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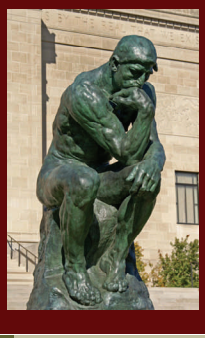

The Thinker
by Auguste Rodin
at the Nelson-Atkins Museum of Art

NATIONAL LABOR RELATIONS BOARD REGION 17

The Kansas City Strip

Recent Board Decisions

Highlights from Recent Board Decisions

BANNERING

In *Carpenters & Joiners of America (Eliason & Knuth of Ariz. Inc.)*, 355 NLRB No. 159 (2010), the Board found that a union's "bannering" in front of a secondary employer's business did not violate the secondary boycott provisions of the NLRA , because bannering is not "picketing" within the meaning of section 8(b)(4)(ii)(B) of the Act and there was insufficient evidence that the bannering caused work stoppages, interrupted deliveries, or otherwise had a coercive impact. Members Schaumber and Hayes dissented stating that the display of the banners was the confrontational equivalent of picketing and therefore constituted coercive secondary activity.

BECK RIGHTS

In *International Association of Machinists and Aerospace Workers, AFL-CIO (L-3 Communications Vertex Aerospace LLC)*, 355 NLRB No. 174 (2010), the Board found that a union violated its duty of fair representation by requiring a nonmember who objected to paying agency fees for nonrepresentational purposes to annually renew his objection filed pursuant to *Communications Workers of America v. Beck*, 487 US 735 (1988). A Board majority composed of Chairman Liebman and Members Becker, Schaumber, and Hayes found that the Union offered no rational justification for requiring *Beck* objectors to renew their objections annually. Chairman Liebman and Member Becker specifically noted that their finding that the requirement of annual renewal was arbitrary was based upon the absence of a compelling rationale for requiring annual renewal and the absence of procedures that minimized the burden of filing an annual objection. Member Pearce dissented, stating that the reasons given by the union for establishing an annual renewal of the objection were reasonable.

DAILY COMPOUND INTEREST

In *Kentucky River Medical Center*, 356 NLRB No. 8, (2010) the Board decided that going forward, interest on backpay and all other monetary awards provided as a remedy for unfair labor practices will be

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compounded daily, rather than annually or quarterly, following the evolving practice of other legal regimes including the Internal Revenue Code. The decision was unanimous.

VOLUNTARY RECOGNITION -- DANA

In *Rite Aid Store # 6473 and Lamons Gasket Co.*, 355 NLRB No. 157 (2010), the Board granted review in consolidated representation cases on the issue of whether the Board should modify or overrule *Dana Corp.* 351 NLRB 434 (2007), and return to the recognition bar doctrine as set forth in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). The Board's decision in *Dana* requires an employer that voluntarily recognizes a union based on proof of majority status to post a notice advising employees that they have a right within 45 days of the notice to file a petition to decertify the union or to seek certification of a rival union. If the notice is not posted, the union and the employer may not later claim that their contract bars a petition by a rival union or a decertification petition. The Board issued an invitation to file amicus briefs on the issue and the briefs received have been posted on the Agency web site. The majority consisted of Chairman Liebman, Becker and Pearce, with Members Schaumber and Hayes dissenting.

DUES CHECK-OFF

Hacienda Resort Hotel & Casino, 355 NLRB No. 154 (2010). This case was twice remanded to the Board from the United States Court of Appeals for the Ninth Circuit. The court stated that the issue squarely before the Board was "whether dues-checkoff in right-to-work states is subject to unilateral change, or whether, under such circumstances, dues-check-off is a mandatory subject of bargaining". The court instructed the Board to explain the rule adopted in the Board's decision in *Hacienda I*, 331 NLRB 665 (2000), or abandon *Hacienda I* to adopt a different rule and present a reasoned explanation to support it. The four Board members eligible to participate in the decision (Chairman Liebman and Members Schaumber, Pearce, and Hayes; Member Becker was recused) considered the court's remand, but were unable to reach a majority agreement and "deadlocked" on the remanded issue. Accordingly, the Board decided to follow extant precedent and to affirm the administrative law judge's dismissal of the complaint allegation that the employer violated the Act by unilaterally ceasing dues-checkoff after its contracts with the union expired.

