



Fall 2011 Issue

# Regional Insight

AN OUTREACH NEWSLETTER TO INFORM THE PUBLIC ABOUT WORKPLACE RIGHTS & ISSUES

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National Labor Relations Board, Region 25  
Room 238—Minton-Capehart Building  
575 North Pennsylvania Street  
Indianapolis, Indiana 46204-1577

Website: [www.nlr.gov](http://www.nlr.gov)  
Local Phone: (317) 226-7430  
Toll-Free : (866) 667-6572  
Fax: (317) 226-5103

Hablamos Español

## We've Gone Electronic!

Region 25, along with the other regional offices, the Office of Appeals, and the Board, are now maintaining all of their records in an electronic case-management system called NxGen. The new single system replaces 13 separate case tracking systems, and will allow for seamless searches that cover the entire life of a case at the agency.

The parties that interact with the NLRB will see some significant changes as a result of this electronic system. First, there will be more consistency in the formatting and language of letters and documents issued by the regional offices and the other offices of the NLRB. This should benefit practitioners, employers, and unions that frequently deal with cases in more than one region.

Second, as more information is filed in this system, there will be greater public access to public documents contained within the electronic case file via the Board's website. Currently regional decisions in representation cases and dismissal letters are accessible on the Board's website along with published and unpublished Board Decisions, ALJ Decisions, Advice Memorandums, etc.

Third, all parties are requested to e-file the documents that they file with the regional offices

and other branches of the NLRB. That does not mean e-mailing your submission to the agent handling the case. E-mail should be reserved for communications that you would otherwise have with a Board Agent by telephone. E-mail should not be used as a way to file documents with the regional offices. If you have the capabilities to e-mail a document, you have the capabilities to e-file. The following short process is all you need to know in order to e-file.

1. Go to the Agency's website at [www.nlr.gov](http://www.nlr.gov)
2. Click on the "File Case Documents" tab  
(Under Resources on right side of screen)
3. Enter the case number
4. Follow the step-by-step instructions on how to:
  - a. Enter your data and upload your documents
  - b. Review and confirm your submission
  - c. Receive your receipt with confirmation number.

The Agency is asking that all parties e-file their documents with the Board, except for unfair labor practice charges, representation petitions, and requests for advisory opinions. E-Filings must be timely, by 11:59 P.M. in the time zone of the receiving office on the due date. The preferred document format is pdf; however, documents also may be submitted in Microsoft Word (.doc) or in simple text (.txt) in a read-only format.



# New Employee Rights Poster

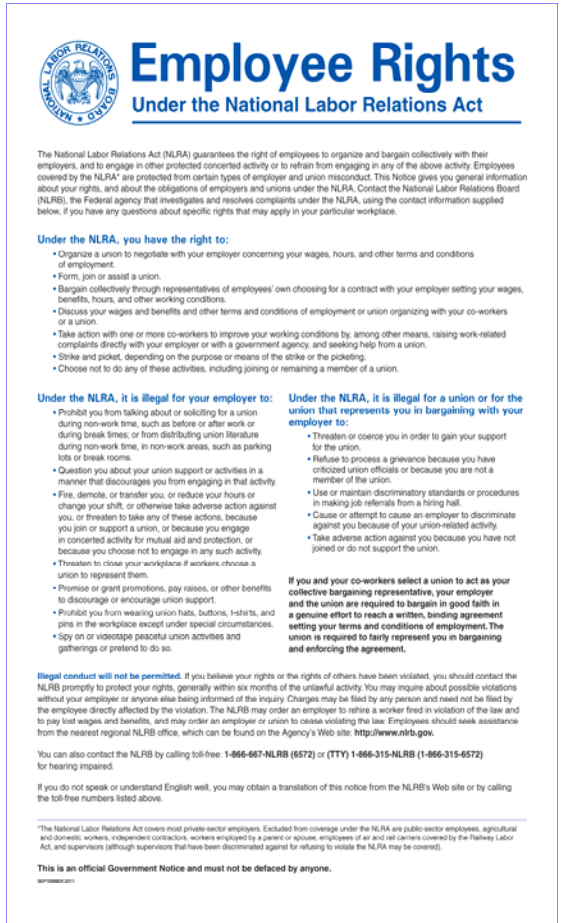
On August 30, the National Labor Relations Board published a Final Rule in the Federal Register that will require employers to notify employees of their rights under the National Labor Relations Act as of January 31, 2012.

