National Labor Relations Board

Region 18 Hot Dish

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HOT DISH CO-EDITORS:

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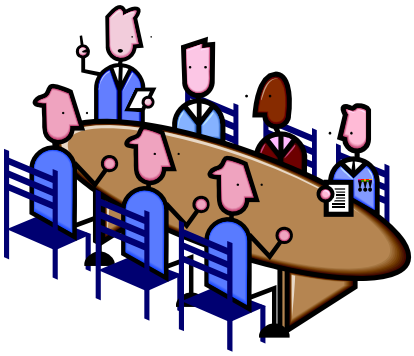
Jimmy John's: What is Protected Concerted Activity?

by Marlin O. Osthus, Regional Director

Whenever the media focuses on the National Labor Relations Act, it is almost always in the context of the Act's impact on employers whose employees are represented by unions or on employers whose employees are seeking union representation. Little understood – especially among employees the Act is supposed to protect – is the Act's impact on employers whose employees neither have nor are interested in union representation. Even in non-union settings, the NLRA protects employees who engage in efforts to improve their working conditions or who protest employer actions impacting their working conditions. To quote parts of Section 7 of the Act, "Employees shall have the right ... to engage in other concerted activities ... for mutual aid or protection."

Cases involving employee rights in the non-union setting therefore involve interpreting whether employees are engaged in "concerted" activities, and whether those activities are "for mutual aid or protection." In addition, questions sometimes arise over whether the concerted activities of employees which are for mutual aid or protection are protected – that is whether the activities employees choose to engage in are so disloyal, reckless, or maliciously untrue as to lose the Act's protection.



A recent case litigated by Region 18 Staff Attorney Florence Brammer involved the concepts and language quoted above. The case is *Miklin Enterprises, Inc. d/b/a Jimmy John's*, 18-CA-19707, et.al. On April 20, 2012, Judge Arthur Amchan issued a decision in the case, and agreed with the Region that Jimmy John's illegally terminated and disciplined employees because the employees engaged in concerted activities for mutual aid or protection.

Miklin Enterprises, Inc. is a franchisee and operates 10 sandwich shops in Minneapolis.

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Arbitration Agreements: Valid or Void?

by Cathy L. Homolka, Field Attorney

Since the passage of the Federal Arbitration Act (FAA) and a series of Supreme Court decisions accompanying it, consumers and employees often encounter agreements requiring them to arbitrate potential disputes. Employers frequently require employees to sign arbitration agreements in an effort to avoid costly and time-consuming litigation; these agreements are increasingly becoming a source of litigation.

At the NLRB, recent ALJ and Board decisions illustrate that these agreements can implicate the NLRA in at least two ways, when the agreement prohibits : 1) employees' access to Board processes; and 2) class or collective arbitration. In both circumstances, the Board examines the agreement's legality by applying the analysis set forth in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)—the leading case on the lawfulness of workplace rules. Pursuant to this case, the Board will first ascertain whether a rule is unlawful on its face. If it is not facially unlawful, the Board may still find a violation of the Act if the rule: 1) could reasonably be construed by employees to prohibit Section 7 activity; 2) was created in response to union activity; or 3) is applied to restrict employees' Section 7 rights.

The Board first encountered factual situations where arbitration agreements interfered with employees' access to Board processes in Bill's Electric, 350 NLRB 292 (2007) and U-Haul Company of California, 347 NLRB 375 (2006). In Bill's Electric, the Board made clear that an employer cannot portray an arbitration policy as the

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Five Years of Region 18

Field Attorney Nichole Burgess-Peel and Deputy Regional Director Jim Fox, who worked on the case

It is highly unlikely that the staff of Region 18 would have predicted in the late summer of 2006 that two charges filed by Glass, Molders, Pottery, Plastics and Allied International Workers Union, Local 359 against Whitesell Corporation, would lead to two unfair labor practice hearings, two Section 10 (j) proceedings, two Board decisions, one proceeding to hold the Respondent in contempt of a Section 10(j) order, and two decisions by the Eighth Circuit Court of Appeals. But that is precisely what happened.

