Region 10

PERSPECTIVE

Spring Edition
April 2008
Vol 2

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An Outreach publication issued by Region 10, National Labor Relations Board, Atlanta, Georgia, our Birmingham, Alabama Resident Office and Knoxville, Tennessee Resident Agent.

Marty's Soapbox — RD Martin Arlook

OUT OF THE BOX

The only constant in the administration of the Act, is that its interpretation is always subject to change depending on the philosophies of individual Board members. Historically, however, some interpretations of the Act have long been considered as settled law.

One of those "settled" issues, the thought that a union can only represent a majority of employees in an appropriate unit, is being challenged by a group of seven unions comprising the Change to Win Labor Federation. The group claims the National Labor Relations Act requires employers to bargain collectively with a union representing a MINORITY of its employees if those employees are not represented by a union enjoying majority status. This challenge, while perhaps not as breathtaking or as revolutionary as Galileo's pronouncement that the EARTH revolves around the sun, is surely a close second to labor law practitioners and students. The group recently requested the Board to issue a proposed rule so stating and adopt a petition (and its reasoning) which was filed with the Board last August by at least an equal number of other labor organizations. The arguments in support of both petitions are those of the distinguished retired law professor, Charles J. Morris and are detailed in his 2005 book entitled, "**The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace**." (continued on page 2)

Out of the Box

(continued from page 1)

The rule, as proposed, would read:

> "Pursuant to Section 7, 8(a)(1), and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section 9(a) majority/exclusive collective-bargaining representative in an appropriate bargaining unit, the employer, upon request, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for any other employees."

Whether this view for expanded representational rights will be ever be adopted by the Board is something no one can predict at this point. However, it may be an issue intensely considered and debated over the coming months or years.

Introducing our Compliance Officer

Each region of the National Labor Relations Board has a regional compliance officer, responsible for insuring adherence to all settlements, as well as compliance with all Board and Court Orders. Compliance is a critical function - it is in essence the delivery of our "product." Regardless of whether that product is a settlement reached after a few weeks of investigating, or a 10-year-old case upon which the Supreme Court just ruled, compliance is responsible for insuring that those who are the victims of unfair labor practices receive the benefits of the settlement or Board or Court Order.

Region 10's compliance officer, **Morris Newman**, has been a member of our Birmingham Resident office since October 1979, serving as field examiner prior to his promotion to compliance officer in August 2005. In performing his duties, CO Newman utilizes all the skills of investigating agents and then some. While compliance sounds simple – just do what the order or the settlement says, sometimes the job requires as much art as science. As often as not CO Newman is confronted with highly complex situations that require additional investigation and detailed negotiations with the parties to see that both the letter, and the spirit, of the remedial functions of the Act are carried out.

During Fiscal Year 2007, 46 Region 10 discriminatees were paid more than $435,000 in backpay. So far this year, the Region has obtained more than $3,000,000 in backpay and interest for more than 200 discriminatees.

If you have any questions about our compliance processes, Morris can be reached at (205) 933-3013 or by e-mail at morris.newman@nlrb.gov.

Recent Board Decisions

In ***St. George Warehouse,*** 351 NLRB No. 42 (9/30/2007) the issue involved a question as to whether a discriminatee had failed to make a reasonable search for work following an unlawful discharge. Historically, the contention that a discriminatee failed to make a reasonable search for work consisted generally of two elements: (1) there were substantially equivalent jobs within the relevant geographic area and (2) the discriminatee unreasonably failed to apply for those jobs. The burden of proof for both elements was placed on respondent. In this case, a Board majority determined that although the burden remained with respondent with respect to element (1) once respondent had met its burden with respect to element (1), because they were more likely to be the repository of information with respect to element (2), the discriminatee and the General Counsel would now have the burden of proving the discriminatee had made a reasonable effort to obtain employment to mitigate his losses caused by the unlawful discrimination. The case was remanded for further hearing on whether the discriminatee in the case had made such reasonable efforts.

