Fall Edition
October 2008
Volume 3

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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.

Marty's Soapbox — RD Martin Arlook

Changes Coming?

Depending upon the results of November's national elections, the enactment of a major legislative initiative, one which in my view would constitute the most significant amendment to the NLRA since the Taft-Hartley Act of 1947, may be in the offing. That legislation, which has been the topic of much publicity and discussion, is the Employee Free Choice Act (EFCA) aka the Free Choice Act or simply the Card-check bill. It contains four major provisions, which, were they to become law, certainly would have a big impact on the way unions, employers and this Agency do business.

1. The bill would provide for certification of a union as the bargaining representative if the Board finds that a majority of employees in an appropriate unit has signed authorization cards designating the union as such. The Board would be required to develop model authorization language and procedures for establishing the validity of the signed authorizations.

2. The bill states that if an employer and a union, in bargaining for their first contract, do not reach an agreement within 90 days, either party may refer the dispute to the FMCS and if the FMCS can't facilitate an agreement within 30 days of its mediation effort, the matter will be referred to arbitration, the results of which are binding on the parties for two years.

3. The bill would provide for civil fines up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract bargaining effort and increases the amount an employer must pay when an employee is discharged or discriminated against during an organizing drive or first contract situation to three times back pay.

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Changes Coming? (Continued from page 1)

4. The bill would require the Agency to petition US District Courts for injunctive relief, including temporary restraining orders (TROs), where it is determined there is reasonable cause to believe that the employer concerned had discharged or discriminated against employees, or threatened to so do, or engaged in conduct that significantly interfered with their rights during an organizing drive or first contract effort. Currently, petitioning for such relief is discretionary, rather than mandatory.

The card check provision of the bill has engendered the most attention and discussion.

A typical argument pro: The bill "would help level the playing field… Given the reign of terror employers are allowed to exercise during what is commonly called the union election process, the Employer Free Choice Act would help restore democracy to the workplace." Judy Ancel, director of the Institute for Labor Studies at the University of Missouri.

A typical argument con: It's anti-democratic. "Most people sign those cards just to get the union toughs off their backs … In the current process… workers decide in the privacy of a secret-ballot election." Greg Mourad, director of legislation for the National Right to Work Committee.

Clear and Unmistakable Waiver or Contract Coverage?

Although historically the Board has adhered to a "clear and unmistakable waiver" analysis in determining whether an employer's unilateral actions were permitted under existing contract language, some courts of appeals have rejected that standard in favor of a "contract coverage" analysis. Under the clear and unmistakable waiver standard, contract language must be rather specific as to the dispute in issue before the Board will determine if constitutes a waiver of the Union's right to be notified and given an opportunity to bargain over changes prior to their taking effect. Under a "contract coverage" analysis, however, the language need not be so specific. Rather, those espousing the "contract coverage" standard believe that where the language is such that it can be argued that the parties have already bargained about the issue in question, the Board and courts should simply ascertain the results of that bargaining. Thus, waiver is irrelevant, and the sole issue is what the clause means, to be determined by applying contract-law principles. Although the "clear and unmistakable waiver" standard continues to apply, some members of the Board in recent years have voiced disagreement with the "clear and unmistakable waiver" standard and expressed support for the contract-coverage analysis. See, e.g., *Exxon Research & Engineering Co*., 317 NLRB 675, 676-677 (1995) (Member Cohen, dissenting in part), enf. denied 89 F.3d 228 (5th Cir. 1996); *Dorsey Trailers, Inc.,* 327 NLRB 835, 836-837 (1999) (Member Hurtgen, dissenting in relevant part), enf. granted in part and denied in part 233 F.3d 831 (4th Cir. 2001); *California Offset Printers*, 349 NLRB No. 71, slip op. at 6 (2007) (Member Schaumber, dissenting); *Provena St. Joseph Medical Center*, 350 NLRB No. 64, slip op. at 9-12 (2007) (Chairman Battista, dissenting).

Undoubtedly, this issue will be one of great interest and debate when the Board is once again at full strength.

Significant Region 10 Cases

On February 14, 2008, the Region closed 2 cases against Mattress King of Norcross, Georgia, pursuant to an all-party settlement. The settlement agreement provided for the posting of a notice by the employer assuring employees, among other things, that the employer would not interrogate employees about their protected concerted activities and discharge them for discussing wages, hours and working conditions with other employees. The settlement also included $26,000 in backpay for two employees who had been terminated after concertedly complaining about a new sales representative agreement the employer wanted employees to sign containing adverse changes employee wages, hours and working conditions.