ELECTRONIC POSTING

In *J. Picini Flooring*, 356 NLRB No. 9 (2010), the Board decided that employers and unions that customarily communicate with employees or members 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 on bulletin boards at their facility. "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. The decision was 3-to-1, with Chairman Liebman and Members Becker and Pearce in the majority and Member Hayes dissenting.

Board Highlights

SUCCESSOR EMPLOYERS

In *UGL-UNICCO Service Company and Grocery Haulers, Inc.* , 355 NLRB, No. 155 (2010), the Board indicated that it may reconsider its 2002 decision in *MV Transportation,* 337 NLRB 770 on the duty of a successor employer – one that takes over its predecessor's business and hires primarily from the predecessor's 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 petition, a rival union or employer petition or other valid challenge to the union's majority status. Prior Board law held that a union in a successorship situation was entitled to a reasonable period of time for bargaining without challenge to its majority statue, i.e. the successor bar doctrine. In *Grocery Haulers, Inc.*, the Intervenor questioned whether *MV Transportation* applies in a "perfectly clear" successor situation. The parties and amici were invited to file briefs addressing the issues, including whether the Board should reconsider or overrule *MV Transportation* and how the Board should treat the "perfectly clear" successor precedent. The briefs received have been posted on the Agency web site.

E-Filing Strongly Encouraged for Items other than Charges and Petitions

The National Labor Relations Board strongly encourages the use of the Agency's E-Filing System to file documents electronically with the Office of the Executive Secretary, the Division of Judges, the General Counsel's Office of Appeals, and Regional, Subregional, and Resident Offices.

The NLRB E-Filing System cannot yet be used to file a charge or a representation case petition to initiate proceedings with the Agency, but can be used to submit most other documents. Operations Management Memorandum OM 07-07 dated October 20, 2006, available on the Agency's website, lists documents that may be filed electronically with a regional office.

To file documents electronically, go to our website at www.nlrb.gov. Access the E-Filing System form on the Agency's home page by hovering over the "E-Gov" tab then selecting either "My NLRB" or "E-Filing" from the drop-down menu.

If you are registered with "My NLRB", you may log in by entering your user name and password. You can E-File documents without registering or logging in, but registration will speed E-Filing because your contact information will be filled in for you. Registration will also allow you to edit your contact information, view information about your pending cases with the Agency, and sign up for electronic issuance of Board and ALJ decisions.

You begin the E-Filing process by entering the case number and clicking "Search Case". After the system finds the case, simply follow the directions for filing your document.

The new E-Filing policy and conditions are found in the instructions for E-Filing on our web-site at mynlrb.nlrb.gov/efile. Answers to frequently asked questions regarding e-filing can be found at mynlrb.nlrb.gov/efilingfaq.

If you have any questions, consult the e-filing section of the Agency's website at www.nlrb.gov or call and ask an information officer (913) 967-3000.

17 Celebrates 75

Region 17 Staff

On August 25, over 40 labor bar practitioners, union representatives, and friends of Region 17 attended our 75th Anniversary celebration of the passage of the Wagner Act, otherwise known as the National Labor Relations Act. Regional Director Dan Hubbel greeted the crowd and thanked them for their attendance and the long term amicable relationships Region 17 has forged in the area.

The Presentation

After hors d'ouevres and conversation, the crowd viewed a 75th Anniversary presentation moderated by RD Dan Hubbel and Field Attorney Mary Taves, which reviewed the history of the NLRA, with a focus on the economic times and the turbulent and often violent struggles that led to its passage. Region 17 wants to thank the attendees and we look forward to the next 75 years.

