes in analyzing rules that do not explicitly restrict protected activities, an employer will always run afoul of the Act if it, in fact, applies its rules to restrict or discipline its employees for using a social network to discuss the union or working conditions.

What if supervisors or managers decide they will stand around the water cooler on occasion to find out what employees are talking about that may be of concern to the employer? If the employer has reason to believe that employees are talking about the union or working conditions, eavesdropping on these conversations either at the water cooler or on Facebook will be unlawful as surveillance or creation of the impression of surveillance. The concern is that employees should feel free to discuss union or protected activity "without the fear that members of management are peering over their shoulders[.]" *Flexsteel Industries*, 311 NLRB 257 (1993).

Rather interestingly though, if a co-worker reports to the employer the substance of these protected conversations, the employer will not be found to have engaged in surveillance or the impression of surveillance. The caveat is that the employer must divulge the source of its information, and the employer cannot have solicited the co-worker for the information. *North Hills Office Services*, 346 NLRB 1099, 1103-04 (2006). With respect to Facebook, this may mean that, if the employer is not itself snooping around to discover what its employees may be saying on their otherwise private pages, which gives the employee an expectation of privacy, the employer would not be guilty of surveillance or the impression of surveillance if a "friend" of the employee, with legitimate access to the page, passed the information on to their employer.

The water cooler analogy breaks down somewhat in situations where the employer monitors social networks due only to legitimate concern about the dissemination of clearly confidential or proprietary information to the public, given that discussions at the water cooler would not be disseminated or overheard by the public. However, such information might be shared with other employees who are not entitled to know that information. Generally, an employer is free to observe or listen to union or protected activities by employees that take place in public or in an area where the employees would not have an expectation of privacy. A water cooler in the middle of an office area that both employees and supervisors frequent has little expectation of privacy, and neither would employees who post comments on a public website or a social network with no privacy settings. However, a water cooler in an employee break room not typically used by management, or an employee's Facebook page with privacy settings limited to certain friends or groups, carry a reasonable expectation by employees that they can engage in protected activity without the employer peering over their shoulder. Even if the employer is legitimately looking for benign information in monitoring otherwise private employee activity, such could interfere with otherwise protected activity of employees.

One commenter has suggested that an employer may be able to avoid allegations of unlawful surveillance by insisting at the time of hire or as a condition of continued employment that an employee sign a waiver allowing the employer to monitor social media for legitimate reasons. However, if Facebook and other social media are truly the new water cooler where employees gather to share information, some of it regarding union or other protected activities, it seems such a waiver might itself be unlawful.

The new Board's reexamination of *Register Guard* may provide some answers to these and other questions.

Naperville Jeep/Dodge (cont.)

healthcare plan at full cost to the mechanics. While advising employees of these changes, the mechanics also were informed that the Lisle facility "was a non-union store," would "never be a union store," and that if the mechanics "ever went out on strike it would mean that [they] quit and would not be able to collect unemployment." Two mechanics ultimately quit, unable financially to accept the new terms offered by Burke Automotive.

On December 17, 2009, the Region issued complaint, amended on January 19, 2010, against the company alleging that, as a single employer, it relocated its unionized mechanics to its non-union facility without bargaining over the effects; repudiated the collective bargaining agreement; unilaterally changed terms and conditions of employment; withdrew recognition from the Union, failed to provide relevant information, threatened unit mechanics, and constructively discharged the two mechanics.

Field Attorney Richard S. Andrews argued the case for the Region before ALJ Bogus on March 15 and 16, 2010. Ultimately, Judge Bogas concluded that Burke Automotive committed all charges as alleged. First, the ALJ found that Burke Automotive and Dodge of Naperville were a single employer, based on an "extremely strong showing" by the Region regarding, among other factors, common management and ownership. Furthermore, giving great weight to the 20-year bargaining history of the unit, the ALJ concluded that absent "compelling circumstances," a history of meaningful bargaining is sufficient to establish the continued appropriateness of a separate unit, even if other factors support a contrary result. See *Radio Station KOMO-AM*, 324 NLRB 256, 262 (1997). In this case, the evidence overwhelmingly showed that the represented employees retained a sufficient community of interest distinct from the unrepresented employees that required continued recognition, even after the Respondent temporarily relocated the unit employees from Naperville to the Lisle facility.

Rich also successfully argued that when, as a single employer, the Employer moved the unit mechanics to another facility without notice, it was still required to adhere to the collective bargaining agreement and bargain with the Union over any changes to terms and conditions of employment, making its repudiation of the contract and changes to terms and condition of employment unlawful. The record evidence also showed that, contrary to the Employer's assertions, the Union was not provided any notice of the relocation nor did it waive its bargaining rights, and therefore, the Employer was still obligated to bargain over the effects of the relocation of the unit mechanics. While the Employer finally responded to the Union's information request in March 2010, it did not make any attempts to justify its 8-month delay in responding to the request, which the ALJ found to be an unreasonable length of time.