Private-sector employers (including labor organizations) whose workplaces fall under the NLRA will be required to post the employee rights notice where other workplace notices are typically posted. Also, employers who customarily post notices to employees regarding personnel rules or policies on an internet or intranet site will be required to post the Board’s notice on those sites. Copies of the notice will be available from the Agency’s regional offices, and it may also be downloaded from the NLRB website.

The notice, which is similar to one required by the U.S. Department of Labor for federal contractors, states that employees have the right to act together to improve wages and working conditions, to form, join and assist a union, to bargain collectively with their employer, and to refrain from any of these activities. It provides examples of unlawful employer and union conduct and instructs employees how to contact the NLRB with questions or complaints.

Employers may post notices in black and white as well as in color. The final rule also clarifies requirements for posting in foreign languages. Similar postings of workplace rights are required under other federal workplace laws.

Board Chairman Wilma B. Liebman and Members Mark Gaston Pearce and Craig Becker approved the final rule, with Member Brian Hayes dissenting. A fact sheet with further information about the rule is available here: <http://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights>



**Employee Rights**  
Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA\* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below. If you have any questions about specific rights that may apply in your particular workplace.

**Under the NLRA, you have the right to:**

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

**Under the NLRA, it is illegal for your employer to:**

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

**Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:**

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

**Illegal conduct will not be permitted.** If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to reinstate a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: <http://www.nlr.gov>.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

\*The National Labor Relations Act covers most private sector employers. Excluded from coverage under the NLRA are public sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and sea carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

## Know Your Workplace Rights

### The Union’s Duty of Fair Representation



**A union must represent all unit employees with good faith**

Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) states that it is an unfair labor practice for a union or its agents “to restrain or coerce employees in the exercise of the rights guaranteed” in Section 7 of the Act. This provision of the statute does not require that a union bargain equal terms for all bargaining unit employees; rather, it requires that a collective bargaining representative only consider legitimate employment-related differences to distinguish one group of employees from another, not irrelevant or invidious reasons.

A union must provide all bargaining unit employees with good faith representation that is fair, impartial, and free from hostile discrimination, regardless of an individual’s membership in the union. In that regard, a union may not refuse to represent or process grievances because an employee is not a union member. International Brotherhood of Electrical Workers, Local 1504 (Western Electric Company, Inc.), 211 NLRB 580 (1974); Newport News Shipbuilding and Dry Dock Company, 233 NLRB 1443 (1977). Nor may a union deny employees fair representation because they engage in protected, concerted activities, including internal union politics. United Rubber, Cork, Linoleum & Plastic Workers of America, Local 374 (Uniroyal, Inc.), 205 NLRB 117 (1973); ITT Arctic Services, Inc., 238 NLRB 116 (1978); Pacific Coast Utilities Services, Inc., 238 NLRB 599, 607 (1978); Terpening Trucking Co., 271 NLRB 96 (1984); Teamsters Union Local No. 287, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Emery Air Freight/Airborne Express), 304 NLRB 119, 122 (1991).



The local and regional labor law community was well represented at the 31<sup>st</sup> Seminar on Labor-Management Relations, co-sponsored by NLRB Region 25 and I. U. Law School – Indianapolis. Over 100 Employer and Union-side labor attorneys, union officials, stewards, HR professionals and other practitioners from across the Midwest attended the seminar, which was held at the Indiana University School of Law – Indianapolis on Friday, June 10, 2011 with the theme “Labor Law in the Age of Social Media.”

In his opening remarks, Regional Attorney Richard Simon welcomed participants and gave an overview of the class offerings. He acknowledged the contributions of the labor-management community as well as the Region’s staff, many who served as faculty members. Special recognition was extended to newly retired Supervisory Field Examiner Mary Jane Mitchell, who served for her final time as the Region’s coordinator for the planning and organization of the conference.

Board Member Mark Pearce served as the keynote speaker, providing special insights regarding the enforcement of the National Labor Relations Act amidst changing times. Law School Dean Gary R. Roberts gave a fascinating presentation pertaining to the unique labor law issues involved in collective bargaining between professional sports leagues and player unions.