In ***Allied Mechanical Services, Inc***., 351 NLRB No. 5 (9/28/2007) the Board, in light of the Supreme Court's decision in NLRB vs. Financial Institution Employees Local 1182 (Seattle-First National Bank), 475 U.S. 192 (1986), determined that the Board had no authority to discontinue an employer's obligation to recognize a union as a result of its affiliating with another union unless the Board determined that a question concerning representation existed. In light of the Supreme Court's decision and the Board's decision in Raymond F. Kravis Center for the Performing Arts, 351 NLRB No. 19, holding that an employer's obligation to bargain continues regardless of whether the merger or affiliation was conducted in a manner that complied with due process requirements as set forth in previous decisions, the Board held in this case that a lack of a membership vote on the merger did not relieve the employer of its obligation to recognize and bargain with the union.

In ***The Guard Publishing Company d/b/a The Register Guard,*** 351 NLRB No. 70 (12/6/2007) a Board majority, a with strong dissent, held that employees have no statutory right to use an employer's e-mail system for Section 7 purposes. The majority also modified the Board's approach in discriminatory enforcement cases to clarify that discrimination under the Act means drawing a distinction along Section 7 lines. With respect to this latter issue, the evidence showed employees had been allowed to use the e-mail system to send personal messages. However, there was no evidence the employer had allowed employees or anyone else to use e-mail to solicit support for or participation in any cause or organization other than the United Way, for which the employer conducted a periodic charitable campaign. The Board majority, reversing precedent, held that unlawful discrimination exists only when there is disparate treatment of activities or communications of similar character based on union or other Section 7-protected status. Examples of unlawful discrimination included an employer's allowing use of e-mail by employees to solicit for one union but not for another, or permitting solicitation by antiunion employees but not by prounion employees. The Board majority held that nothing in the Act prohibits an employer from drawing a distinction between charitable and non-charitable solicitations, solicitations of a personal nature, solicitations for the commercial sale of a product, between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use.

Information Requests

Don't drop the ball!

Under the National Labor Relations Act, parties are obligated upon request to furnish information which is "potentially relevant" in a timely manner. Information relating to the wages, hours and working conditions of unit employees is presumptively relevant. Information provided need not necessarily be in the precise form requested. Parties may offer to make requested information available for inspection and/or copying under reasonable conditions. If a party demonstrates its willingness to provide the requested information in a reasonable manner, and the requesting party fails to avail itself of the opportunity, there will be no unfair labor practice.

In dealing with relevant, but purportedly confidential information, the Board will balance a party's need for the information against any "legitimate and substantial" confidentiality interests established by the party to whom the request was made. The appropriate accommodation must be established on a case-by-case basis, and the party asserting confidentiality has the burden of proof. While legitimate and substantial confidentiality and privacy claims will be upheld, blanket claims of confidentiality will not.

When making an information request, the requesting party should describe with specificity the information sought and set forth its relevance. Written requests establish a paper trail showing the request was in fact made and when. If no response is received, the requesting party should follow up and keep track of its efforts to obtain the information.

If you receive an information request, ***don't ignore it.*** If you have doubts as to whether you have an obligation to furnish information, seek legal counsel promptly. Generally, if the information sought is clearly relevant, Board law requires that it be furnished or made available with reasonable speed. If the information is unavailable or does not exist, or there are doubts as to whether it is relevant, privileged or confidential, timely communication with the requesting party may result in a modification of the information request.

Board's Deferral Policy — Or Why Aren't You Deciding My Case Now?