In its initial charges in 2006, the Union accused Whitesell, a successor employer of a small manufacturing facility in Washington, Iowa, of bargaining in bad faith and implementing a contract in the absence of a good faith impasse. After a trial and a favorable ALJ decision, Whitesell was enjoined by the U.S. District Court for the Southern District of Iowa in a Section 10 (j) case from engaging in bad faith bargaining. The injunction also required that Whitesell rescind implementation of its final offer, which had imposed significant economic cuts and adversely affected the Union's ability to represent employees.

According to the ALJ in *Whitesell II*, when Whitesell returned to the bargaining table pursuant to the injunction requiring it to bargain in good faith, it continued to engage in bad faith bargaining. It made regressive proposals, pressed unreasonable proposals that were not part of its pre-injunction position, made unilateral changes, refused to provide information in response to information requests, and lacked the requisite open mind necessary to bargain in good faith, among other things. Therefore, the Region sought to hold Whitesell in contempt of the Section 10(j) injunction.

On the day of the hearing, the Federal District Court brokered a resolution of the petition for contempt which included a bargaining schedule and agreement by Whitesell to use its counsel as its lead negotiator, rather than its Chief Operating Officer. While under the agreement, the Union and Whitesell started making progress toward a contract. However, Whitesell abruptly ceased having its attorney bargain on its behalf and returned to its prior bargaining posture once it met the requirements set forth in the bargaining schedule. By then, the Board issued its decision in *Whitesell I* finding that the Company bargained in bad faith and unlawfully implemented its final offer,

NLRB OUTREACH OPPORTUNITIES

The NLRB is continuing its efforts to reach community groups with information about the Agency. Members of the Region's staff are available to make presentations before any interested group such as students taking history, law, or civics classes, staff of legal services or other civil rights agencies, unions, HR groups, or any other groups with a particular interest in the nation's labor laws.

Typical topics that speakers might address are as follows: what the NLRA covers and protects, how the regional office investigates and attempts to resolve unfair labor practice cases, and how the representation case process works.

To arrange for a speaker for your group, please call Field Attorney Chinyere Ohaeri at (612) 348-1766.

Litigation Come to A Close

and therefore the first Section 10(j) order dissolved as a matter of law.

In the meantime, the Union continued to file additional charges. Region 18 issued yet another complaint in a series of cases, and among other claims, alleged that Whitesell engaged in unlawful bargaining from the date it resumed bargaining after issuance of the first injunction. In addition, the Region argued that Whitesell continued to engage in bad faith bargaining and engaged in overall surface bargaining after issuance of the Board's Order in *Whitesell I*. Therefore, when Whitesell once again implemented a final offer, the Region obtained a second Section 10(j) injunction to enjoin it from engaging in bad faith bargaining and requiring rescission of a second implemented offer. The Region proceeded with the litigation of the second set of unfair labor practice charges (*Whitesell II*), and obtained from the Board, among other remedies, an order that the Employer reimburse the Union for bargaining expenses for the entire period of surface bargaining covered by *Whitesell II*.

Region 18 began investigating additional charges regarding conduct following issuance of *Whitesell II*, when, in a "stunning development" (to quote Region 18 Field Attorney Nichole Burgess-Peel), late last year the Union and Whitesell finally reached a collective bargaining agreement.

Also busy was the Appellate Court Branch, which successfully defended the Board's decision in *Whitesell I*. The Eighth Circuit Court of Appeals remanded the issuance of the second Section 10(j) injunction to the Federal District Court instructing the Court to engage in more extensive findings of fact. Fortunately, the Board issued *Whitesell II* before the District Court responded to the remand.

In the course of the many proceedings, the initial investigator (Field Examiner Bob Reid) retired, the Resident Officer for the Des Moines Regional Office (David Garza), became the Resident Officer in Albuquerque, and the Regional Director (Bob Chester) who decided the initial cases became the Regional Director for Region 6 (Pittsburgh).

Assuming the investigation of subsequent charges was Field Examiner Charles "Chip" Chermak under the supervision of Des Moines Resident Officer Jennifer Hadsall. In addition to now-Regional Director Marlin Osthus (who worked on a number of the Section 10(j) recommendations and participated in deciding the cases) and Compliance Officer Roger Czaia (who ably and promptly resolved remedy issues), two stalwart individuals involved in these cases from the beginning to the end were Region 18 Field Attorney Nichole Burgess Peel and now-Deputy Regional Director Jim Fox. Nichole litigated the unfair labor practice and Section 10(j) proceedings, and represented the Region in the contempt proceedings. Jim supervised the drafting of most of the briefs, petitions, motions, responses to motions, and a variety of other documents, as well as attended and assisted in most of the litigation.