Following these presentations, participants were invited to their choice of classes. A number of this year’s sessions offered diverse perspectives on the explosive impact that social media has had on employment today. Management and union side representatives described some of their experiences, including sharing videos from YouTube and posts from Facebook and Twitter. Representatives from the NLRB and the EEOC gave their agency’s perspective. Participants agreed that this developing area continues to be chal-

lenging.

Additional topics included remedial strategies for Wage and Hour glitches, accommodating the disabled worker, and arbitration. Separate management side and union side classes were conducted pertaining to access issues. Special guest Bob Chavarry, former Region 13 and Region 25 Regional Director (and current arbitrator and USF Professor), discussed dealing with workplace conflict in his class.

One feature that distinguishes this seminar from others is the cooperation and collaboration of the local and regional labor law community in creating and maintaining it. Many of this year’s class offerings were staffed by one management side representative, one labor side representative and one neutral (an NLRB staff member or other appropriate government representative) which offers seminar participants a more balanced presentation. For example, the classes pertaining to social media/protected concerted activity issues were staffed by Board personnel Regional Director Rik Lineback, Special Ethics Counsel Lori Ketcham, Field Attorney Kim Sorg-Graves, and Field Attorney Derek Johnson; Aaricka Mack-Brown represented the EEOC; management side was represented by Stuart Buttrick of Baker & Daniels, LLP; Travis P. Meek of Hall Render Killian Heath & Lyman, PC; William T. “Tuck” Hopkins of Barnes & Thornburg, LLP; and Jan Michelsen of Ogletree Deakins Nash, Smoak & Stewart, PC; and union side was represented by Barry Macey of Macey, Swanson & Allman; Geoff Lohman and Rick Dennerline, of Fillenwarth, Dennerline, Groth & Towe, LLP; and Anthony Alfano of the United Steelworkers of America.

The Seminar was well received and the Region is looking forward to continuing this long-term educational experience for the labor-management community.

# 31<sup>st</sup> Labor Law Seminar was a Success

*In Fiscal Year 2010, Region 25 recouped more than \$843,000 for employees who had been treated unlawfully.*

## Region 25 Unfair Labor Practice Case Statistics

The following statistics highlight Region 25’s unfair labor practice case processing during Fiscal Year 2010 (October 1, 2009—September 30, 2010):

- 721 unfair labor practices cases were filed.
- 35.4% of the cases reviewed were found to have merit.
- 94.7% of meritorious cases were settled.

Settlements and compliance with Board Orders resulted in:

- \$843,508 in backpay being awarded.
- \$656 in fees, dues, and fines reimbursed.
- 48 discriminatees being offered reinstatement (20 accepting, 28 rejecting).

# The Regional Attorney's Corner

By Dick Simon

## Submissions to the Division of Advice

On occasion a Board Agent will contact the parties involved in a particular case and alert them to the fact that the Region will be submitting that case to the Division of Advice in Washington, D.C. You may ask yourself what is the Division of Advice and why does the Region send a case to Advice rather than decide the case themselves? In this article I will discuss the role of the Division of Advice Regional Advice Branch in the processing of cases and hopefully answer the question regarding why Regional Offices send cases to Advice.

The Division of Advice is the office through which the General Counsel decides significant legal and policy issues in unfair labor practice cases, direct the Regional Offices regarding their processing of such cases, and communicates those decisions to the public. The Division is made up of three branches: the Regional Advice Branch; the Injunction Litigation Branch which coordinates the initiation and litigation of injunction proceedings under Section 10(j) and 10(l) of the Act; and the Legal Research and Policy Planning Branch which has various responsibilities including providing guidance to the Regions regarding Freedom of Information Act issues.

The Regional Advice Branch (Advice) provides legal guidance to Regional offices in novel or complex unfair labor practice cases or other cases warranting attention by the General Counsel. Cases may be submitted at the direction of the General Counsel because they address