The ALJ credited the unit mechanics, finding that the Employer threatened the unit employees through its statements that they would no longer receive union benefits, would never be a union shop, and would be terminated if they engaged in strike activity. When the two mechanics refused to accept these conditions of employment, the ALJ concluded that they resigned their employment as a consequence of the employer's unlawful actions. The ALJ did not buy the Employer's argument that constructive discharge was not established because the evidence did not show that either engaged in any organizing activities during the three days they worked at the facility.

Overall, the ALJ dismissed the Employer's defenses as the facts presented by the General Counsel fully supported a finding of a violation on all charges. The Employer was ordered to offer full reinstatement to the two mechanics, plus make them whole; meet, upon request, with the Union and bargain in good faith; and revoke the unilateral changes, reinstate prior terms and conditions, and make unit employees whole for any losses. The case is currently pending on the company's exceptions to the ALJ decision filed with the Board.

Congratulations to Rich Andrews for his outstanding work in his final trial prior to his retirement in July 2010. Throughout his successful career at Region 13, Rich has been well-respected by both our staff and area practitioners. Rich, thank you for all the work you have done and we look forward to hearing from you about life after the Agency.

Modernized ULP Remedies (cont.)

Going forward, interest on backpay and all other monetary awards will be compounded daily, following the evolving practice of other legal regimes including the Internal Revenue Code. The decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (Oct. 22, 2010), was unanimous.

"Our primary focus must be on making employees whole," the Board noted in its decision in *Kentucky River*. "After careful consideration, and based on the Board's experience in the decades following the initial decision to order interest on backpay awards, we have concluded that compound interest better effectuates the remedial policies of the Act than does the Board's traditional practice of ordering only simple interest and that, for the same reasons, interest should be compounded on a daily basis, rather than annually or quarterly."

With respect to notices, employers who customarily communicate with their employees electronically, either through e-mail or an Internet or Intranet site, will be required to post remedial notices the same way, in addition to posting a paper notice to a bulletin board. The same will hold true for union respondents who customarily communicate with their members electronically. The decision in *J. Picini Flooring*, 356 NLRB No. 9 (Oct. 22, 2010), was 3-to-1, with Chairman Wilma Liebman and Members Craig Becker and Mark Pearce in favor and Member Brian Hayes dissenting. "We find that given the increasing prevalence of electronic communications at and away from the workplace, respondents in Board cases should be required to distribute remedial notices electronically when that is a customary means of communicating with employees or members," the majority wrote in its opinion.

Dissenting, Member Hayes said his colleagues' decision improperly equates "the traditional notion of 'where notices are customarily posted,' with the notion of 'how employers customarily communicate with employees,' " thereby "transform[ing] what has heretofore been an extraordinary remedy into a routine remedy. Further, they have done so without considering practical implementation problems presented by the tremendous variation in the types of electronic media involved."

On both issues, the Board had sought briefs from interested parties in addition to the respondents. On the question of compound interest, amicus briefs were received from the National Right to Work Legal Defense Foundation, the Service Employees International Union, and the AFL-CIO. On electronic notice posting, amicus briefs were received from the AFL-CIO, Service Employees International Union, the National Right to Work Legal Defense Foundation, the U.S. Chamber of Commerce, Bodman LLP, and the Texas Association of Business.

Acting GC Considering Changes In Approach to *Spielberg/Olin* Deferral

By Gail Moran, Assistant to the Regional Director

Pursuant to long-standing precedent known as *Spielberg/Olin* deferral, the Board will defer to an arbitration award and dismiss ULP charges if four factors are established concerning the arbitration and award: (1) the proceedings were fair and regular; (2) all parties agreed to be bound; (3) the arbitrator "considered" the unfair labor practice issue in that the contractual issue was "factually parallel" to the ULP issue and the arbitrator was presented generally with the facts relevant to resolving the ULP issue; and (4) the award is not "clearly repugnant" to the Act. Citing concerns with the D.C. Circuit's conclusion that, once deferred, the Board has waived its ability to proceed on the merits, Acting General Counsel Lafe Solomon recently asked Regions to submit to the Division of Advice certain cases that have been deferred where an arbitral award has since issued, with a possible eye towards proceeding on the merits of the underlying ULP cases following the award. Regions are to complete the investigation of the deferred case after the issuance of the arbitral award, and without regard to the contents of that award or application of the standards, make a determination on the merits of the charge. If the Region believes there is merit to the charge, it must then submit the case to the Division of Advice for further guidance. Charges deemed to lack merit may be dismissed by the Region, but only on the merits and without regard to reliance on the *Speilberg/Olin* standards.

New, Expedited Timelines for Certain 10(j) Cases

10(j) relief and will request that a position statement on that issue be submitted to the Regional Office within seven calendar days after the written notification. This notification will often be combined with the letter putting the charged party on notice of the allegations raised by the charge and soliciting submission of evidence, including affidavits and documents. Again, this should include any evidence the charged party may wish to submit on whether 10(j) relief would be "just and proper."

