



Summer 2009
Issue

Regional Insight

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

INSIDE THIS ISSUE:

Labor Law Seminar 2

Your Right to Fair Representation 2

Website Features 3

ULP Investigation Deadlines 3

Federal Court Success 4

NLRB Speaker Availability 4

Updates from Last Issue 4

Transition to Digital TV 5

Regional Attorney's Corner 6

Liebman is New Board Chair 6

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

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



From the Desk of the Regional Director

"The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country."

- December 1, 1862 - Lincoln's Second Annual Message to Congress

"It is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change."

- Charles Darwin

Adam Gopnik's "Angels and Ages: A Short Book About Darwin, Lincoln and Modern Life" examines the works and impact of these two great



Regional Director,
Rik Lineback

writers, thinkers, and agents of change. Lincoln and Darwin left this world a much different place than the one of their shared day of birth some 200 years ago. Indeed, their insights and intelligence still resonate today. And speaking of today and change, we find ourselves in a time of transition and potential change at the NLRB. Our 3rd edition of "Regional Insight" looks into some of these changes as we explore the Agency's electronic filing initiative and outline new Regional investigation time targets. We also introduce our new Board Chairman and highlight recent rulings in the world of backpay and compliance. Additionally, we have articles about this year's 30th Annual Labor-Management Relations Seminar, case-handling highlights and updates, and the duty of fair representation as well as a NLRB Website Features column. Enjoy – and see you at the Seminar!

Cordially,



E-File Your Documents !

In an attempt to encourage electronic filing, the Board has revised its guidelines for electronic filing by extending the time to file electronically to 11:59 P.M. in the time zone of the receiving office and altering its service requirements under Rules and Regulations Section 102.114(i). That rule now provides: "In the event the document being filed electronically is required to be served on another

party to a proceeding, the other party shall be served by electronic mail (email), if possible. If the other party does not have the ability to receive electronic service, the other party shall be notified by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service no later than the next

(continued on pg. 5)

The 30th Annual Labor-Management Relations Seminar :

“Employees & Employers in Distress: Tips, Traps & Tough Calls”

The legislation proposed in the Employee Free Choice Act (EFCA) is poised to change the way unions, employers and the National Labor Relations Board (NLRB) handle organizing, elections and first contracts. With the many potential legal questions involved, this year’s seminar promises to provide insights from many different viewpoints.

This year’s seminar is scheduled for May 15th, and will take place at IU Law School’s Inlow Hall in downtown Indianapolis, located at 530 W. New York St. There will be a plenary session devoted to the overall aspects of the EFCA featuring Randy Johnson, Vice President, U. S. Chamber of Commerce and Stewart Acuff, Director of Organizing, AFL-CIO. Afterward, participants will have the opportunity to attend a management side or union side break out session to learn more about the legislation’s specific impact on each side.

Additionally, a variety of Quick Pick classes will be offered, including the ever-popular How to Take a Case Before the NLRB, Emerging Evidentiary and Procedural Issues in Arbitration; Developments in the Family Medical Leave Act (FMLA) & Americans with Disabilities Act (ADA); Collective Bargaining (how to do it and the future of collective bargaining); Pensions and Benefits, including a review of the Pension Protection Act and new forms of

Friday, May 15, 2009
IU School of Law – Indianapolis
Downtown Indianapolis

- ◆ 6.75 hours of CLE credit (pending approval)
- ◆ Registration Fee is \$200.00
- ◆ Register online at www.indylaw.indiana.edu

Enrollment in the seminar is open to attorneys and labor and management officials. The fee includes all seminar materials and a boxed lunch. Fees will not be refunded after May 1, 2009.

- ◆ Questions? Contact Shaun Ingram
 Tel: (317) 278-4789 Email: slingram@iupui.edu

pensions; Withdrawal of Recognition; Ethics; and more. Continuing Legal Education (CLE) credit will be available.

The one-day seminar is designed to educate both labor and management representatives about the legal aspects of common work-related issues. Proceeds from the seminar are awarded as scholarships to law students with an interest in labor law. In 2008, two deserving students received scholarships.

Check the law school web site for more information: www.indylaw.indiana.edu or call 317-278-4789.

A union may only consider legitimate employment-related differences to distinguish one group of employees from another.