The Reception

Board Member Update

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 previously received a recess appointment to the Board by the President in April 2010. Member Pearce's term will expire in August 2013. 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 Region 3 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. His term with the Board expires in December 2012. Member Hayes had 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.

Members Becker, Pearce, and Hayes joined current-Chairman Wilma Liebman and former Member Peter C. Schaumber. Member Schaumber's term ended on August 27, 2010, leaving the Board with four current members.

Supreme Court Rules Two Member Board Lacked Authority to Issue Decisions

On June 17, 2010, in a 5-4 decision, the U.S. Supreme Court in ***New Process Steel, LP v. NLRB***, 130 S. Ct. 2635, 188 LRRM 2833 (2010) ruled that the two-member Board composed of Chairman Wilma B. Liebman and Member Peter C. Schaumber lacked the authority to issue decisions during a 27 month period when three of the Board's five seats were vacant. From January 2008 to late March 2010, the Board operated with only two members because Congress was unable to confirm appointments to the three vacant seats on the Board. The two-member Board issued about 600 decisions during this 27 month period, relying upon an opinion issued by the Department of Justice Office of Legal Counsel supporting the authority of the two-member Board to continue to act.

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.

On August 5, 2010, the Board issued its first decisions in the cases 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 are refreshed daily.

By September 30, 2010, the Board had issued new decisions in 70 of the 96 two-member cases that were pending in the federal appeals courts when the *New Process Steel* decision issued.

Acting General Counsel's Initiative:
10(j) Injunctive Relief for Discharges During Organizing Campaigns

On September 30, 2010, NLRB Acting General Counsel Lafe Solomon announced an initiative intended to strengthen and expedite the Agency's response when employees are fired during a union organizing campaign. The initiative is set forth in General Counsel Memorandum GC 10-07, found on the Agency's website.

Going forward, in all cases where an investigation establishes meritorious Section 8(a)(3) discharges during an organizing campaign, the General Counsel's office will consider seeking a federal injunction to compel the 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 investigatory 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."

Under Section 10(j), the Agency is authorized to seek preliminary injunctions from federal courts to protect victims of unfair labor practices pending litigation. Under the new initiative, Regional Directors are required to immediately investigate allegations of unlawful firings in organizing cases and, if merit is found, to submit the case to the General Counsel's office with a short memo, ideally within a week of the finding of merit. Acting General Counsel Solomon told his staff that he will personally review each case submitted to him by the Regions.

Under NLRB processes, the General Counsel must obtain authorization from the Board before seeking a 10(j) injunction. Chairman Wilma Liebman said that the Board has revisited its procedures for reviewing such requests in an effort to expedite the process. "The Board recognizes that 10(j) injunctions are a vital enforcement tool and time is of the essence in this kind of case," she said.

Lafe Solomon Appointed Acting General Counsel

On June 18, 2010, Ronald Meisburg resigned as General Counsel of the Board, prior to the expiration of his term in August 2010. Effective June 21, 2010, President Obama named Lafe Solmon to serve as Acting General Counsel of the Agency. Mr. Solomon will serve as Acting General Counsel for 210 days, or until a General Counsel is appointed and confirmed by the Senate.

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.

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 obtain a law degree, he returned to the Agency as a field attorney in the Office of Appeals. He subsequently transferred to the Agency's Appellate Court Branch. In 1981 he left the General Counsel side of the Agency to join the staff of former Board Member Don Zimmerman and subsequently worked for nine other Board members. For the past ten years, Mr. Solomon has served as the Director of the Board's Office of Representation Appeals. He received his B.A. degree in Economics from Brown University and his J.D. from Tulane University.