certain issues or legal areas, or at the discretion of the Regions when seeking guidance on difficult legal issues. The General Counsel's Office periodically issues instructions to the Regions regarding the type of cases that are to be submitted to Advice. The most recent instructions are contained in Memorandum GC 11-11 which was issued by Acting General Counsel Lafe Solomon on April 12, 2011. This memo is available for your review on the Board's webpage at [www.nlr.gov](http://www.nlr.gov). There are four general categories of cases that must be submitted to Advice by the Regions: cases raising issues where there is no governing precedent or that involve a policy issue of interest to the Acting General Counsel including 1) cases raising issues concerning the appropriate remedies to be sought for violations occurring during an organizing campaign or during first contract bargaining, and 2) cases involving employer rules prohibiting, or discipline of employees for engaging in protected concerted activity using social media such as Facebook or Twitter; cases involving issues where the law is in flux as a result of Board or court decisions including cases which present the issue of whether to defer to an arbitrator's award rather than issue a complaint alleging violations of Section 8(a)(1) and (3); and cases raising difficult legal issues including cases involving the legality of a pending or completed lawsuit or grievance where the Region recommends issuing complaint. The fourth category of cases that must be submitted to Advice include cases that have traditionally been submitted to Advice by the Regions including recommendations to the Injunction

*(story continued on page 7)*



## Improved NLRB Website—More Information & Easier to Use

The National Labor Relations Board launched a new agency website that is more flexible, timely, easy to navigate, and useful to a variety of audiences, from practitioners to first-time visitors. The redesigned and re-imagined site, at [www.nlr.gov](http://www.nlr.gov), builds on an overarching effort toward greater transparency and efficiency at the NLRB, which enforces federal labor laws covering most private sector employment. Among highlights of the new site:

- The Website offers easier access to more case information. All Board decisions, including unpublished decisions, are now posted to the site at the time they are issued, rather than after a one-day holding period. Additional documents from Washington and the regional offices not previously available will be posted to the site over time.
- The website showcases the NxGen case-management system that has been deployed in all regional offices. More information and documents will be accessible by the public through this system.
- For the first time, the Agency's 32 regional offices are prominently highlighted in the new site. An interactive map shows regional boundaries and allows visitors to quickly locate their own regional office. One click away is a web-page for each region that lists top officials and features newsletters, news releases and local cases and decisions.
- A data section tracks NLRB activities over the years by the numbers with eight charts and tables covering a variety of indicators, from charges filed to back pay collected. More charts and tables, with greater interactivity, will be added through the year.

Improved navigation will make it far easier for visitors to find their way and new pages explain the NLRB processes and functions in accessible language. At the same time, all the case-handling manuals, memos and forms found on the old website are still available.

# Are Major Changes to the Election Process Coming?

## The NLRB publishes a Notice of Proposed Rulemaking



On June 22, the Board published in the *Federal Register* a Notice of Proposed Rulemaking, which proposes extensive and major changes to the existing rules and procedures governing representation elections. The stated goals of the proposed rules changes, supported by a Board majority consisting of Chairman Wilma Liebman and Members Craig Becker and Mark Gaston Pearce, are to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing.

The Board set a 60-day period for the filing of public comments on the proposed rules, with comments due by August 22. Reply comments to the initial comments may be filed during an additional 14-day period. The Board expects to receive more than 20,000 comments to the proposed rules. In addition, the Board held an open public meeting to hear statements regarding the proposed rules on July 18 and 19, the first such open meeting on rule proposals since the 1993 public meeting on proposed rules to implement the Supreme Court's decision in the *Beck* case on the right of non-members to refrain from paying full union dues and fees. More than 150 people registered to attend the July 18 and 19 meetings, including 69 speakers from the business, labor, academic, and advocacy communities, who had 5 minutes each to make their presentations to the four current Board Members. In addition, the hearing was streamed on the internet to those who did not make it to the headquarters building.

Highlights of the proposed amendments to the Board's rules are as follows:

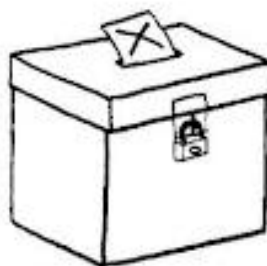
- Election petitions, election notices, voters' lists, and other documents could be filed and delivered electronically.
- Pre-election hearings would be scheduled to begin 7 days after a hearing notice is served (absent special circumstances) and post-election hearings would occur 14 days after the tally of ballots.
- Parties would be required to state their positions and the issues presented no later than the start of the hearing, and any issues not raised would be waived, except for voter-eligibility issues, which could be raised by way of the challenge procedure during the election. Litigation of eligibility issues involving less than 20 percent of the bargaining unit would be deferred until after the election.
- The non-petitioning party would be required to

produce a preliminary voter list, including names, work location, shift, and classification, by the opening of the pre-election hearing.