The Regional Director will normally make a determination on the merits of the case and whether 10(j) relief is warranted within 49 days from the filing of the charge. Regions are instructed to "quickly issue complaints" in these nip-in-the-bud discharge cases once a merit determination is made and to set prompt administrative hearings before an administrative law judge. In Region 13, proposed settlement agreements will be drafted and sent to the charged party within two days of the merit determination. Charged parties are expected to respond expeditiously to the settlement proposal because the Region intends to issue complaint within seven days of the merit determination if the case has not settled.

REGION 13 TIMELIME FOR NIP-IN-THE-BUD 10(j) CASES

(Measured from date of charge filing)

- **14 days: Charging party evidence, including just-and-proper**
- **28 days: Charged party response, including just-and-proper**
- **49 days: Decision on the merits**
- **Settlement to charged party within 2 days of merit decision**
- **Complaint issued within 7 days of merit decision**
- **ALJ hearing within 28 days of merit decision**

If complaint issues in nip-in-the-bud case, the Region will endeavor to schedule the trial within 28 days of issuance. The trial will be scheduled for consecutive days, using a liberal estimate as to the length of the trial, so as to avoid any adjournment of the trial before its completion. The Region will oppose any request for postponement of the trial once it is scheduled and will oppose adjournment of the trial once before an administrative law judge.

At the unfair labor practice trial, the Region will request that the administrative law judge accept not only evidence on the merits of the complaint, but also any just and proper evidence that the parties may have regarding the appropriateness of injunctive relief. After the trial closes, the Region will seek an expedited transcript of the hearing.

The Region will decide at the time of the merit determination whether it will submit a written recommendation immediately (within seven days) to the Injunction Litigation Branch as to the need for 10(j) relief or whether it will wait until after the trial to make a recommendation to seek 10(j) relief (again within seven days of the close of the hearing). Factors that the Region may consider in deciding to wait until after the trial are whether the respondent has raised a significant *Wright Line* or economic defense, or if processing to the administrative hearing would seriously facilitate settlement.

Once the Region has submitted a request for injunctive relief, the Injunction Litigation Branch and the Acting General Counsel will review the request under their own expedited time lines. As indicated by the Acting General Counsel, neither discriminatees' lack of desire for interim reinstatement nor a union's abandonment of its organizing campaign are, in themselves, grounds to decline to seek Section 10(j) relief. A union's abandonment of an organizing campaign is itself evidence of chill and does not remove the negative message that discharges have on employee statutory rights. And a court order offering interim reinstatement may cause the resumption of employee interest in organizing with the previous or a new union, whether or not the offer is accepted.

If the Board authorizes the Acting General Counsel's request that injunctive relief be sought, the Region will file its 10(j) petition with the District Court within two business days absent good reason for not doing so. Based on the expedited transcript from the trial, the Region will seek to have the District Court decide the appropriateness of injunction relief without the need of any further evidentiary record or discovery.

Blackstone Hotel (cont.)

Dana decision) and then having a high-ranking manager solicit employees to sign a decertification petition that was being circulated. The ALJ likewise found that the hotel maintained in its employee handbook several overly broad work rules that unlawfully restricted the employees' right to solicit their co-workers and to engage in other activities protected by Section 7 of the Act. After carefully considering all of the evidence as well as the parties' competing legal arguments, the ALJ further concluded that the hotel had committed all of the egregious 8(a)(5) violations alleged in the Consolidated Complaint by: (1) unilaterally changing its existing health insurance plans and rates; (2) dealing directly with employees by requesting they execute individual agreements requiring the prompt payment of healthcare premiums that were in arrears; (3) delaying and failing to provide the Union with requested health insurance information; (4) failing to bargain with the Union about the decision to eliminate the room service department and two cafeteria attendant positions; (5) failing to bargain with the Union about the decision to transfer the room service department's duties to employees working in the hotel's restaurant, Mercat a la Planxa; and (6) failing to bargain with the Union about the decision to lay off 14 employees.

Following the issuance of ALJ Carissimi's decision on June 29, 2010, The Blackstone filed exceptions with the Board which are currently pending. In an effort to limit its backpay liability, the hotel offered reinstatement to all 14 discriminatees and many of them have already returned to work. The Union has also continued to meet with the hotel's representatives in the hopes of reaching an agreement on an initial contract. Due to these recent developments, the Region has decided that it is no longer necessary to seek authorization from the Board to pursue Section 10(j) injunctive relief in District Court.

SAVE THE DATES!

NLRB REGION 13 PRACTICE AND PROCEDURE COMMITTEE MEETING: TUESDAY, JANUARY 11, 2011

LABOR LAW CONFERENCE FROM CHICAGO KENT COLLEGE OF LAW AND NLRB REGION 13: FRIDAY, MARCH 18, 2011

PROTECTING WORKPLACE DEMOCRACY

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