In conformance with Board policy, absent special circumstances indicating the grievance procedure is unworkable or inappropriate, the region must defer certain cases to parties' grievance/arbitration procedures rather than make an immediate decision on the merits of the cases. The most common basis for deferral is the Board's policy set forth in *Collyer Insulated Wire,* 192 NLRB 837 (1971). Deferral is appropriate if the following conditions are met: the charge has arguable merit, the conduct at issue in the charge is cognizable under the grievance procedure, the grievance procedure provides for binding arbitration, and the charged party waives timeliness defenses to the grievance. Cases most frequently deferred involve allegations that employees have been discriminated against in violation of Section 8(a)(1) and (3) of the Act, and cases raising allegations that an Employer has unilaterally changed wages, hours and working conditions without notifying and bargaining with the incumbent Union. In all such deferral cases, the region will contact the parties every 90 days to determine if the case should remain in deferral status. If a charged party prevents or impedes the resolution of the underlying grievance, the regional director will revoke the deferral and resume the processing of the charge. If the charging party fails to file or process a grievance or declines to have the grievance arbitrated if no resolution is reached, the regional director will dismiss the charge. Upon receipt of an arbitrator's decision, the regional director may review the decision to determine whether it meets the standards set forth in *Spielberg Mfg. Co*., 112 NLRB 1080 (1955) and *Olin Corp*., 268 NLRB 573 (1984). Thus, the arbitration process must have been fair and regular, the unfair labor practice allegations of the charge must have considered by the arbitrator, and the award cannot be clearly repugnant to the Act.

Representation Case Processing

What is a Petition?

A petition is the document an employee, union or an employer files with the NLRB to begin the process necessary to decide if a group of employees will be represented by a specific union. The Act provides for four types of petitions seeking Board-conducted elections:

(1) RC -- a petition seeking certification;
(2) RM -- an employer petition seeking resolution of a question concerning representation;
(3) RD -- a petition seeking decertification of the presently recognized bargaining agent, and
(4) UD -- petitions to remove the authority of a union to negotiate an agreement requiring periodic payments by employees to the union in order to retain their jobs.

The two remaining types of petitions, UC and AC do not require an election:

(5) UC -- is a petition for clarification of a bargaining unit, and
(6) AC -- is a petition to amend certification to reflect changed circumstances, such as changes in the name of the labor organization or in the site or location of the employer.

How to File a Representation Petition:

Filing NLRB representation petitions can be simple and convenient. An NLRB information officer can assist you in completing a petition form. Our contact information is on page 10, including the NLRB website which contains forms and detailed instructions. If you attempt to complete the petition yourself, keep in mind these helpful tips:

1. If you have any questions as to which form to use or how to complete it, please contact one of our information officers who can assist you.

2. Know the job titles used by the employer and the employee shift schedules.

3. Provide the region with the required showing of interest in its original form along with an alphabetized list of those who signed the supporting authorization cards, petitions, statements, or letters. Faxed or emailed showing of interest is <u>not</u> permitted.

4. Hearings are typically scheduled 10 days from date of filing so be prepared to proceed. Elections are typically held within 42 days of the filing.

5. If a hearing is necessary, prepare for a hearing by knowing: (1) the employer's operations; (2) the community of interests of various employee job categories; and (3) who the "supervisors" are. If issues are in dispute, ensure you bring witnesses to the hearing to provide testimony in support of your position. Otherwise, the only evidence in the record will be that of the other party. Subpoenas should generally be served at least 5 days prior to the hearing.

During the most recent one year period, the region conducted 40 elections. Of those, the petitioning union was certified as the bargaining representative in 21 of the cases. The median time for the conducting of the election from the time of filing was 41 days.

Filing Charges or Petitions

Unfair labor practice and petition forms are available for download from the NLRB Website at www.nlrb.gov. Forms may also be obtained from any NLRB regional office. Pre-filing assistance is available daily from 8:00 am to 4:30 pm in Atlanta and Birmingham in person or by phone. (See page 10 for contact information.) Our information officers can provide information as to which forms to use, how they should be completed, and generally discuss unfair labor practice and representation issues.

TIPS ON FILING UNFAIR LABOR PRACTICE CHARGES

1. USE THE PROPER CHARGE FORM.

If you are not sure of the proper form or how to complete it, please contact one of our information officers.