- The current pre-election Request for Review procedure would be eliminated; all Regional Director rulings would be subject to only a single, post-election request for review.
- The Board would have the discretion to deny review of post-election rulings, leaving those rulings to the Regional Directors, whose decisions would be final in most cases.
- Employers would be required to include employees' telephone numbers and email addresses on *Excelsior* lists.
- *Excelsior* lists would be due 2 working days after the issuance of the Direction of Election, instead of the current 7 days, and would be required to be produced in electronic form, if possible.

Board Member Brian Hayes dissented from the proposed rulemaking.

During the two-day open public meeting, the wide range of speakers (including individuals speaking on their own behalf) expressed their support for, and opposition to, various aspects of the proposed rule changes. The parts of the proposed rules that engendered the most discussion were the provision for the holding of hearings 7 days after the filing of the petition, the requirement that *Excelsior* lists contain employees' email addresses, the "20 percent" standard for litigating unit eligibility issues before the election, the so-called "raise it or waive it" provision concerning issues for the pre-election hearing, and the elimination of the pre-election Request for Review procedure. The Board members engaged in spirited discussions with many of the speakers, who included former Board Members Marshall Babson; Charles Cohen (on behalf of The Coalition for a Democratic Workplace); Peter Kirsanow (on behalf of the National Association of Manufacturers); John Raudabaugh (on behalf of the National Federation of Independent Business; and former Board Member and General Counsel Ronald Meisburg, who appeared on behalf of the United States Chamber of Commerce. Links to various related documents can be found on the Board's website, including the proposed rules changes, Member Hayes' dissent, Chairman Liebman's statement, a fact sheet, and transcripts of the two days of public meetings. These links can be accessed at [www.nlrb.gov](http://www.nlrb.gov) by clicking on "Rules and Regulations" under the "Publications" tab, and then clicking on "Notice of Proposed Rulemaking."



# We Want to Talk to You!

## Interested in having a representative of the Regional Office address your group?

The NLRB is committed to broadening public awareness of its mission and the range of workplace rights that the National Labor Relations Act protects. The staff of Region 25 enjoys an active role in the community and has participated in a number of events to educate the public about the protections of the Act, Board policies and procedures, and how to contact the Regional Office.

In recent months, members of Region 25 staffed booths at two local festivals, the annual Indiana Black Expo Summer Celebration, the largest African-American event in the nation, as well as Fiesta de Indianapolis, Indy's premier Latino celebration. Board Agents have also conducted a number of educational presentations, including at IPS' Back to School Night, a United Steelworkers Educational Conference, and groups of students at the University of Illinois and the I.U. Law School - Bloomington. The Region has also promoted our work at local college career fairs.

Region 25 has recently had a presence at the U. S. Citizen Naturalization ceremonies that take place sev-

eral times a year. Both Regional Director Rik Lineback and Assistant Regional Director Patricia Nachand have made presentations at these events and welcomed each new citizen by providing them a list of contact information for various U. S. Government agencies.

Region 25 provides speakers free of charge. Members of the Regional Office staff are available to make presentations before any group, including classroom groups, legal services clinics or service agency staffs, as well as those members of the public that they serve. Speakers are available to cover a variety of topics, including presentations describing what the Act's protections cover, how the Region investigates unfair labor practice charges, the NLRB's representation case procedures, or any other NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please contact the Assistant to the Regional Director Patricia Nachand at (317) 226-7404 or [patricia.nachand@nlrb.gov](mailto:patricia.nachand@nlrb.gov). You may also request a speaker through a link on the NLRB's Web site: [http://www.nlrb.gov/about\\_us/speakers.aspx](http://www.nlrb.gov/about_us/speakers.aspx)



