Region 29's Quarterly Newsletter

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NLRB CONNECTIONS

INSIDE THIS ISSUE:

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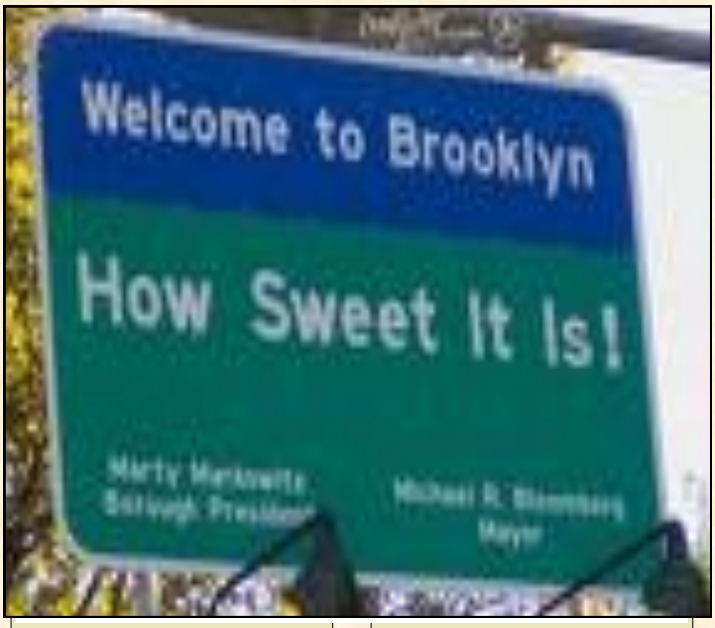
KEEP THOSE Ws COMING

We are pleased to report that the Region has had a good deal of success in those cases it recently litigated. In *Sunrise Plus*, an Administrative Law Judge found that the Employer unlawfully discharged 12 employees because of their support for Industrial Workers of the World (IWW), and subsequently refused to bargain with the IWW. The Board subsequently adopted the ALJ's recommendations and ordered the Employer to reinstate the terminated employees, make them whole and bargain with the Union.

In *Dickens*, an ALJ found that the Employer unlawfully ordered employees not to discuss their wages with each other and terminated an employee for speaking on behalf of his fellow employees regarding bonuses.

In *Dedicated Services*, an ALJ found that the Employer, which provides Access-a-Ride services for elderly and disabled individuals, unlawfully directed employees to join Local 713, IUJAT and recognized Local 713 even though the Employer had not commenced operations at the time such recognition was extended. After the Region sought an injunction in the Eastern District Court, the Employer and Region entered into a Consent Agreement in which the Employer agreed to withdraw recognition of Local 713.



News on the Compliance Front

Our compliance department is responsible for ensuring that employers and unions that violate the Act comply with board orders, court judgments or settlements designed to remedy these violations. In several cases, the Region is in the process of collecting substantial sums of backpay and disbursing those monies to discriminatees. Four employers, Airway Maintenance, Kolin Plumbing, Kathleen's Bakeshop and Ramada Plaza, have entered into backpay stipulations providing that they will make those affected by their unfair labor practices whole through installment payments. Collectively, these payments will total approximately $500,000.

Regional Elder Statesmen Bid Adieu

For those of you who have done business with us going back to the days at 16 Court Street, we want you to know that after many years of dedicated and valuable service, two wily, old veterans, Richard Epifanio and Vincent Coffey, have recently called it quits. Both seem quite content with their decision, but their presence is sorely missed.

Mr. Epifanio served as the Region's Supervisory Compliance Officer for more than 20 years, during which time he earned a well-deserved reputation for leading tireless and often intensive investigations, to ensure compliance with Board orders and settlement agreements. His efforts over the course of a 36 year career led to the collection of millions of dollars in backpay for thousands of employees.