2. **INCLUDE THE FOLLOWING INFORMATION ON THE CHARGE FORM:**

Full name, address, and telephone/fax numbers of the person or party filing the charge and the person or party against whom the charge is being filed.

A clear and concise statement of the claimed unfair labor practice (ULP). The charge need only provide a brief statement setting forth the alleged unlawful conduct i.e. discharge, failure to process a grievance, unlawful picketing, bad faith bargaining, etc.; the date of the conduct and the names of those persons affected. Do NOT include a long narrative of what occurred or any specific facts that support the charge. Do NOT include the names of potential witnesses who can support the charge allegations. The Board agent assigned to investigate the charge will obtain the specific facts and names of potential witnesses during the investigation of the charge.

3. **DO NOT ATTACH ANY ADDITIONAL DOCUMENTS TO THE CHARGE FORM.**

Charges filed with the regional office are public records. If a charge contains attachments, those documents also become public records and must be served on the charged party.

4. **FILE ONE COPY OF THE CHARGE BY MAIL OR OFFICE VISIT.**

Only one original of a charge need be filed. However, if you submit a charge by facsimile , mail the original charge to the office.

5. IF YOU ARE NEAR THE SIX-MONTH DEADLINE FOR THE FILING OF A CHARGE, SERVE THE CHARGE YOURSELF AFTER FILING IT WITH THE REGIONAL OR RESIDENT OFFICE.

Section 10(b) of the National Labor Relations Act prohibits issuance of a complaint based on any unfair labor practice which occurs more than 6 months prior to the filing and service of a charge. Upon receipt and after docketing, agency regional offices serve charges as a courtesy. However, the charging party is responsible for ensuring that the charge is timely served upon the party being charged. Accordingly, if the 6 month period is close to expiring, charging parties should personally serve copies of charges on the charged party. Before personally serving the charge, obtain a docketed copy of the charge from the regional office or call the office and obtain the case number and date filed and insert that information on the charge before you serve the charge on the charged party.

Birmingham Bits

C. Douglas Marshall Resident Officer

Where Are They Now??

After the publication of the inaugural issue of The Region 10 Perspective, I received several comments from readers who enjoyed reflecting on the "old days." When I mentioned the comments to our ARD Chip Harrell, he opined that as the longest continuously serving member of the Region 10 staff [i.e. old], it was logical that I should undertake this as a regular feature of The Perspective. The only caveat was that I should try to avoid this becoming an obituary page. As I let my mind take me throughout the old 730 Peachtree Street NE offices [next door to the old Howell House and DeeDee's fine liquid refreshments], I smiled and grew wistful — determined to track down the old timers. [Diane, since we are still working, I do not consider either of us an old timer]. Before I start filling in some of the blanks, I want to invite those of you that wonder what happened to "old so and so," to email me at douglas.marshall@nlrb.gov or write to me at the Birmingham address on the contact page herein. If you will list the Region 10 alum (either Atlanta or Birmingham) about whom you are interested, I'll try to locate them and report in the next issue what they are doing.

Alabama has seen an increase in charges the past 2 years stemming from organizing campaigns among suppliers to automotive companies.

Without any particular order, here are some to get us started: Tom Palmer, former FX, compliance officer and supervisor, is enjoying his retirement with his wife, Mary, playing with their grandchildren and watching sports. Long time litigation specialist and later supervisory attorney, Thaddeus "Sobie" Sobieski, recently stopped practicing with the youngster, Steve Liebel. Any time Tom Palmer could not remember a piece of baseball trivia, I could always go to Sobie for the answer. Sobie still keeps in touch with many of the former Region 10 folks as well as the Atlanta labor relations community in general. Sobie and John B. Luke, FX, election desk coordinator, and supervisor, both also retired as full bird colonels in the reserves (as did our current RD, Marty Arlook). John Luke lives at home with his wife of many years, "Miss Kitty," and spends time visiting with family and friends in the area. When I was speaking with John on March 6th for this article, I learned that former supervisory attorney Silvio Mascotti passed away that morning at age 91. Paul Styles, Jr., field attorney, left well before retirement age, and now is a contracted dance companion on various cruise lines. [I did not make that up — and those of you that knew Paul would not be surprised]. He has danced his way to many foreign ports and logged many nautical miles. Former field attorney and attorney supervisor Paul Tamaroff and his wife still are running their business, including tracking down missing witnesses.

