Volume 1, Issue 1

September 2008

The Gateway-River City Times

NLRB Region 14 St. Louis, MO and Subregion 33 Peoria, IL Quarterly Outreach Newsletter

- **Section 7 of the National Labor Relations Act (NLRA) gives employees the right to:**
- Form, join or assist a union
- Choose representatives to bargain with their employer on their behalf
- Act together with other employees for their benefit and protection
- Choose not to engage in any of these protected activities

St. Louis

Peoria

We've Rolled out the Red Carpet for You!

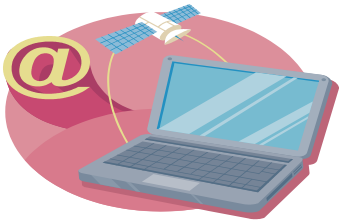
Welcome to the inaugural Outreach Newsletter from Region 14 and Subregion 33. This Newsletter comes to you via the Agency's Outreach initiative aimed at bringing us closer to you, the public we serve. We plan to issue this Newsletter quarterly, which will highlight general Agency information, recent nationwide case law, and cases arising out of Region 14 and Subregion 33 that we think are helpful or interesting to you. As part of our Outreach efforts, we have been speaking to employers, labor organizations, and the general public. If you would like to have someone from Region 14 or Subregion 33 speak to you or your group, please visit our website at www.nlrb.gov and sign up! You may also contact Region 14 Outreach Coordinators, Lynette Zuch or Cindy Flynn or Subregion 33 Outreach Coordinator Melissa Olivero. While you are on the Agency's website signing up for a speaker, you can take a look at other Regions' Newsletters located just a click away!

Inside this issue:

The Basics

The National Labor Relations Board (NLRB), charged with enforcing the NLRA, has two principal functions: 1) to determine through secret ballot elections whether employees wish to be represented by a union in dealing with their employers, called representation cases, and 2) to prevent and remedy unlawful acts by either employers or unions, called unfair labor practice cases. The Agency does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections that are filed with the NLRB in one of its 51 Regional, Subregional, or Resident Offices. Region 14 covers the geographical area of Eastern Missouri and Southern Illinois. Subregion 33 covers the Northern Half of Illinois (except for the Chicago area) and some of Iowa. If you have questions about a workplace problem, please call an NLRB Information Officer in the Office that covers the area where your employer is located. Information Officers are available by phone or by walking into Regional Offices during business hours. Region 14 contact information is found on page 4 of this Newsletter and Subregion 33 contact information is found on page 5 of this Newsletter. Our website is extensive and user-friendly, and it can give you additional information about filing charges and petitions with the NLRB and other workplace questions.

Protected/Concerted Activities and the Use of Employer's Email



What are Protected Activities? Generally, these are activities employees engage in concerning wages, hours, and other terms and conditions of employment. What are concerted activities? The Board has held that activities are concerted if they are engaged in *with or on behalf of* other employees. What are protected/concerted activities? In addition to having the right to discuss having a union represent employees, employees also 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. These discussions with fellow employees may lawfully take the form of "soliciting" employees to join a union while talking to them on non-work time.

In *The Register Guard,* 351 NLRB No. 70 (December 16, 2007), a divided Board held that the right to engage in union related solicitation during non-work 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. In the past, the Board had sometimes found disparate enforcement if an employer permitted solicitation for some non-work purposes, such as selling raffle tickets, while prohibiting solicitation relating to union or protected concerted activities. In *Register Guard,* the Board "clarified" this standard to provide that a finding of disparate enforcement requires that the types of solicitation involved be of a "similar character." For example, 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.

Speaking of technology, using scanning equipment and our "expert" knowledge of Word, Excel, etc., Region 14 has begun maintaining electronic case files. We are doing this to prepare for changes in the way the Agency as a whole maintains data. In the near future, a new software package will allow all case information to be kept electronically. We are spreading the word to those doing business with the Agency to submit approved documents electronically. Click here to see the list of those approved documents, which can also be found on our website.

Hot News About Backpay !

In *Grosvenor Orlando Assoc., LTD d/b/a The Grosvenor Resort,* 350 NLRB No. 86 (September 11, 2007), the Board found "that reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial two-week period . . ." Thus, a discriminatee will lose backpay if there is more than a two week period after his/her termination, layoff or refusal to 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, such as 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. For more information about this decision, read Operations Management Memorandum OM 08-54, which can also be found on our website.

WE WANT TO HEAR FROM YOU!

We would like to know if this Newsletter is helpful and informative. We would also like to know if there are certain topics, issues, Board decisions, or Regional practices that you would like to see addressed or discussed in future editions. If so, please contact Region 14 Outreach Coordinators Lynette Zuch or Cindy Flynn at (314) 539-7770 or Subregion 33 Outreach Coordinator Melissa Olivero at (309) 671-7080 and let us know. Your feedback will be greatly appreciated and carefully considered. You may also contact the Outreach Coordinators if you would like to be added or deleted from our mailing list.