Mr. Coffey recently retired as Deputy Regional Attorney. Like Mr. Epifanio, Mr. Coffey's Regional career spanned nearly four decades. He earned a nearly perfect litigation record over the course of 16 years as a Field Attorney. As a Supervisor, and later as Deputy Regional Attorney, he was instrumental in the Region's recruitment efforts, attending various outreach events and serving as a mentor to hundreds of law student interns who gained hands-on experience in applying the National Labor Relations Act under his tutelage.

Board Issues Decision Concerning Use of Email

Employee Rights

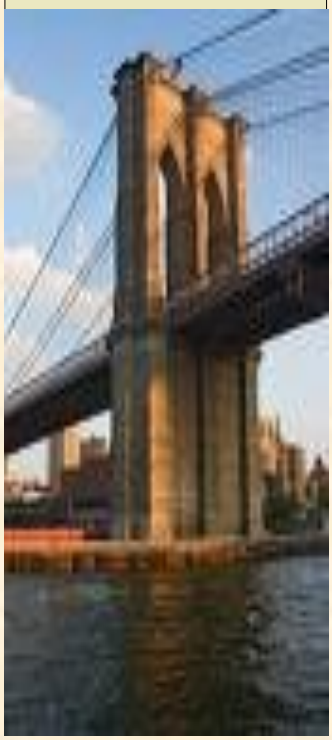
The Board recently issued an important decision regarding the use of email. To understand it, it is important to know a little about the rights of employees. While many may know that the National Labor Relations Act protects the right of employees to engage in union activities, fewer know that it also protects their right to engage in certain *concerted* activities. The Board has held that activities are concerted if they are engaged in *with or on behalf of* other employees, and these activities are generally *protected* by the Act if they relate to wages, hours and other terms and conditions of employment. Thus, in addition to having the right to engage in union activities, employees have the right to discuss their wages and working conditions with each other and to concertedly demand changes in their terms and conditions of employment without suffering reprisals.

It is important to note that these rights are not absolute. Working time is for work and an employer has the right to insist that employees refrain from engaging union or concerted activities while working. However, in *Republic Aviation*, 324 US 793 (1945) the Supreme Court held that the Act protects the right of employees to engage in union related solicitation at their employer's facility during *non-work time*. Rules restricting when employees can solicit their coworkers are called "no solicitation" rules, and no solicitation rules prohibiting employees from engaging in union solicitation at *all* times are unlawfully broad under the *Republic Aviation* standard. No solicitation rules are to be distinguished from no distribution rules. The Board has held that because of an employer's interest in maintaining an orderly and litter free work area, it can prohibit the distribution of literature, even if it relates to union or concerted activities, at *all* times in *working* areas. (See *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962)) Of course, a full description of the rights of employees, and their limitations, is well beyond the scope of this or any newsletter. For more information concerning these rights, you are encouraged to visit the agency's website at www.nlrb.gov.

Keeping Pace with the March of Technology

In *The Register Guard*, 351 NLRB No. 70 (Dec. 16, 2007) a divided Board held that the right to engage in union related solicitation during nonwork time does not extend to the use of an employer's email system. The Board also modified the standards under which it will analyze an employer's enforcement of no solicitation rules. An employer with a facially valid no solicitation rule may violate the Act if the rule is enforced in a disparate manner. Whereas in the past the Board had sometimes found disparate enforcement if an employer permitted solicitation for some nonwork purposes, such as selling raffle tickets, while prohibiting solicitation relating to union or protected concerted activities, its decision in *Register Guard* "clarified" this standard to provide that a finding of disparate enforcement requires that the types of solicitation involved be of a "similar character." The Board majority provided some examples of solicitations that it believed were of similar character. Thus, under the Board's new standard, an employer may violate the Act if it allows its email system to be used for solicitation in favor of one union while prohibiting its use for solicitation in favor of another, or if it allows employees to send emails opposing unionization, while prohibiting emails in favor of unionizing. The Board's decision in *Register Guard* can be found on its website.