If your requests for updates on alumni exceed the space available, I'll be back in the next issue with updates on more of the Region 10 alumni. If you are silent, I'll tell you about the ones that I locate next.

NLRA BASICS PROGRAM — COMING SOON

Regional Director Arlook has been asked to be a co-chair of a NLRA Basics Program sponsored by the Regional Programs Committee of the ABA Labor and Employment section. Planning for the program is currently underway. If you need additional information immediately, please contact Meaghan Daly at dalym@staff.abanet.org.

Resident Office USPS Outreach Initiative

With the agreement of the USPS, and as part of the Agency's Outreach efforts, field attorney John Doyle and resident officer Doug Marshall spoke to approximately 40 postal managers in four separate workshop sessions in mid-November regarding employee Weingarten rights and the obligation of the USPS to furnish requested relevant information on a timely basis. It is anticipated that these meetings will reduce the number of refusal to furnish information cases and Weingarten charges being filed against USPS facilities in Alabama.

It was emphasized during the 90 minute sessions that information requests could not be ignored and that managers needed to promptly advise the requestor of any delays or problems which might be associated with the timely production of requested documents. Managers and supervisors were reminded of standing instructions from John Oldenberg, their labor law counsel, that the only time they were to deny a request was only after specific authorization to do so from Oldenberg's office. It was also suggested that if managers and supervisors were going to be absent for more than a few days, that they advise the local union officials of the time period and who would be acting as their alternate so that information requests could be timely processed in their absence.

With respect to employee Weingarten rights, FA Doyle and RO Marshall explained the rights and roles of the participants. In particular they noted that where an employee is called into an investigatory meeting and the employee reasonably believes that discipline may result from the meeting, upon request the employee is entitled to effective union representation during the meeting. They covered examples of phrasing of employee requests or statements that had been held to trigger Weingarten rights; the right to be advised generally of the subject matter of the investigation; the selection process (and options) when a particular steward is requested but not promptly available; the right to consult with the union representative; the right of the union representative in the meeting to participate and not be forced to remain silent; and the options available to the employer and the employee when a request for representation was made.

Subsequent to these meetings, the USPS and the Agency entered into a Joint Settlement Stipulation to address Weingarten issues. This agreement, in part, established a trial program for certain pending charges providing that where discipline resulted from a meeting in which an employee was not afforded full Weingarten rights, the union and employee may request a new meeting, and information improperly obtained during the first meeting cannot be used against the employee in determining whether the original discipline should remain, or be eliminated or altered. Procedures were also established for the processing of any future charges during the trial period. Following completion of the trial period, upon agreement of the USPS and the Agency, the parties agreed to seek the D.C. Circuit to enter a consent order essentially incorporating the provisions of the trial program permanently.

The Bully Pulpit

by Mary Bulls, Regional Attorney

What's going on with the Board these days?

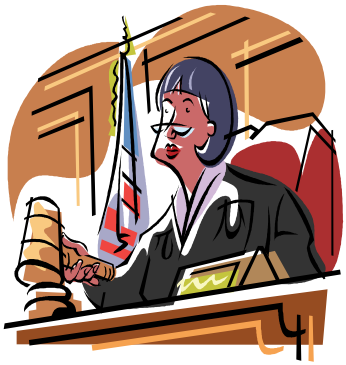
On December 16, 2007, Board Chairman Robert J. Battista's five-year term expired. Faced with the prospect of a two-member Board upon expiration of the recess appointments of Members Dennis Walsh and Peter Kirsanow effective December 28, 2007, Members Wilma Liebman, Peter C. Schaumber, Kirsanow and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. In accordance with the provisions of Section 3(b) of the Act, this two-member quorum has the authority to issue decisions and orders in unfair labor practice and representation cases.