On May 8, 2008, the Region closed a series of cases which had been filed against International Longshoreman's Local 1414 of Savannah, Georgia, alleging that the union had, among other things, been charging non-members excessive hiring hall user fees. Following an investigation, it was determined that reasonable cause existed for issuing a complaint. Pursuant to informal settlement agreements, the Local agreed to annually recalculate its hiring hall fees based on the actual costs of the operation of the hiring hall rather than charging user fees equal to the amount of dues that members paid to the union. As a result of the settlements, approximately $250,000 in excess fees were reimbursed to almost 250 non-members.

On July 7, 2008, the Region closed a case against Best Loading of College Park, Georgia, pursuant to an all-party settlement. The charge alleged the employer had discharged employees for concertedly engaging in a peaceful short term work stoppage to protest pay cuts the employer had implemented. A settlement in the case provided for reinstatement for all 16 employees and for full backpay in the amount of $78,874.78.

On September 26, 2008, the Region closed cases against Southern Nuclear Operating Company, Alabama Power Company, Georgia Power Company (for former Savannah Electric and Power Company), and Gulf Power Company pursuant to a Court Order issued by the United States Court of Appeals for the District of Columbia Circuit enforcing, in part, the Board's Order in 348 NLRB No. 95 (2006). The Board's Order, as enforced by the Court, provides the employers will not make unilateral changes in bargaining unit employees' future retirement health insurance benefits or bargaining unit employees' retiree welfare life insurance benefits, without providing notice of the proposed changes and adequate opportunity for the employees' bargaining representatives to bargain about those changes.

A Special Remedy Case

On August 22, 2008, Board Agent Patrick Linn McCarty visited the shop floor of the Ai3 automotive components warehouse in Vance, Alabama and read aloud a Notice to Employees, reassuring employees, in the presence of their management, of their rights under the Act. While postings of Notices to Employees are relatively common, notice reading is a special remedy reserved for occasions where there is concern that mere posting of a notice will not sufficiently assure employees that their rights will be protected and special remedial alternatives are appropriate.

The occasion marked the Resident Office's first notice reading in at least 30 years. It came as part of a settlement agreement into which employers Averitt Express, Inc. and Team One Concepts, LLC entered on July 31, 2008, to resolve unfair labor practice litigation related to their jointly employed work-force arising out of an organizing campaign by the UAW. Besides the notice reading, the settlement provided for certain backpay payments, the standard posting of a Notice to Employees and a requirement the employers furnish the UAW, upon request, with updated lists of employees in the bargaining unit on a monthly basis for two years or until the Regional Director issues a certification following a full and fair election, whichever comes first.

On February 29, 2008, the Region issued a complaint against the employers alleging an unlawful discharge of an employee because of his support for the UAW, threats of plant closure, threats that the employers were withholding raises because of the union campaign, interference with distribution of union literature, creating the impression that the employers were engaged in surveillance of union activities, interrogation, and soliciting employees to campaign against the union.

Investigative Subpoenas

Investigative subpoenas have been issued to parties and third party witnesses more frequently in recent years whenever the Regional Director has believed additional evidence was needed to make an informed judgment on the merits of a case. Only the Regional Director, on behalf of the General Counsel, has the right to issue investigative subpoenas. In other words, a party to a case does not have the right to issue such a subpoena. Issuance of investigative subpoenas occurs when necessary evidence is not provided voluntarily following a written request.

There are two types of investigative subpoenas:

1. Subpoenas ad testificandum compel testimony by affidavit, by oral testimony under oath before a court reporter or by response to written interrogatories.
2. Subpoena duces tecum, compel the production of documents relevant to the charge under investigation.

Parties are given a reasonable period of time to comply with an investigative subpoena. What is reasonable depends on an array of factors, including the type and number of documents sought, the parties' history in cooperating in current and past investigations, and the nature of the issues presented in the charge. However, 14 days is generally considered a reasonable period.

Our experience has been that most parties comply with subpoenas in a timely fashion. Although some have filed motions to quash with the Board, to date, the Board has consistently denied such requests. Although we have not had to do so in recent years, if a party refuses to comply with a subpoena, the Region will seek enforcement of the subpoena in the applicable US District Court. In the one case the Region had to so litigate , the court immediately enforced the subpoena and compelled the witness to give sworn testimony immediately while he was in the court room.

Discriminatees Must Look for Work

Within the past year, the Board issued a number of decisions which have significantly increased the obligations of discriminatees to mitigate losses they incur as a result of unlawful discrimination against them.