On a somewhat lighter note, in the near future, the Region will be making use of the most recent advances in information technology to begin maintaining electronic case files. The software the agency intends to use is designed to assist agents in organizing their files and allow authorized supervisors and managers, both at the Regional office and at headquarters, ready access to their contents. While some of the more seasoned agents and managers are grimacing at the prospect of further automation, they know when a fight is not worth the effort and intend to do their best to learn and implement the new technology.



Representation Case News

After a petition, supported by an adequate showing of interest, is filed, the Region reaches out to the parties and their representatives and attempts to secure an election agreement. In the overwhelming majority of cases, the Region succeeds. In a few cases, despite the Region's best efforts, the parties are unable to come together on an agreement and it becomes necessary to litigate the issues on which they differ. Among the more unusual issues that were recently litigated was whether a hospital's midwives were supervisors within the meaning of the Act. *Brookdale University Hospital.* The midwives employed at this hospital are highly trained individuals, some of them RNs, and some of them college graduates with coursework in such subjects as statistics, microbiology, physiology and psychology. While the parties agreed that the Employer's midwives met the Board's definition of "professional employee," the Employer also contended that they were supervisors or managers. The Region rejected that contention, and they were allowed to vote in the election. They voted to be represented by 1199 SEIU as part of a larger unit of professional employees already represented by 1199.

In *Transcare New York*, the parties litigated several issues related to the scope of the three petitioned-for units, specifically whether they should be limited to a single facility, as the union sought, or several locations, as desired by the employer. The Region found that it would be appropriate to limit two of the units to a single facility, but that one of the units should consist of many locations.

The Region also conducted several elections involving large bargaining units. In *Wenner Bread Products*, a case involving a bargaining unit of approximately 370 employees, the employees voted to remain unrepresented. In *Guild for Exceptional Children*, a petition filed pursuant to the Board's *Dana* decision, reported in our first newsletter, the Employer's nonprofessional employees, who work with developmentally disabled children, voted to remain represented by the Civil Service Employees Association. Its professional employees voted against representation. In *Four Seasons Solar Products*, a matter involving approximately 150 employees employed at a company that manufactures sun rooms, the employees voted to replace Local 621, United Workers of America with Local 810 International Brotherhood of Teamsters. Local 621 contested the results of the election, and the Region overruled Local 621's objections and certified Local 810.

Esoterica

At Region 29, we are sometimes confronted with some esoteric legal issues. The Board actually has an office in Washington, the Division of Advice, whose sole function is to provide regions with guidance concerning these issues and other unsettled questions of Board law. To get a flavor of the types of cases we submit, consider this recent case concerning whether a "union signatory" clause violated Section 8(e) of the Act. Don't roll your eyes just yet.

Many of the Act's less accessible provisions are designed to prevent neutral parties from becoming enmeshed in labor disputes. During labor disputes, unions will often attempt to exert economic pressure upon the employer with whom it is in conflict by approaching its customers and suppliers and encouraging them to end their business relationships with the employer. While unions may lawfully appeal to neutrals for assistance, if they strike, picket or otherwise coerce neutrals in order to pressure them to cease doing business with employers with whom they are in conflict, they violate Section 8(b)(4)(B) of the Act, the provision prohibiting secondary boycotts. It is largely because of its concern with this pressure directed at neutrals that the Board generally looks with disfavor upon agreements prohibiting companies from doing business with other employers. Such agreements, which are sometimes the result of this unlawful pressure, generally violate Section 8(e) of the Act. There are exceptions to this, and our case, concerning a union signatory clause, involved one of these exceptions. (Cont. on page 4)

Regions To Display American Flag at Elections

The Board's election procedure has been called "the crown jewel of the Board's endeavors." To accord elections the solemnity they deserve, in the near future, Regions will display the American flag at all elections they conduct. In announcing this initiative, Associate General Counsel Richard Siegel noted:

> Display of the flag will lend dignity to the election process and communicate to all participants that they are involved in an official activity of the Government of the United States. For many of the voters in our elections, including some immigrant workers, voting in a secret-ballot NLRB election may be their first experience with the democratic process. For all employees who cast ballots for or against representation, our elections present a rare opportunity to emphasize that the Government is truly serious about the promise of Section 7 of the Act .