Know Your Workplace Rights



⇒ Your Right to Fair Representation

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

A union must provide all bargaining unit employees with good faith representation that is fair, impartial, and free from hostile discrimination, regardless of an individual’s membership in the union. In that regard, a union may not refuse to represent or process grievances because an employee is not a union member. Electrical Workers IBEW Local 1504 (Western Electric), 211 NLRB 580 (1974); Newport News Shipbuilding and Dry Dock Co., 233 NLRB 1443 (1977). Nor may a union deny employees fair representation because they engage in protected, concerted activities, including internal union politics. Rubber Workers Local 374 (Uniroyal, Inc.), 205 NLRB 117 (1973); ITT Arctic Services, 238 NLRB 116 (1978); Pacific Coast Utilities Services, 238 NLRB 599, 607 (1978); Tarpening Trucking Co., 271 NLRB 96 (1984); Teamsters Local 287 (Emery Air Freight), 304 NLRB 119, 122 (1991).

Visit Us Online

The NLRB's website was recently recognized by the National Security Archive as one of the five best in the federal government. Most case-related documents may now be filed through the website with the field offices, as well as the Division of Judges, General Counsel's Office of Appeals, and the Board's Executive Secretary's Office. The redesigned website also provides several options for conducting legal research.

The NLRB's homepage (www.nlr.gov) looks like the image to the right. From the "I am a labor professional" section on the homepage, you will find links to great resources, including:

(continued on pg. 5)

Expedited ULP Investigation Deadlines

One of the most common questions we get in connection with any investigation is, how soon will the case be decided? For the majority of cases, the answer is between 7 and 9 weeks from the date the case was filed.

Over 90% of all unfair labor practice charges in Region 25 are designated as Category III or Category II charges. The designated category determines all of the deadlines. Category III charges, such as those involving discharges, strikers, or first contract bargaining, are considered to be of exceptional "high impact" and accordingly, have the shortest deadlines. The investigating agent normally reports the case within 5 weeks of the filing date. If the case is determined to be non-merit, the final disposition (withdrawal or dismissal of the charge) generally will be accomplished within 7 weeks of the filing date.

Category II cases, i. e., cases of "significant impact" raising such issues as unilateral changes or fair representation, should be reported within 7 weeks of filing. The goal for final disposition is 9 weeks if the case is non-merit.

If a merit determination is made in any case (regardless of category), the next step is to attempt settlement. Depending on the complexity of the case, the settlement process can take several weeks. NLRB settlements typically require the posting of a Notice

for 60 days, and depending on the violation, can also include backpay and reinstatement. If no settlement is reached, the case is then set for trial.

Multiple case filings may also impact the final disposition of a case. Typically, no determination is made until the investigation of all related cases has been completed.

The category of a specific case isn't included in the information in the initial correspondence to the parties. However, if you want to know, the investigating agent will tell you. If you are the Charging Party, you should be prepared to present your evidence shortly after the charge is filed, regardless of the category. If you are the Charged Party, you will receive a letter from the investigating agent outlining the deadlines for submitting evidence.

Additional information about the categorization of unfair labor practice charges can be found in the Unfair Labor Practice Casehandling Manual in Section 11740. It is available on line at www.nlr.gov, where all of the Agency's casehandling manuals can be accessed. Here is a link to the portion of the manual where the above designations are outlined (skip to page 22 to access Section 11740): <http://www.nlr.gov/nlr/legal/manuals/COMMON%20TO%20ALL%20CASES%2011700%2011886.pdf>

How soon will your case be decided by the Region?

Regional Success in Federal District Court

In conducting investigations, Region 25 requests voluntary production of information from the parties. However, if a party fails to respond to repeated requests for evidence necessary to make a determination on an issue before the Region, then the Region may issue an investigatory subpoena pursuant to Section 11 of the Act. If a party fails to respond to an investigatory subpoena, the Region may file for enforcement of the subpoena in federal district court.

Unfortunately, several parties have recently failed to respond to investigatory subpoenas issued by the Region. In each of these cases, Region 25 has been successful in petitioning the Federal District Court—Southern District of Indiana to compel the parties to comply with the subpoenas. In *Lineback v. Harco Asphalt Paving, Inc.* [1:08-mc-0174] and *Lineback v. Steel Supply & Engineer Co.* [1:08-mc-0179], Region 25 sought information necessary to complete the investigation of unfair labor practice charges. In *Lineback v. Shaw Associates, LLC*, [1:08-mc-0181], Region 25 sought jurisdictional commerce information. In each of these cases, the District Court ordered the production of the documents pursuant to the subpoenas. In *Shaw*, the company's president was also ordered to give an affidavit

concerning the subpoenaed documents.