Article originally printed in April 2012 All Aboard

Dear Abby. . . *Questions from the public*

Each day, an agent is responsible for serving as the Region's Information Officer (I.O.). The following questions (and answers) were compiled by the Region 18 agents as particularly interesting.

Dear Abby,
My co-workers and I want to form our own union instead of affiliating with an existing labor organization. Can we do that?

Yes. Under the National Labor Relations Act, employees do have the right to form their own labor organization. The only requirements under the Act to be considered a "labor organization" are that the group be one "in which employees participate and which exists for the purpose, in whole or in part, of dealing with employer concerning grievances, labor disputes, wages, rates of pay, hours or employment, or conditions of work." (Section 2(5)). It is recommended, however, that the group have some official form, name, and officers. You should note that as a labor organization, your group might be subject to reporting requirements by the Department of Labor.

Once your group has formed a labor organization, in order to secure bargaining rights, you should file a petition with our office. To be processed by our office, the petition must be supported by at least 30% of the employees in the unit that the petitioning labor organization wishes to represent. If, after an election, the majority of employees in that unit vote in favor of being represented by the labor organization, it will be certified as the exclusive bargaining representative. In lieu of, or in addition to, filing the petition, the labor organization can also make a demand on the Employer to voluntarily recognize it as the exclusive bargaining representative.

VISIT US ON THE WEB

NLRB AGENCY WEBSITE
WWW.NLRB.GOV

REGION 18 WEBSITE
http://www.nlrb.gov/category/regions/region-18

DID YOU KNOW?

Every day there is someone here to answer your questions.

The **information officer** is responsible for incoming phone calls and visitors. We rotate the responsibility daily, and make an effort to answer all inquiries before the close of business.

The **information officer** cannot offer legal advice, but can provide information about NLRB procedures and the NLRA, refer inquisitor to other agencies, and log questions for future reference.

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Arbitration Agreements

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employees' exclusive method of dispute resolution.

Similarly, in U-Haul Company of California, the Board asserted that agreements prohibiting the filing of lawsuits could lead reasonable employees to believe they were precluded from filing Board charges.

The Board recently issued a decision in D.R. Horton, Inc., 357 NLRB No. 184 (2012), reiterating its earlier holdings but also specifically asserting that these agreements cannot prohibit class arbitration. In D.R. Horton, Inc., the employer required employees to sign a Mutual Arbitration Agreement (MAA) as a condition of employment. By signing the MAA, employees agreed to arbitrate, rather than litigate, all claims on an individual basis. The MAA prohibited the arbitrator from consolidating claims, fashioning collective claims, and awarding relief to a group or class of employees. The Board found this agreement unlawful, explaining that "the collective pursuit of workplace grievances through litigation or arbitration is conduct protected by Section 7 and the right under the NLRA to freedom of association." Id. The Board made clear, however, that its decision did not mandate class arbitration as long as the agreement allowed collective claims in a judicial forum.

> "... this decision is significant and highlights the intersection, or arguably tension, between federal labor law and both the FAA and Supreme Court law ..."

When the Board issued D.R. Horton, Inc., many questioned whether it conflicted with the FAA and Supreme Court precedent. First, under Section 2 of the FAA, arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Second, in AT & T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), the Supreme Court struck down a California Supreme Court rule that said class-action waivers in arbitration clauses of contracts of adhesion are unconscionable. In D.R. Horton, the Board addressed this potential conflict-of-law issue and distinguished the situations presented by D.R. Horton and other employment-related cases from that in Concepcion. The Board emphasized that class arbitration is more practical in the employment context compared to contracts in the retail and service industries and pointed out that companies employ a limited number of employees and class arbitration would merely involve a specific subset of a company's employees. The Board also considered the policies underlying the NLRA and FAA, reasoning that the FAA would have to yield if there was a conflict between the two. In the end, the Board denied a conflict, stressing that the FAA was not intended to interfere with employees' substantive rights. This case has since been appealed to the Fifth Circuit.