Esoterica (Cont.)

A union signatory clause in a contract is a clause providing that if the employer signatory subcontracts unit work, it must contract the work to a company that is also signatory to a contract with the union. These clauses generally violate Section 8(e) because they have the effect of prohibiting employers from doing business with non-signatory employers. In the context of the provision prohibiting secondary boycotts, nonsignatory employers can be viewed as having a primary dispute with the union involved, based upon their failure or refusal to execute a contract with the union, and union signatory clauses would prohibit employers from doing business with them. Though such agreements would normally violate the Act, Section 8(e) contains a proviso allowing these agreements, subject to certain conditions, in the construction industry. In our case, two locals of the Laborers International Union had contracts with the General Contractors Association (GCA), an association of employers which negotiates union contracts on their behalf. These agreements contained union signatory clauses. Since the contracts covered construction industry work, the above described proviso to Section 8(e), permitting union signatory clauses in the construction industry, would appear to apply. However, in *Connell Construction Co*, 421 U.S. 616 (1975), the Supreme Court limited the situations in which the proviso could apply to those in which the agreement arose in the context of a collective bargaining relationship. Exactly what the Court meant by this is not entirely clear. The Charging Party in our case argued that since the GCA did not itself employ laborers, the agreement could not have arisen in the context of a bargaining relationship. A genuine bargaining relationship, it argued, could only arise where the employer employed bargaining unit employees and the union represented those employees. The Division of Advice determined that the Charging Party was taking an overly restrictive view of what types of agreements were allowed by the Supreme Court's decision. It found that entities like the GCA can and do have bargaining relationships with unions without employing employees. It also noted that in the construction industry, collective bargaining agreements are often signed before contractors have begun work. These types of agreements, called prehire agreements, are lawful in the construction industry. If the Charging Party's reading of *Connell* were correct, the effect would be to prohibit many, if not most, union signatory clauses involving the construction industry. In their view, this was not the Supreme Court's intent. Inasmuch as the plain language of the statute permitted union signatory clauses in the construction industry, and this agreement was negotiated in the context of a longstanding bargaining relationship, the Division of Advice directed the Region to dismiss the case.

An Information Officer is available Monday through Friday from 9:00 a.m. to 5:30 p.m. The officer of the day can be reached at (718) 330-7713. Walk-ins are welcome.

Grosvenor Resort Decision May Impact Backpay

On September 11, 2007, the Board issued its decision in *Grosvenor Orlando Assoc., LTD d/b/a The Grosvenor Resort, and its general partners Grosvenor Properties, Ltd., Donald E. Werby and Robert K. Werby*, 350 NLRB No. 86. In this decision, the Board found "that reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial 2 -week period . . ."

Thus, a discriminatee will lose backpay if there is more than a 2 week period after his/her termination, layoff or refused hire in which s/he does not engage in a search for work. However, even if the discriminatee fails to search for work during this two week period, the backpay period does not stop. If a discriminatee unreasonably delays an initial search, the Board will toll backpay until such time as a reasonably diligent search begins.

As a result of this decision, it is important to remember that if backpay and/or other reimbursement is due as part of the remedy for the unfair labor practice, for instance, an unlawful discharge or refusal to hire, the Board requires discriminatees to mitigate (offset) the backpay by beginning to look for another job in the same or similar line of work promptly. If a discriminatee is unable to establish that s/he actively sought to mitigate damages, s/he may face the risk of having whatever money is owed reduced.

Accordingly, discriminatees are urged to keep careful records of when and where they sought employment.