Voluntary Recognition Procedures get Major Overhaul

In *Dana Corp. and Metaldyne Corp.*, 351 NLRB No. 28 (September 29, 2007), the Board, in a 3-2 decision, 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. Under the Board's former policy, an employer's voluntary recognition of a union, based on a showing of the union's majority status, barred a decertification petition filed by employees or a rival union's petition for a "reasonable period" of time. The Board had reasoned that labor-relations stability was promoted by a rule under which a voluntarily recognized union was insulated from challenge while negotiating for a first collective-bargaining agreement. In *Dana*, the Board majority concluded that although the basic justifications for providing an insulated period are sound, they do not warrant immediate imposition of an election bar following voluntary recognition. The Board held that the uncertainty surrounding voluntary recognition based on an authorization card majority, as opposed to union certification through a Board election, justifies delaying the election bar for a brief period during which unit employees can decide whether they prefer a Board conducted election. Under the Board's new policy, an employee or rival union may file a petition during a 45-day period following notice that a union has been voluntarily recognized. The petition will be processed if, like other petitions, it is supported by 30 percent of the bargaining unit. If no petition is filed within 45 days, the Union's status cannot be challenged for a reasonable time to allow the parties to negotiate a contract. The *Dana* decision created a new classification of cases called a "VR" to track the notification of voluntary recognition. For more information see Operations Management Memorandum OM 08-07, which can also be found on our website.

Have Region 14 and Subregion 33 had any VR cases?

Yes! Since *Dana* issued, six VR cases have been filed in Region 14 and five have been filed in Subregion 33. Applying the guidance in OM 08-07, once the Office is notified that an employer has voluntarily recognized a union to represent a specific unit of employees, the Region immediately sends the parties a Notice to Employees which is then posted in the facility for 45 days. The Notice advises the employees of the voluntary recognition in the specified unit and advises that anyone may file a petition for an election within that time period. The employer is required to complete a certification of posting and return it to the Regional Office after the 45-day posting period expires. One of the VR cases Region 14 recently handled proved quite interesting: The Employer recognized one union as the representative of the bargaining unit. Upon receiving notice of that recognition, the Region directed the *Dana* Notice to be posted. Within the 45-day posting period, a rival RC petition was filed by another union. An election was scheduled with both unions being on the ballot. Prior to the election, the unit was split and both unions were granted recognition for their respective units. It remains to be seen whether there will be any additional VRs filed as a result!

First Amendment Rights Prevail: REASONABLY BASED LAWSUIT NOT UNLAWFUL

In *BE&K Construction Company*, 351 NLRB No. 29 (September 29, 2007), the Board held that the filing and maintenance of a reasonably based lawsuit does not violate the National Labor Relations Act (Act), regardless of the motive for bringing the suit. BE&K's federal lawsuit against several unions was dismissed. Thereafter, the unions filed unfair labor practice charges alleging that the lawsuit was unlawfully retaliatory. Pursuant to *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Board and the Sixth Circuit Court of Appeals found merit to the charges. *BE&K Construction Company*, 329 NLRB 717 (1999); *BE&K Construction Co. v. NLRB*, 246 F.3d 619 (2001). The Supreme Court, however, rejected the Board's analysis on First Amendment grounds. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). The Court found that the Board's standard for evaluating the lawfulness of completed, unsuccessful lawsuits raised a difficult First Amendment issue. The Court adopted a limited interpretation of Section 8(a)(1) to avoid this constitutional issue, and it invalidated the Board's legal standard because it did not comport with that limited interpretation. On remand, the Board majority noted, first, that in *Bill Johnson's*, the Court held that in order to protect the First Amendment right to petition, an ongoing, reasonably based lawsuit could not be enjoined as an unfair labor practice even if its motive was to retaliate against the exercise of rights protected by the Act. The Board then found, "[J]ust as with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor practice. In determining whether a lawsuit is reasonably based, we will apply the same test as that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis, or is "objectively baseless," if "no reasonable litigant could realistically expect success on the merits. "*Professional Real Estate Investors*, 508 U.S. [49] at 60 [(1993)]."

Region 14 Wrap-up

This section will highlight Board decisions arising out of Region 14.

Board Finds Installation of Surveillance Cameras Unlawful, but Rejects Make-Whole Remedy

In its 2004 decision in *Anheuser-Busch, Inc.*, 342 NLRB 560, the Board held that Anheuser-Busch unlawfully installed hidden surveillance video cameras without bargaining with the union that represents the employees at its St. Louis facility. Through use of the cameras, Anheuser-Busch learned that certain employees were engaged in misconduct, and it disciplined or discharged 16 employees. Although the conduct was found to be unlawful, the Board concluded that it lacked authority to order reinstatement or backpay because the employees were disciplined for cause, regardless of the fact that their employer learned of their misconduct only as a result of its own unfair labor practice. On petition for review, the D.C. Circuit affirmed the Board's unfair labor practice finding, but found that the Board had not adequately reconciled with existing case law its decision to withhold a reinstatement and backpay remedy from the employees and remanded the case. On remand in Anheuser-Busch, Inc., 351 NLRB No. 40 (September 29, 2007), the Board majority reaffirmed its 2004 holding that the Act prohibits the Board from granting a make-whole remedy to employees disciplined or discharged for misconduct discovered as a result of unlawful conduct by their employer.