## Update

# Updates from Last Issue

- Our Spring 2010 newsletter advised readers that the U.S. Supreme Court had granted certiorari in *New Process Steel v. NLRB*, [564 F.3d 840 \(7th Cir. 2009\)](#), cert. granted [130 S.Ct. 488 \(2009\)](#), to consider whether two-member Board decisions were binding. For over two years, the five-member National Labor Relations Board consisted of only two members who issued approximately 600 decisions in which they could reach agreement. In a 5-4 opinion by Justice John Paul Stevens, the Supreme Court ruled that the NLRB did not have the authority to issue binding decisions without maintaining at least a quorum of three members. *New Process Steel, L.P. v. National Labor Relations Board*, [130 S.Ct. 2635](#) (June 17, 2010). Justice Kennedy dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.
- The Region's Winter 2007/Spring 2008 issue highlighted the Region's successes in securing injunctive relief under Section 10(j) of the Act against Spurlino Materials and Frye Electric, Inc. At the time of the newsletter, the underlying Administrative Law Judges decisions in both cases had been appealed to the Board. On August 9, 2010, the Board upheld Judge Sandron's finding that Spurlino Materials had violated Section 8(a)(1), (3), and (5) of the Act by unilaterally changing terms and conditions of employment without bargaining with the newly certified union and had also discriminated against pro-union employees in making job assignments. *Spurlino Materials, Inc.*, [355 NLRB No. 77](#) (August 9, 2010). Subsequently, on June 23, 2011, the Seventh Circuit Court of Appeals rejected an appeal from Spurlino Materials to overturn the Board's decision. *Spurlino Materials, LLC v. NLRB*, [--- F.3d ---, 2011 WL 2473468, 190 L.R.R.M. \(BNA\) 3345, C.A.7, June 23, 2011 \(NO. 10-2875, 10-3049\)](#). Currently, additional proceedings against Spurlino Materials are pending further litigation. Likewise, on April 28, 2008, the Board upheld Judge Buxbaum's finding that Frye Electric had unlawfully interrogated and discharged two union supporters in violation of the Act. *Frye Electric, Inc.*, [352 NLRB No. 53](#) (April 28, 2008). Frye Electric ultimately complied with the Board's Order and the case is now closed.

# Rat Display Lawful

The National Labor Relations Board has ruled that a union practice of displaying a large inflatable rat balloon at a secondary employer's premises to protest the labor practices of its non-union contractor is not coercive, and so does not violate U.S. labor law.

The case, Sheet Metal Workers Local 15 (Brandon Regional Medical Center), was originally decided by the Board in January 2006. In that decision, the Board found that a mock funeral staged by the union in front of an acute care hospital was unlawfully coercive. Given that decision, the Board found it unnecessary to rule on the display of the inflatable rat balloon. The union, Sheet Metal Workers International Association, Local 15, which had been protesting the hospital's use of non-union contractors, appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit. In June 2007, the court reversed the Board's decision, finding that the use of a faux coffin and a costumed Grim Reaper outside the hospital was not "coercive." The case was remanded to the Board for review of other issues raised in the case, including the legality of the balloon display.



In a 3-1 decision, the Board followed the reasoning laid out by the Board in *Carpenters Local 15006 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (2010), which found the display of large stationary banners at secondary employer locations was not unlawful. The National Labor Relations Act prohibits conduct found to "threaten, coerce, or restrain" a secondary employer not directly involved in a primary labor dispute, if the object of that conduct is to cause the secondary to cease doing business with the primary employer. Under existing precedent, picketing that seeks a consumer boycott of a secondary is usually coercive and therefore unlawful, whereas stationary handbilling with that same object is not, and is therefore protected speech. The question before the Board was where the use of a 16-foot-tall inflatable rat balloon falls on that continuum.

The Board majority – Chairman Wilma B. Liebman and Members Craig Becker and Mark Pearce – found that the balloon display did not involve any confrontational conduct, unlike picketing. Nor was the display coercive in other ways, the majority found. It observed that the union agents involved in the display did not move, shout, impede access, or otherwise interfere with the hospital's operations. Rather, the "rat balloon itself was symbolic speech. It certainly drew attention to the Union's grievance and cast aspersions on [the contractor], but we perceive nothing in the location, size or features of the balloon that were likely to frighten those entering the hospital, disturb patients or their families, or otherwise interfere with the business of the hospital."

## Division of Advice (Story continued from page 7)

Litigation Branch concerning seeking or processing injunctions under Section 10(j) or 10(l) of the Act. When the Region submits a case to Advice, the parties are notified of this fact and are informed of the issue(s) involved in the Advice submission.