As shown above, this decision is significant and highlights the intersection, or arguably tension, between federal labor law and both the FAA and Supreme Court law. Many not only await the circuit court's decision, but also are interested in seeing how Board law develops with regard to arbitration agreements in general. Region 18 currently has a case involving a mandatory arbitration agreement pending before the Board. In that case, Supply Technologies, Inc., 2011 WL 2160298 (NLRB Div. of Judges May 31, 2011), the General Counsel argued that the Employer terminated twenty employees for their refusal to sign an unlawful arbitration agreement. The Employer denied terminating them, asserting they voluntarily quit by refusing to sign. Ultimately, the ALJ found the agreement to be unlawful, explaining that it was ambiguous and would lead a reasonable employee to believe it prohibited or severely limited their right to file a Board charge or use its processes.

Jimmy John's
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Initially employees employed at some of the 10 outlets were involved in a union organizing campaign. However, a few months after that campaign ended, some employees decided to pursue a different route to improve their working conditions. These employees presented to the owners of Miklin Enterprises, Inc. a request to improve their benefits. Specifically, the group of employees asked the owners to implement a policy of providing paid sick leave. The employees did so because, from their perspective, the company was in essence requiring them to work by employing a policy under which employees who did not work because they were ill were assessed disciplinary points when they did not find their own replacements. In other words, if an employee was ill and could not find a replacement, the employee faced the choice of not working and receiving discipline or working in spite of being sick.

When the owners of Miklin refused to provide paid sick leave the employees posted notices near the 10 shops warning customers that their sandwiches might be made by employees who were sick, and asking customers to support their efforts to get paid sick leave. Two days later, six employees involved in the postings were fired and three others received written warnings.

Miklin argued to Judge Amchan that the employee-created posters were unprotected because the posters discouraged customers from eating at the Miklin-franchised sandwich shops. The Company also argued that the employees' claim that sandwiches consumed by customers might be made by sick employees was false. However, Judge Amchan agreed with arguments made by Attorney Brammer that employees may appeal to customers even if the appeal may adversely affect the employer's business, where, as in this case, the employees make clear to the customers that they are seeking to improve their working conditions. Furthermore, Judge Amchan rejected the Company's argument that the employees' claim that they could not call in sick is a false claim. Judge Amchan noted that employees are in fact subject to being assessed points which can lead to discipline if they call in sick without finding a replacement. Finally, Judge Amchan rejected the Company's argument that the suggestion in the posters that customers might become ill resulted in the employees' conduct being unprotected. In doing so, Judge Amchan concluded that the Company failed to show that any of the employees realized that the statements in the posters regarding the risk to the public were false or "entertained serious doubts about the truth therein."

Miklin Enterprises, Inc. is filing exceptions to Judge Amchan's decision. While the Region believes that the Board will affirm Judge Amchan's above conclusions, in any event the *Jimmy John's* case is a textbook example of the issues that can arise when employees attempt to improve their working situation without the aid of a union.

Note: A story about the Jimmy John's certification election was printed in Region 18's Hot Dish in December, 2010.

Where Are They Now? *Continued from Page 6*

Here, my case load consists more of protected concerted activity discharges and duty of fair representation cases against unions.

Q: Tell us about your climbing adventures!

A: Since I moved back to Denver I have climbed Mt. Kilimanjaro in Africa (19,340 feet). Kilimanjaro is a non-technical climb, which means you can walk up without special equipment. However, the altitude is challenging. I've also started to learn mountaineering and technical climbing. I climbed Mt. Rainier in Washington last summer. Mt. Rainier is 14, 411 feet and is a technical climb over glaciers and involves crevasse crossings. We used ropes, ice axes, and crampons. I just got back from climbing Mt. Whitney, in California. Whitney is the highest mountain in the contiguous United States at 14,494 feet and is also a technical climb. The last 500 feet of the climb required rock climbing with ropes and belays.

I think my next trip will be to Argentina to climb Aconcagua this coming December. Aconcagua is the highest mountain in South America at 22,831 feet. It will definitely be my biggest challenge because of the altitude and the extreme cold and windy weather conditions. If I succeed I will have climbed 2 of the 7 summits (the highest mountain on each continent).