LPNs Found to be Supervisors

In one of the first Region 14 decisions issued post *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (September 29, 2006), the Board majority in *Oak Park Nursing Center*, 351 NLRB No. 9 (September 26, 2007) reversed the Regional Director's finding that the petitioned-for licensed practical nurses (LPNs) at the Employer's long-term care facility were not statutory supervisors under the Act and dismissed the petition. The majority found that the LPNs were supervisors due to their authority to discipline and effectively recommend discipline of employees. The majority relied on the LPNs having the authority to fill out employee counseling forms under the Employer's progressive disciplinary policy, which laid a foundation for future discipline against an employee. Additionally, the majority found that the LPNs have the authority to effectively recommend discipline against employees. The LPNs' recommendations are accepted without further independent investigation.

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Employee on Disability Leave is Eligible to Vote!

In a 2-1 decision in *Abbott Ambulance of Illinois*, 347 NLRB No. 82 (August 2, 2006), the Board affirmed the Hearing Officer's recommendations and directed the Regional Director to open and count the ballot of an employee who was on disability leave when she cast her ballot and prepare and serve on the parties a revised tally of ballots and the appropriate certification. The Board majority agreed with the Hearing Officer that the employee was on disability leave and was neither affirmatively discharged nor had resigned at the time of the election and was therefore eligible to vote under *Red Arrow Freight Lines*, 278 NLRB 965 (1986), noting the Board reaffirmed the *Red Arrow* standard in *Home Care Network, Inc.*, 347 NLRB No. 80 (2006). Thereafter, the Union was certified as the employees' exclusive bargaining representative. In August 2008, the Union disclaimed interest in representing the employees.

Management -Rights Clause Survives Expired Contract Extended by Oral Agreement

In *Quebecor World Mt. Morris II, LLC*, 353 NLRB No. 1 (September 8, 2008), the Board majority reversed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a "Performance Improvement Plan" (PIP) procedure and demoting an employee pursuant to a PIP. This case occurred in the context of the parties operating under the terms of an expired contract extended by oral agreement. The Board held that a management-rights clause, like a no-strike clause, remains in effect when the contracting parties orally agreed to extend their contract. After determining that there was an oral agreement to extend the contract and that the management-rights clause survived, the majority analyzed the case using a "clear and unmistakable waiver" standard. The Board majority found that, based on the language of the management-rights clause at issue, the Union clearly and unmistakably waived its right to bargain over the implementation of the PIP process. The Board, however, upheld the administrative law judge's finding that the Respondent violated Section 8(a)(5) the Act by refusing to provide requested information regarding the PIP process.

Employers May have to Provide Information about Non-Unit Employees

In *Hamilton Sundstrand*, 352 NLRB No. 65 (May 19, 2008), the Board affirmed the administrative law judge's ruling that the Respondent's failing and refusing to provide the Union with information regarding temporary employees violated Section 8(a)(5) and (1) of the Act. The Board indicated that its decision in *Disneyland Park*, 350 NLRB No. 88 (2007), reaffirmed that a union must demonstrate the relevance of requested non-unit information to trigger an employer's obligation to furnish it. Under the

Board's broad discovery-type standard, the General Counsel can establish the relevance of requested information by presenting evidence either that (1) the union demonstrated the relevance of the non-unit information; or (2) the relevance of the information should have been apparent to the respondent under the circumstances. In its decision, the Board noted that the Union demonstrated the relevance of the requested information because it believed that the temporary employees were performing bargaining unit work. The General Counsel further demonstrated that the relevance of the requested information should have been, and was, apparent to the Respondent under the circumstances.

Board Concludes Union Violated its Hiring Hall Rules

In *International Union of Operating Engineers, Local 150*, 352 NLRB No. 54 (April 30, 2008), the Board affirmed the administrative law judge's ruling that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act and its duty of fair representation by departing from its established referral procedure when it dispatched one member to a tank farm refurbishing project ahead of another qualified member listed above the referred member on an out-of-work list. The Board noted that it has long held that a departure from established exclusive hiring hall rules that denies employment to an applicant inherently encourages union membership.

How did it Play in Peoria?

In a "play" on words of the city's motto dating back to Vaudevillian days, this section will highlight Board decisions arising out of Subregion 33.

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NLRB

Region 14 St. Louis, MO and

Subregion 33 Peoria, IL

Quarterly Outreach Newsletter

www.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.

Board Initiates American Flag Policy

The Board's election procedure has been called "the crown jewel of the Board's endeavors." In keeping with this tradition, Regions now display the American flag at all elections they conduct. In announcing this initiative, the Agency noted that 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 Board 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, Board elections present a rare opportunity to emphasize that the Government is truly serious about the promise of Section 7 of the Act.

For more about this, read Operations Management Memorandum OM 08-28, which can also be found on our website.