During the past year Region 25 has submitted several cases to Advice including cases involving employees' posting of comments on Facebook and whether that conduct was protected concerted activity under the Act. For example, in *Rural Metro*, Case 25-CA-31802, the Division of Advice determined that an employee's posting of comments on a U.S. Senator's Facebook wall was not concerted activity and that the Employer's discharge of the employee for engaging in such conduct therefore did not violate the Act. In reaching this conclusion Advice noted that there was no evidence that the Charging Party discussed the Facebook posting with any other employee either before or immediately after the posting nor was there any evidence employee meetings or any attempt to initiate group action regarding the subject matter of

the Facebook posting. Finally, the Charging Party admittedly did not expect the Senator to take any action to affect the Charging Party's employment situation. The Advice memo in this case is available on the Board's website. In the *Teamsters Local 142 (Reith-Riley Construction)* case the Region sought advice on difficult legal issues under Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the Act. The issue considered by Advice was whether the Union, by filing grievances alleging that the Employer violated the parties' collective-bargaining agreement when it subcontracted to another employer the hauling of materials between two Employer-owned facilities, violated the above-noted sections of the Act. Advice concluded there was no merit to the Section 8(b)(4)(ii)(A) and (B) allegations because bargaining unit employees had a colorable claim to the hauling work between the Employer's facilities and the related grievances therefore have a lawful work preservation object. Advice also concluded there was no violation of Section 8(e), in part, because a grievance filing in itself does not constitute a bilateral agreement between the parties that would be necessary to find a violation of Section 8(e).

**Why does the Region submit some cases to the Division of Advice?**



## National Labor Relations Board, Region 25

Room 238 - Minton-Capehart Federal Building  
575 North Pennsylvania Street  
Indianapolis, IN 46204-1577

Phone: (317) 226-7430

Toll-Free Phone: (866) 667-NLRB (6572)

Fax: (317) 226-5103

**Regional Insight is an outreach newsletter published by Region 25 of the National Labor Relations Board to inform the public about workplace rights & issues.**

Fall 2011 Issue Contributors: Joanne Mages, Colleen Maples, Mary Jane Mitchell, Patricia Nachand, Dick Simon, & Kim Sorg Graves.

\*\* Please contact the Region if you wish to be added to or deleted from our newsletter distribution list.

The National Labor Relations Board is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, the primary law governing relations between unions and employers in the private sector. The statute guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activity with or without a union, or to refrain from all such activity. The NLRA extends rights to most private sector employees, to their employers, and to unions/labor organizations. The NLRA protects workers who form, join, support or assist unions, also known as labor organizations, and protects groups of workers (two or more employees) who engage in protected concerted activities without a union concerning their wages or working conditions. The Act protects non-union and union employees against employer and union discrimination based on union-related activities or other protected concerted activities.

Employees, who wish to pursue workplace organization issues or allegations of unfair labor practices may seek assistance from the nearest regional NLRB office. Employers and Unions who wish to pursue allegations of unfair labor practices may do the same. The Agency has 51 regional, sub-regional, or resident offices to serve the public.



## From the Desk of the Regional Director

*Our political differences, no matter how sharply they are debated, are really quite narrow in comparison to the remarkably durable national consensus on our founding convictions. ~John McCain*

*It is understanding that gives us an ability to have peace. When we understand the other fellow's viewpoint and he understands ours, then we can sit down and work out our differences. ~ Harry S. Truman*



**Assistant  
Regional  
Director,  
Patricia  
Nachand**

Since Regional Director Rik Lineback was away on an Italian escapade, he asked me to write the overview article for this issue.

With so many NLRB issues being vigorously debated in Congress and the media, the above quotes are quite pertinent. Of course, two of the most controversial issues are (1) the new requirement that employers (including unions) post the new NLRB notice of employee rights under the National Labor Relations Act and (2) the proposed rules changes designed to expedite representation procedures. If you were unable to attend our June Seminar on Labor-Management Relations, co-sponsored by our office and the Indiana University School of Law - Indianapolis, we hope that you will join us at a future seminar and/or invite us to one of your own events. As explained in this newsletter, the seminar topics (including Facebook and other social media) were quite timely, and our staff will gladly share the Agency's mission, case law, etc. with interested groups at other seminars, job fairs, university forums, etc. This edition also contains our Regional Attorney's insights on what occurs when a Region seeks guidance from the Agency's Division of Advice. Likewise, you will find articles on the Agency's enhanced e-filing program and related technological advances, the legality of displaying a rat balloon at a secondary employer, and a Union's duty of fair representation under Section 8(b)(1)(A). Please enjoy our newsletter and provide feedback. We value your opinions and would like to hear what you would like to see in future newsletters!

Sincerely, *Pat Nachand*