On September 11, 2007, the Board issued a decision in *Grosvenor Orlando Associates, LTD., d/b/a The Grosvenor Resort, and its general partners Grosvenor Properties, Ltd., Donald E. Werby and Robert K. Werbe,* 350 NLRB No. 86. In its decision, the Board found "that reasonably diligent discriminatees should have begun searching for interim work at least at some time within the initial 2-week period after the unlawful action against them. Thus, discriminatees will lose backpay if they delay their search for work more than **2 weeks** after their termination, layoff or refusal to hire. This tolling of backpay for failure to look for work in a timely manner does not permanently preclude the accrual of backpay. Rather, backpay will begin to accrue when a reasonably diligent search for work begins.

As a result of this decision, it is important to remember that if backpay or other reimbursement is due as part of the remedy for an 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 discriminatees are unable to establish that they actively sought to mitigate damages, they may face the risk of having whatever money is owed reduced.

The need for discriminatees to maintain careful records of their efforts to obtain interim employment was also underscored by the Board's decision in *St. George Warehouse*, 351 NLRB No. 42 (2007). There, the Board articulated that once a respondent produces evidence that there were substantially equivalent jobs in the geographic area available to disciminatees, the burden of showing that work was unavailable shifts from the respondent that unlawfully fired the employee to the unlawfully discharged employee and the General Counsel.

Both cases underscore the need of discriminatees to begin a search for work immediately following the discrimination against them and to keep careful records of when and where they sought employment in the event respondents challenge the amount of backpay they are due on the ground that the discriminatees did not diligently seek to mitigate their damages.

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 (eastern time) and Birmingham (central time) in person or by phone. (See page 11 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.

Regional Effectiveness

It is no secret that there have been significant decreases in both unfair labor practice and representation case filings with the Agency in the past decade or so. A multitude of reasons have been advanced as to why this decline has occurred. While some of the reasons offered for the decline are often the subject of intense debate, regional office efficiency is never a concern. Region 10 has an active and effective program to ensure that cases are handled in an expeditious manner while at the same time ensuring that case quality is maintained. Consequently, Region 10 consistently meets, and in most situations exceeds, all of the Agency's performance goals. Here are a few examples of Region 10's efficiency for fiscal year 2008 (for the period from October 1, 2007, through August 31, 2008):

Merit factor	34.9%
Settlement Rate	95.5%
Litigation Results (whole or in part)	100%
Backpay/fees obtained (857 employees/discriminatees)	$3,454,000
Election Agreement Rate	97.1%
Regional Director Representation Case Decision Median (for cases where no Election Agreement was reached)	28 days
Election Median Time (from date of filing)	38 days
Percentage of Certifications of Representative Issued (where elections were held and results are final)	58.8

Birmingham Bits

C. Douglas Marshall Resident Officer

Where Are They Now?? - Second Verse

In the second issue of the Perspective, I reported on the whereabouts of seven Region 10 alums which, of course, prompted inquiries regarding others. Here's what I have found out:

Since his retirement in January 2007, former Regional Attorney Ken Meadows and his wife, Roz, traveled to Olympia National Park in June and will take their fourth cruise in December. They welcomed their 3rd and 4th grandsons this winter. Ken spends two days a week volunteering at a food and clothing ministry; works as a 'carpenter apprentice in training' for the local Habitat for Humanity; and volunteers on a citizens committee advising local juvenile court judges. Now that Ken is out from behind the desk, he has joined the YMCA and lost 30 pounds. (I suspect that construction work in the sun and chasing grandchildren might have helped too.)

Another member of the class of '71 [a very good year] Supervisory Examiner Sarah Robinson, left after 25 years to pursue her love of theater and the arts by starting a second career with the Georgia Shakespeare Festival. There, she is responsible for fund raising both for the foundation and its productions. Ironically, she works with foundation board members who are from several of the same law firms with whom she dealt while with Region 10. She avers she is slowing down to four days a week and aiming to reduce that to three. This fall she is going on a Mediterranean cruise.

Field Attorney Larry P. Rothman left the Birmingham Resident Office over twenty years ago to practice law in D.C. in the same firm in which NLRB General Counsel Ron Meisburg previously worked. Larry currently practices solo employment law from his home where he lives with writer wife Margie and 12 year old son Harris.

In coming issues I will cover former field attorneys Robert C. D. McDonald, Matt Shade and Walter Bowman, former Supervisory Attorney George L. Card, as well as former Regional Attorney Bill Caldwell [last I heard he is in Winston-Salem, NC] and Field Examiner Anne B. Reel [I believe she was in Stanton, VA]. If you have any further requests or clues, please email me at douglas.marshall@nlrb.gov.

