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REGION 10 PERSPECTIVE

An Outreach publication issued by Region 10, National Labor Relations Board, Atlanta, Georgia, our Birmingham, Alabama resident office and Knoxville, Tennessee resident agent.



At Toll-Free: (866) 667-6572

WELCOME

From the Desk of
Regional Director Martin M. Arlook



Welcome to the inaugural issue of the Region 10 Perspective. This publication is an outgrowth of the NLRB's nation-wide efforts to inform the public, employees, employers and labor organizations about rights, responsibilities and obligations under the National Labor Relations Act. It is our hope that you find this issue and forthcoming issues informative and interesting. Our intended audience is meant to range from members of the bar who are experienced in dealing with the NLRB to members of the general public who may not be aware of the NLRB and the Act we enforce. Consequently, the content of the Perspective will range from providing very basic information to discussions about noteworthy cases and Agency-wide initiatives. Along the way, we hope to impart some insight into the inner workings of Region 10.

Region 10 is responsible for the enforcement of the National Labor Relations Act (Act) in most of the State of Georgia, 41 counties in the central and northern portions of Alabama and 30 counties in the eastern portion of Tennessee. The Region's workforce is made up of twenty professionals, 13 of whom work out of the Atlanta, Georgia regional office, 6 who work out of the Birmingham, Alabama resident office, and 1 who is a resident agent residing in Knoxville, Tennessee. In addition, we have eleven support staff personnel, nine of whom work in the Atlanta office and two who work in the Birmingham office. Our supervisory and managerial ranks include a regional director, regional attorney, assistant to the regional director, deputy regional attorney and supervisory examiner in the Atlanta office and a resident officer in Birmingham.

Know Your Workplace Rights

The National Labor Relations Act (NLRA) protects the rights of both unionized and non-unionized employees. The NLRA protects employee rights to join and support unions where they work, to participate in protected concerted activities with other employees, and to refrain from participating in such activities. Under the NLRA, two or more employees have the right to act together to raise workplace issues with their employer or to press for changes in wages or other working conditions. Such employee actions are known as protected concerted activities.

The following are examples of **unlawful acts by an employer under the NLRA**:

- ⇒ Threatening, disciplining, terminating, or otherwise retaliating against an employee for having engaged in union or protected concerted activities.
- ⇒ Prohibiting employees from discussing or sharing information about their wages, hours of work, or working conditions.
- ⇒ Prohibiting employees from talking about workplace issues on their own time.

The NLRA prohibits not only certain employer activities but many types of union conduct as well.

Union violations of the NLRA include, among other things, the following:

- ⇒ Statements to employees who oppose the union that the employees will lose their jobs if the union wins a majority in the plant.
- ⇒ Fining employees for crossing a picket line after they resigned from the union.
- ⇒ Refusing to process a grievance in retaliation for an employee's criticism of union officers.
- ⇒ Rejecting an application for referral to a job based on the applicant's race or union activities.



The National Labor Relations Act (NLRA) protects the rights of both unionized and non-unionized employees.

Careful!

There are limits to the Act's protections

The National Labor Relations Act protects non-supervisory employees who act together to raise workplace issues. Employees are not protected by the Act when they make complaints or demands for themselves alone.

The Act does not protect employees who engage in misconduct, even when the misconduct is intended to support concerted employee action. Threats, violence, or occupation of the employer's premises are among actions generally considered to be misconduct warranting discipline.

The Act provides for backpay to compensate employees for losses resulting from unlawful conduct, but the Act does not provide for fines, punitive damages, or losses not directly resulting from lost employment.

The Act does not require an employer to grant employee demands.

Recent Case Developments

In *Jones Plastic & Engineering*, 351 NLRB No. 11, a Board majority held that the Employer's issuance of an "at-will" disclaimer informing employees hired as strike replacements that their employment was for "no definite period" and that they could be terminated for "any reason" and "at any time, with or without cause" did not detract from the Employer's showing that the employees were permanent replacements under the Act. The Board overruled *Target Rock*, 324 NLRB 373 to the extent it was inconsistent with the Board's holding.

In *Toering Electric Co*, 351 NLRB No. 18, a "salting case", a Board majority ruled that an applicant for employment must be genuinely interested in seeking to establish an employment relationship with an employer in order to qualify as a Section 2(3) employee and thus be protected from hiring discrimination based on union affiliation or activity.

In *Dana Corp.*, 351 NLRB No. 28, a Board majority modified its recognition-bar doctrine and held that an employer's voluntary recognition of a labor organization does not bar a decertification or rival union petition that is filed within 45 days of the notice of recognition.

In *Provena Hospitals, d/b/a Provena St. Joseph Medical Center*, 350 NLRB No. 64, a Board majority found that the employer had violated Section 8(a)(5) of the Act by unilaterally implementing changes in the terms of employment of bargaining unit members. In so doing, the majority rejected the employer's contention the Board should abandon its long-standing "clear and unmistakable" standard in favor of a "contract coverage" analysis adopted in recent years by the DC and 7th Circuits.