The Board also announced on December 28 that it was delegating all court authority, including authority to authorize Section 10(j) proceedings, to the General Counsel.

On January 25, 2008, President Bush announced his intention to nominate former Chairman Battista to be a member and designate Chair of the Board, upon confirmation, for the remainder of a five-year term expiring on December 16, 2009. He also stated his intention to nominate Gerard Morales of Arizona to be a Board Member for a five-year term expiring December 16, 2012, and Dennis Walsh of Maryland to be a Member for the remainder of a five-year term expiring August 27, 2008, and an additional five-year term expiring August 27, 2013.

Given the current political climate, it is anyone's guess as to how long the Board will have to operate in uncertain legal waters. It is also unclear what, if any, legal challenges may be made with respect to Board decisions issued while the Board is not at full strength.

All first contract bargaining allegations determined to have merit are subject to extra consideration for 10(j) or special remedies.



During Fiscal Year 2007, the Region received 684 unfair labor practice cases. The merit factor for the year was 36.9%. The Region's settlement rate was 99.2%. Our percentage of overage cases was just 1.6%.

Contact Information

Region 10, Atlanta Regional Office
Suite 1000, The Harris Tower
233 Peachtree St, NE
Atlanta, Georgia 30303
Phone: (404) 331-2896
Toll-Free Phone: (866) 667-NLRB (6572)
Fax: (404) 331-2858 (50 page limit on faxes)
Web: www.nlrb.gov
For the Hearing Impaired: (866) 315-6572

Birmingham Resident Office
Ridge Park Place, Suite 3400
1130 South 22nd Street
Birmingham, Alabama 35205
Phone: (205) 933-2018
Fax: (205) 933-3017 (50 page limit on faxes)

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

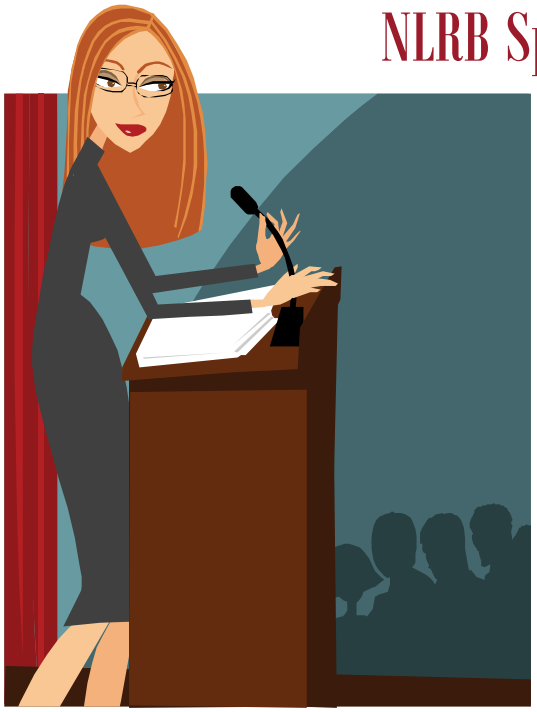
If you would like to receive future copies of the newsletter by email, please notify us at NLRBRegion10@nlrb.gov.

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 seeking to modify 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.

We're on the Web!
www.nlrb.gov

NLRB Speakers are Available for Your Group



Members of the Region's staff are available to make presentations before any employer or union group, classroom group, legal services clinic or service agency, or labor relations association, to describe the Act's protections, how the Region investigates and resolves unfair labor practice charges, processes representation petitions, or any NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please do not hesitate to telephone Regional Outreach Coordinator Wanda Pate Jones (404) 331-2894.

April 2008 Issue Contributors:

Mary Bulls, Chip Harrell, Diane Williams, Lisa Henderson, Wanda Pate Jones, Jason Hardman, Doug Marshall, Morris Newman and Martin Arlook.