Another recent occasion where Region 25 petitioned for the enforcement of a subpoena was in a compliance investigation involving Lana Blackwell Trucking, LLC. In *Lineback v. Lana Blackwell Trucking, LLC* [4:09-mc-001], the company was ordered to produce financial records, and a witness was ordered to sign a deposition transcript.

Because of continued difficulty in getting one company to comply with a Board order, Region 25 requested and was granted an ex parte writ of garnishment on the company's bank account from the Federal District Court—Southern District of Indiana under the Federal Debt Collection Procedures Act, 28 USC 3001 (FDCPA). Under the FDCPA, a governmental entity can file a pre or post judgment ex parte motion requesting that a respondent's account be garnished. If granted, the court issues an ex parte writ of garnishment to the financial institution. Only after the garnishment takes effect is the garnishee given an opportunity to show cause why the garnishment should not continue in effect. If cause is not shown, then the court may order that the garnished funds be transferred to the governmental entity.

Region 25 was recently granted Federal Court enforcement of subpoenas and an ex parte writ of garnishment



NLRB Speakers are Available for Your Group

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

Members of the Regional Office staff are available to make presentations before any group, including classroom groups, legal services clinics or service agency staffs, as well as those members of the public that they serve. Speakers are available to cover a variety of topics, including presentations describing what the Act's

protections cover, how the Region investigates unfair labor practice charges, the NLRB's representation case procedures, or any other NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please contact the Assistant to the Regional Director Patricia Nachand at (317) 226-7404. You may also request a speaker through a link on the NLRB's Web site: http://www.nlr.gov/about_us/speakers.aspx

Update

Update from Last Issue

◆ CASINO AZTAR, 352 NLRB No. 41
Our Winter 2007/Spring 2008 issue advised readers that Casino Aztar had openly refused to recognize the UAW as its employees' certified bargaining representative with the intent of having the Board's certification of the Union reviewed by the 7th Circuit Court of Appeals. Subsequent to that issue printing, the casino also filed for bankruptcy, which further complicated the matter. The issues raised in that case, along with other cases, alleging

that the casino unlawfully unilaterally changed various employee terms and conditions of employment, were recently settled. After extensive negotiations involving representatives of Casino Aztar, the UAW, the staff of Regions 25 and 26, and the Board's Contempt Litigation and Compliance Branch in Washington, D.C., the casino agreed to recognize and bargain with the union and also agreed to pay approximately \$90,000 in back-pay to the 127 affected bargaining unit employees.

Transition to Digital TV:

Are YOU Ready?

On June 12, 2009, the United States will stop television broadcasting on analog airwaves and begin broadcasting only in digital. Find out more about whether or not you will be impacted by the digital (DTV) transition by visiting the DTV Website of the Federal Communications Commission at <http://www.dtv.gov/> or by consulting information posters posted in federal government regional offices.



Visit Us Online (Story continued from page 3)

1. Casehandling Manuals: a great place to begin any research project as they contain the Board's policies and procedures for unfair labor practice, representation, and compliance cases.
2. Rules and Regulations: provide the procedural guidelines for the Board's processes, including various deadlines and how different documents may be submitted and served on other parties, including which documents may be filed or served by fax.
3. Decisions by the Board, ALJs, and Regional Directors: the most recent legal precedents and how they are being applied.
4. General Counsel Memos: the GC's stance on novel issues and legal issues of particular interest dating back to 1973. Find insight into what the GC looks for in a quality investigation – for example, see GC 08-06 which includes checklists for investigation of different types of ULP allegations.
5. Operations Management Memos: updates to the Agency's policies in memos dating back to 1985 – for example, see OM 08-54, Grosvenor Orlando Associates, LTD, which describes a discriminatee's obligation to search for work after a discharge.
6. Advice Memos: information on the General Counsel's position on issues for which there is not clear legal precedent.

E-File (Story continued from page 1)

day, by overnight delivery service, or with the permission of the party receiving the document, by facsimile transmission.”

The Agency is also moving toward a fully electronic records system. To facilitate this important initiative, the Agency strongly urges all parties to submit all documents and other material (except unfair labor practice charges and representation petitions) to Regional Offices through the Agency's E-Filing system on its website: www.nlr.gov. The Agency is asking

parties to use the E-Filing system at the website instead of emailing documents directly to Board agents. This allows for the timely receipt and processing of electronic submissions when agents are away from the office.