Region 10 Food Drive

"Hunger never takes a holiday or goes on vacation."

The Atlanta Community Food Bank donates monthly to more than 800 nonprofit partners in 38 counties in metro Atlanta and North Georgia, including food pantries, community kitchens, child care centers, night shelters and senior citizens centers.

Unfortunately, the country's economic woes have resulted in record-low donations to ACFB at a time of record-high need. In response, ACFB designated September as Hunger Action Month, and the Federal Executive Board issued a call to all Atlanta federal agencies to help feed those who might otherwise go hungry.

In response to this call to action, Region 10 employees went above and beyond in providing cash donations, pasta, canned goods, cereal, peanut butter and other non-perishable foods in support of this worthy cause.

Region 10 and ABA Labor Section Sponsor Basic Labor Law Seminar

On July 14, 2008, Region 10 and the American Bar Association Section of Labor and Employment Law sponsored a one-day institute on basic law and procedures related to the National Labor Relations Act. Regional Attorney Mary L. Bulls was instrumental in making arrangements and securing participants in the program. Several members of the Region's experienced staff, joined by local management and labor attorneys, presented panel discussions aimed at demystifying Board law and providing practical approaches to labor law. In addition, Associate General Counsel Barry Kearney flew in to address participants during a "Hot Topics" luncheon.

The institute, held in a capacious meeting room at the State Bar of Georgia's downtown Atlanta headquarters, attracted a diverse group of labor law practitioners at all stages of their careers. The program opened with an overview of the National Labor Relations Board and its Act presented by Regional Director Martin M. Arlook. RD Arlook delivered an extemporaneous summary of the Board's structure and history, deftly interweaving anecdotes from his years of experience in the Manhattan, Puerto Rico and Atlanta Regional Offices. His remarks set the tone for the lively presentations that followed, as distinguished representatives of the local labor bar and Region 10 management and staff offered perspectives on such topics as Individual Employee Rights under the NLRA, Representation Law and Procedures, and Management and Union Rights and Obligations in Collective Bargaining. In addition to the Regional Director and Regional Attorney, other Region 10 participants were Assistant to the Regional Director Chip Harrell and senior attorneys Lauren Rich, Frank Rox and Lisa Henderson.

"I was very happy and pleased with the participation of the panelists and the enthusiasm with which they were received;" commented RD Arlook, "a performance clearly up to Region 10's high standards."

Back Row: Field Attorneys Lisa Henderson, Frank Rox, and Lauren Rich
Front Row: ARD Chip Harrell, RD Martin Arlook, RA Mary Bulls

The Bully Pulpit

by Mary Bulls, Regional Attorney

Board's E-Filing Initiative

On July 21, 2008, the Board announced a pilot project for issuing and serving final decisions of the Board and Administrative Law Judges electronically. Historically, such decisions were served on the parties via U.S. mail and posted on the NLRB website, www.nlrb.gov, on the third business day following issuance. The new procedure allows parties to get the decisions immediately upon issuance.

Pursuant to the pilot project, the Board now issues a daily docket sheet on its website at the close of each business day. The full text of any decision listed in the docket sheet is also posted on the website (E-Issuance) the following business day at 2:00 p.m. Eastern Time. In addition, parties who voluntarily register for electronic service (E-Service) will receive an e-mail constituting formal notice of the decision and an electronic link to the decision itself immediately upon posting of the docket sheet, meaning the full decision will be available to them prior to its posting on the NLRB website. Parties who do not register will continue to receive service by traditional means, usually via U.S. mail.

The Board's goal in implementing this program is to speed parties' receipt of decisions immediately upon their issuance and to realize significant costs savings to the Agency.

For more information, go to http://mynlrb.nlrb.gov. In addition, E-Issuance and E-Service frequently asked questions can be found at http://mynlrb.nlrb.gov/eissuancefaq.

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

Board Continues to Operate with Two Members

At this time, the Board continues operating with just two members, Peter Schaumber and Wilma Liebman, rather than five members which constitute a full board. Chairman Schaumber and Member Liebman, a quorum of the Board's typical three-member panel, temporarily continue to issue decisions and orders in unfair labor practice and representation cases while the General Counsel continues to determine those cases in which 10(J) injunctive relief should be sought. It is anticipated that the vacancies on the Board will not be filled until after installation of our next president.

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*** 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.

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: Editor Chip Harrell

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