In *Shaw's Supermarkets, Inc.*, 350 NLRB No. 55, a Board majority held that an employer with knowledge of actual loss of a union's majority status did not violate the Act by withdrawing recognition from the labor organization representing its employees during the term of the contract where the withdrawal occurred more than 3 years after the contract went into effect.

Filing Charges or Petitions

Unfair labor practice and petition forms are available for download from the NLRB Website at www.nlr.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 7 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.



Bargaining over Changes

Under the Act, an Employer has an obligation, absent a clear and unmistakable waiver to the contrary, to give the union representing its employees advance notice of a proposed change in a mandatory subject of bargaining, and, upon request, to negotiate with the union about the matter until either an agreement is reached or the parties reach a good faith impasse on the issue. Absent either an agreement or impasse, an employer cannot make a change in a mandatory subject without risking a determination that it has violated Section 8(a)(5) of the Act.

Upon notification of a proposed change in wages, hours and/or working conditions, a Union must request bargaining about the matter. *Simply filing a grievance or protesting the matter may not be sufficient to trigger a bargaining obligation.* A written request for bargaining with some clear demonstration of receipt by the Employer is the best method of ensuring the Employer has received a bargaining demand.

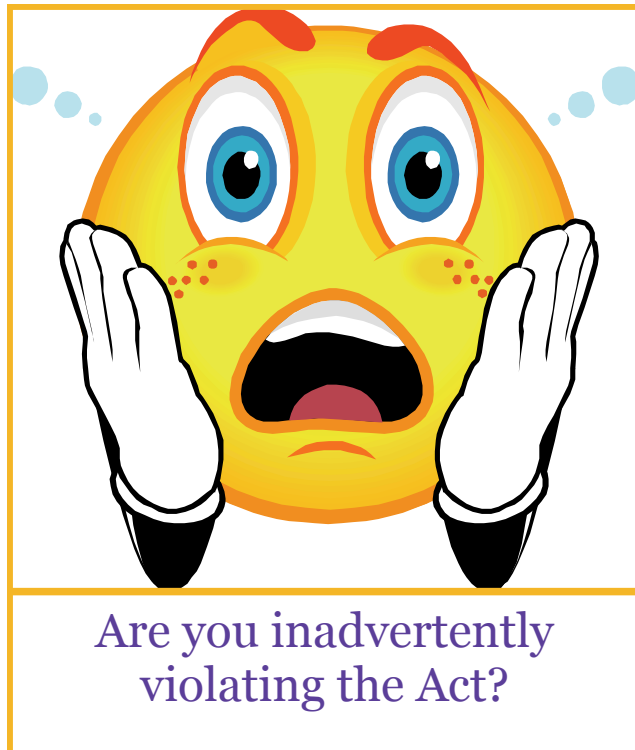
General Board policy is that upon the filing of a charge alleging a unilateral change, if there is

arguable merit to the charge and if a timely grievance has been filed or if the Employer agrees to waive the time limits for the filing of a grievance, the charge is generally deferred to the parties' grievance procedure. Charges may not be deferred, however, if the changes are of such a nature as to constitute a rejection of collective bargaining principles, if the Employer refuses to waive time limits for a grievance or raises other procedural issues which would preclude an arbitrator from hearing the grievance on its merits.

Following receipt of an Arbitrator's decision, the region, absent withdrawal of the charge, will review the decision to ensure it comports with the policies of the Act. It should be noted, however, that the arbitrator's decision need not be in strict accord with what the Board may have decided if it had decided the issue de novo. Further discussion of the Board's standards for deferral will appear in future articles.

When in doubt - Ask!

A common error by labor organizations after learning of a proposed change in operations or terms and conditions of employment is: a failure to request bargaining.



Don't tell me I can't talk about my wages!

Employer rules which have a tendency to chill employees in the exercise of their rights under Section 7 violate the Act. [Lafayette Park, 326 NLRB 824 \(1998\)](#). In this regard, the Board

has held, among other things, that employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid.

Such rules violate the Act even if they are not enforced. See: [Jupiter Medical Center Pavilion, 346 NLRB No. 61 \(2006\)](#)

OTHER RULES TO AVOID:

Prohibiting employees from discussing their hours, or working conditions.

Prohibiting solicitation on non-work time in non-work areas .

Birmingham Bits



C. Douglas Marshall
Resident Officer
Go UT!

The Birmingham, Alabama Resident Office staff welcomes you to the ‘western front’ of Region 10. This office serves the counties in the northern two-thirds of Alabama. My staff consists of three examiners [one of whom is the Regions’ Compliance Officer] with 28, 28 and 25 years here; three attorneys with 13, 12 and 10 years on staff; a Case Processing Assistant with 7 and a recent MBA graduate, with 4, currently transitioning to an examiner position.

From the yellowed papers in my desk drawers, I was able to piece together a limited history of the office. In 1960, Carlton Bryant, aka The Silver Fox, became the first Resident Officer in the Old Comer Building (later known as the City Federal Building) and remained so until his retirement. Don Howard was the second Resident Officer from the early 70’s until his tragic death December 19, 1976 in a motorcycle accident. In February of 1977, I was appointed the third Resident Officer.