Where Are They Now?
Q&A with Field Attorney Kristyn Myers

Kristyn Myers worked in Region 18 from 2003 to 2009 before transferring to Region 27, Denver, to enjoy her family, the mountains, and the sun.

Q: What are your fondest memories of Region 18?
A: The senior attorneys and field examiners mentored and trained me. I would not be the competent attorney I am today without my friends from Region 18. Marlin Osthus, Robert Chester, and Jim Fox were the best managers a new attorney could hope to have. I pass on their sage advice to the new attorneys in Region 27 all of the time. Believe it or not, I am now one of the senior attorneys in Region 27.

Q: What are some of the differences in the casework in Region 18 and Region 27?
A: Region 27 is a large Region and covers Colorado, Montana, Wyoming, Utah, and Idaho. None of these states are highly industrialized and three of them are right to work states. Therefore, there is much less union organizing in Region 27 than there is in Region 18. In Region 18, I investigated more organizing cases with Section 8(a)(3) discharges and a number of interesting Section 8(a)(5) bargaining cases.

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Pam Scott Moves to Region 12 Miami Office

Pamela W. Scott has been named Resident Officer in the Resident Office in Miami, Florida (Region 12).

Pam received a B.A. from the University of Maryland, and J.D. from George Washington University Law School. She joined the NLRB in 1988 as a staff attorney for Board Chairman James M. Stephens in Washington, D.C., and in 1994, transferred to Minneapolis, where she worked as a field attorney until her promotion to Supervisory Attorney in 2004. In 2010, she became the Deputy Regional Attorney.

Pam is married to Collin Rust and they have two sons.

A Retiree's Recollections
Q&A with Field Attorney David Biggar

David Biggar's first day with the NLRB was July 3, 1973, during the term of President Richard Nixon. After nearly 39 years, Dave retired in January, 2012.

Q: What most excited you about your new job?
A: I was most excited about meeting and working with the public. I knew I would meet a wide variety of people doing a wide variety of jobs in many different sectors of the economy. I liked the idea that I might be an important person to all of them with regard to any given dispute, and looked forward to helping them settle or resolve issues. I basically looked forward to helping them get along with one another.

Q. Do you remember the first election you ran?
A: I believe the first election I ran on my own was at Toby's Saw Mill in Hinckley, MN. There were two employees who were going to be challenged. I had not been told of this before the election. There were not many voters so two challenges was a big deal. Both sides knew I was new and tried to tell me what authority I did or didn't have with regard to allowing these voters to be challenged. One of the parties was jabbing me in the chest with his index finger to make his point. I handled it pretty well, but it was rather stressful since I was not sure I took the correct approach. There were no cell phones then, and I did not have time to go to a phone and call the office. The challenged ballots were not determinative, so everything worked out well.

Q. Where is the "best" place you traveled within the Region?
A: I always liked going to the Lead and Deadwood areas in the Northern Hills of South Dakota. The Homestake Gold Mine was located there. It claimed to be the largest gold mine in the U.S., and employed hundreds of employees. There was quite a bit of work for the NLRB in the mine and related businesses. I really enjoyed meeting some of the characters that lived there, and the scenery is second to none.

6. Tell us about the most interesting hearing you've seen.
A: One of the earliest representation cases I had was located in Coralville, Iowa. Another board agent was with me, since I had not seen a hearing before. I was helping him with an investigation in the same area. When we got to the hearing, the Employer announced that it had fired all of the unit employees that day. The union claimed they had gone on strike and the Employer claimed they had engaged in misconduct on the picket line. Before we could decide what to do, Bob Conley, a savvy old Teamster attorney in Iowa, said he wanted to talk to the Employer. They went into an area to talk, while the two agents got on the phone to the Regional Office. After a while, Conley came out and announced that the Union was withdrawing the petition. He said that the parties were going to resolve the matter. I'm not sure what magic he worked, but I heard later that the Union was voluntarily recognized.

Q. What will you miss most?
A: I will miss the wonderful people who have become friends as well as co-workers. I suppose that is what we all would say. I will also miss those occasions when the law works– when I am thanked by someone who had the courage to exercise their rights, felt the wrath from their employer or union, and was made whole after a favorable outcome before the Agency.