Directions concerning what documents can be e-filed with the Agency's various offices and how to e-file can be found at www.nlr.gov by clicking on E-gov or by consulting the Board's Rules and Regulations, which are also maintained on the website.

The NLRB is now encouraging all parties to electronically file their documents at www.nlr.gov

The Regional Attorney's Corner By Dick Simon

Backpay is a standard Board remedy whenever a violation of the Act has resulted in a loss of employment or earnings. Backpay is generally based on the earnings a discriminatee would have had but for the unlawful action. A discriminatee's earnings from other employment that took place after the unlawful action may be an offset to this gross amount of backpay.

In September 2007 the Board decided two cases that impact on the Board's process for determining the amount of backpay for discriminatees. In the first case, *Grosvenor Resort*, 350 NLRB 1197, the Board noted that in order for a discriminatee to be entitled to backpay they must make a reasonable search for work in order to mitigate their losses. In determining whether a discriminatee made a reasonable search for work, the Board evaluates a discriminatee's efforts to mitigate backpay with respect to the backpay period as a whole rather than basing this determination on isolated portions of the backpay period. While a discriminatee is not required to instantly seek new work, in the *Grosvenor* case the Board concluded that a discriminatee should normally begin their search for work within the two-week period following their discharge absent circumstances justifying a longer delay. If a discriminatee begins a reasonably diligent search for work within this two-week period, their backpay may run from the date of the respondent's unlawful action. If a discriminatee

fails to commence a search for work during this two-week period, then backpay will not begin to accrue until the discriminatee commences a proper search for work.

In the second case, *St. George Warehouse*, 351 NLRB 961, the Board considered the issue of which party has the burden of production of evidence when a respondent asserts that a discriminatee has failed to mitigate damages by making a reasonable effort to search for work. The issue of a reasonable search for work generally has two elements: 1) whether there were substantially equivalent jobs within the relevant geographic area, and 2) whether the discriminatee unreasonably failed to apply for these jobs. Prior to the *St. George* case, the Board had concluded that a respondent-employer has the burden of presenting evidence on both elements of the defense that a discriminatee has failed to make a reasonable search for work. In this case, the Board reaffirmed that a respondent-employer continues to have the burden regarding the availability of substantially equivalent jobs. Once an employer-respondent presents such evidence, the General Counsel and the discriminatee rather than the respondent-employer will now have the burden of presenting evidence to show that the discriminatee made a reasonable search for work.



Wilma Liebman Designated NLRB Chairman

President Barack Obama designated NLRB Member Wilma B. Liebman as Chairman of the Board on January 20, 2009. She replaces Member Peter C. Schaumber, who had been the Chairman since March 19, 2008. Chairman Liebman is currently serving her third term, which will expire on August 27, 2011. She has served on the Board since November 14, 1997, having first been appointed by President Clinton. Chairman Liebman becomes the second woman to serve as Chairman in the Board's 78-year history. In a statement, Chairman Liebman said:

"I am honored by President Obama's designation to serve as Chairman, and I look forward to continuing my service on the Board with my colleague, Peter Schaumber, and ultimately with a full complement of Board Members. I wish to thank Member Schaumber for his own outstanding service as Chairman. His leadership and collegiality, coupled with the efforts of dedicated agency staff, have enabled the Board to operate productively this past year. The Board's work matters, just as

it did when the National Labor Relations Act was passed in 1935. Democracy in the workplace is still basic to a democratic society, and collective bargaining is still basic to a fair economy. The statute we administer is the foundation of America's commitment to human rights recognized around the world."

Chairman Liebman began her legal career as an NLRB staff attorney in 1974, and then served on the legal staff of two labor unions: the International Brotherhood of Teamsters from 1980 to 1989, and the International Union of Bricklayers and Allied Craftsmen from 1990 to 1993. From 1994 to 1997, Chairman Liebman served at the Federal Mediation and Conciliation Service, first as Special Assistant to the Director and then as Deputy Director. A native of Philadelphia, Chairman Liebman holds a B.A. from Barnard College and a J.D. from The George Washington University Law Center.



Wilma B. Liebman



National Labor Relations Board, Region 25

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

Phone: (317) 226-7430

Toll-Free: (888) 667-NLRB (6572)

Fax: (317) 226-5103

Web: www.nlrb.gov

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

Summer 2009 Issue Contributors: Rik Lineback, Joanne Mages, Colleen Maples, Mary Jane Mitchell, Patricia Nachand, Dick Simon, Kim Sorg Graves.

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

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

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

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