In addition to assisting you with your case handling needs, my staff and I are available to make presentations to unions, employer or civic organizations, educational institutions and others about the NLRB, its purpose and protections, representation and unfair labor practice cases, and related NLRB topics. (See page 7 for contact information.)

Representation elections held by the Agency are conducted in a median time of 42 days or less.

Introducing our Resident Agent

Our Knoxville, Tennessee, Resident Agent, **Alex Edinger** is responsible for handling most of the Region’s cases within the corridor between Sweetwater and Kingsport, Tennessee, excluding the city of Bristol, TN, (which is serviced by the Winston-Salem Board office). Alex has been with the Agency since 1992. Prior to his appointment as Resident Agent in 1999, Alex worked in the Agency’s Philadelphia Regional Office and Nashville Resident Office.

Agency regulations preclude Alex from interviewing witnesses or conducting face to face meetings at his home. Consequently, Alex conducts witness interviews in employer facilities, union halls, law offices, public libraries or other suitable public meeting locations.

Thanks to the internet and the telephone, Alex is able to conduct business, access all case materials and conduct research without the burden of maintaining a significant law library in his home. For those occasions when he genuinely needs a real library, he has the good fortune of living just minutes away from the University of Tennessee Law Library.



DRA
Gaye Nell Hymon

Welcome Our New Deputy Regional Attorney

Region 10 is proud to introduce you to **Gaye Nell Hymon**, our newest manager. Gaye Nell joined the Agency as a field attorney in September 1976 after receiving a B.S. degree in Sociology and a J.D. degree from Southern University in Baton Rouge, La. in 1973, and 1976, respectively. She was promoted to Supervisory Attorney in the Atlanta office in 1997 and was appointed as Deputy Regional Attorney on September 17, 2007.

Although proud of her tenure and accomplishments in Region 10, Gaye Nell feels her greatest accomplishment and source of pride is her role as a mother of sons Juano, age 26 and Jared, age 23. Juano is in his third year at Harvard Law School and Jared, is a mortgage professional at a mortgage firm in Atlanta.

Now that she finally has some time for herself, she enjoys reading, has a real passion for good movies and is a lover of all things on the food network.

The Bully Pulpit

by Mary Bulls, Regional Attorney

FIRST CONTRACT BARGAINING CASES AND SPECIAL REMEDIES



General Counsel Ronald Meisburg has given priority to first contract bargaining cases during his term and in Memoranda GC 06-05 and 07-08, set forth instructions to the regional offices for the processing of these cases.

In GC 06-05, GC Meisburg stated that initial contract bargaining constitutes a critical stage in the negotiation process because it forms the foundation for the parties' future labor-management relationship. In order to protect new bargaining relationships, GC Meisburg requested that regional offices focus particular attention on remedies for violations that occur during the period after certification when parties are or should be bargaining for an initial collective bargaining agreement. He further requested that the regional offices should consider two types of potential relief in cases involving initial contract bargaining violations: (1) Section 10(j) relief and (2) special remedies as part of the Board's order.

In GC 07-08, GC Meisburg stated the need for additional remedies in initial contract bargaining cases and identified certain high impact violations which might occur during this critical time, including:

Outright refusal to bargain or overall bad-faith bargaining that may be tantamount to a repudiation of the bargaining relationship.

Refusals to meet at reasonable times, the use of bargaining agents without adequate bargaining authority, refusal to provide information that is critical for negotiations to proceed, or other tactics that prolong bargaining.

Unilateral changes that inject extraneous issues into the negotiations.

Unlawful discharges of union supporters.

Pursuant to GC 07-08, regions are now considering the following additional remedies in appropriate cases:

Requiring bargaining on a prescribed or compressed schedule.

Periodic reports on bargaining status

A minimum six-month extension of the certification year

Section 10(j) allows the Region to request an injunction in District Court pending the conclusion of the Board proceedings.



10(J) Injunction Granted in Mesker Door

On April 10, 2007, United States District Judge Inge P. Johnson issued a Section 10(j) injunction in Arlook v. Mesker Door, Inc., ordering Mesker Door to resume negotiations with the Steelworkers Union pending further litigation. In this case, workers at the Huntsville factory voted the Union in on March 10, 2005. The Company commenced bargaining with the Union, but withdrew recognition on May 8, 2006. The Region determined the withdrawal of recognition was improper and that injunctive relief was necessary to prevent irreparable harm to the union's status as bargaining representative while the case was being litigated.

The Judge agreed, and Ordered the Company to resume bargaining with the Union. The Company complied with the Order and has since signed a first contract with the Union.

Contact Information

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 Fax: (404) 331-2858 (50 page limit on faxes)
 Web: www.nlr.gov
 For the Hearing Impaired: (866) 315-6572

Birmingham Resident Office

Ridge Park Place, Suite 3400
 1130 South 22nd Street
 Birmingham, Alabama 35205
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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.

*** 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.



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.

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