Region 17 Conducts Four Speedy Hospital Elections

Staff members in Region 17 had to dust off the Consent Election Agreement forms in August 2010 when SEIU Healthcare Missouri/Kansas, a division of SEIU Healthcare Illinois/Indiana filed the first of a series of petitions for various technical, service and maintenance employees at area hospitals. Consent Election Agreements differ from Stipulated Election Agreements: in a consent agreement, the parties agree that any objections to the election or unresolved challenged ballots will be decided solely by the Regional Director. In a stipulated election, the parties have the right to file a Request for Review of the Regional Director's Decision with the Executive Secretary's Office in Washington, D.C. As such, consent election agreements are not common and to have four consent election agreements in a two month time period was unusual.

The four petitions were filed pursuant to an agreement by parent company HCA, Inc., to remain neutral during the union campaigns for employee support at their hospitals. The agreement also called for expedited elections to be held within 14 days of the filing of a petition. This significantly shortened time period for scheduling an election required the parties to have all election details, including the voter eligibility list, agreed upon at the time of filing the petition. Normally, an employer has 7 days from the date the election agreement is approved to provide the Region with the eligibility list; and the list must be received by the Region no less than 10 days prior to the election. Because the parties' neutrality agreements required that an election be held within 14 days, this only allowed for a 2 day margin of error to work out all agreed-upon election details, execute the election agreement and obtain the eligibility list.

Despite this shortened time period, four elections were conducted pursuant to these agreements, with no major obstacles. The first, Case 17-RC-12668, was filed on August 4 by SEIU for technical employees, service and maintenance employees, and skilled maintenance employees working at Menorah Medical Center in Overland Park, Kansas. The election, held on August 18, resulted in a 140-to-59 vote in favor of SEIU which was certified as the bargaining representative on August 30.

A second petition, Case 17-RC-12672, was filed by SEIU on August 17 for technical employees and service and maintenance employees working at two Research Medical Center facilities on E. Meyer Boulevard and Rockhill Road in Kansas City, Missouri. The election, held on August 31, resulted in a 285-to-136 vote in favor of SEIU, which was certified on September 13.

The third petition, Case 17-RC-12675, was filed by NNOC-Missouri/NNU, who also had a neutrality agreement with HCA, Inc., on August 31 for all Registered Nurses employed at the same two Research Medical Center facilities as the prior SEIU election. The election, held on September 14, resulted in a 258-to-148 vote in favor of NNOC-Missouri/NNU, which was certified on September 27.

The fourth and final petition, Case 17-RC-12677, was filed by SEIU on September 7 for service and maintenance employees working at Lee's Summit Medical Center in Lee's Summit, Missouri. The election, held on September 21, resulted in a 36-to-48 vote against representation by SEIU. A Certification of Results issued on October 4.

There were no objections filed in any of the elections.

Overall, the entire expedited process ran smoothly from the filing of the petitions to the issuance of the certifications. This was due in large part to the professional and cooperative manner maintained by all the parties involved.

The **NATIONAL LABOR RELATIONS BOARD** is an independent federal agency established in 1935 to administer the National Labor Relations Act, the primary law governing relations between unions, employers and employees. Our agency has two principal functions: 1) to conduct secret ballot elections to determine whether employees want to be represented by a union or not; and 2) to investigate and remedy unfair labor practices by employers and unions.

La **Junta Nacional de Relaciones del Trabajo** (JNRT) es una agencia federal independiente establecida en 1935 para poner en vigor a la Ley Nacional de Relaciones del Trabajo, la ley principal que gobierna las relaciones entre las empresas, los sindicatos, y trabajadores. Nuestra agencia tiene dos funciones principales: 1) llevar a cabo elecciones de voto secreto para determinar si los empleados desean o no desean ser representados por un sindicato; e 2) investigar y dar remedio a prácticas ilícitas que son cometidas por empresas y sindicatos.

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NLRB Speakers Available

Regional staff members are available to speak at your event. Contact either of the Regional Outreach Coordinators for details.

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