NATIONAL LABOR RELATIONS BOARD
REGION 13
CHICAGO
NEWSLETTER

THE ChiRO UPDATE

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UPCOMING EVENT

The Labor & Employment Relations Association is sponsoring a holiday reception in December 2008 featuring the staffs of the NLRB and FMCS among others. Watch for details.

First Contract Bargaining Cases Continue to Receive Special Attention

By Joseph Barker, Regional Director

Back in 2006, General Counsel Ronald Meisburg announced his intent to pay special attention to cases involving initial contract bargaining agreements. The General Counsel believed then, and now, that initial contract bargaining constitutes a critical stage of the negotiation process because it forms the foundation for the parties' future labor-management relationship. When employees are bargaining for their first collective bargaining agreement, they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative.

In order to protect those new bargaining relationships, and therefore protect employee free choice, the General Counsel has asked Regional Offices to 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. As a major part of this remedial initiative, Regional Offices have been asked to consider two types

("First Contract Bargaining Cases" continued on page 8)

Board Members Testify Before Congressional Subcommittee

By Elizabeth Galliano, Field Examiner

In April 2008, Board Members Peter Schaumber and Wilma Liebman offered conflicting testimony before the United States Senate Subcommittee on Labor, Health and Human Services, Education and Related Agencies, while addressing Committee members' concerns regarding NLRB representation elections and first contract cases after a union has been designated the collective bargaining representative of employees.

Mr. Schaumber defended the Agency's performance in both of these substantive areas. First, Mr. Schaumber provided the Senate with statistics to demonstrate the effectiveness and efficiency of the NLRB's representation proceedings. Those statistics showed that 2,302 representation (RC) petitions were filed in fiscal year 2007, 2,030 elections were conducted by the Board pursuant to those petitions, and unions were

("Congressional Testimony" continued on page 13)

Board Agents Proud to Display U.S. Flags

By Walter Hoffman, Field Examiner Supervisor

Those of you representing parties to NLRB-conducted representation elections recently may have noticed an addition to the equipment regularly carried by Board Agents (sometimes lovingly referred to as 'the tools of ignorance'). In addition to the booth, box and election kit, Board Agents arriving at election sites are now sporting the America flag to be erected and displayed at the polling place.

The display of American flags at NLRB representation elections was announced in an Operations-Management memo, OM 08-28. The Agency implemented this policy following an impasse in bargaining with the National Labor Relations Board Union (NLRBU) and a Federal Service Impasses Panel (FSIP) Decision and Order imposing upon the parties a Memorandum of Agreement (MOA), largely following the Agency's final bargaining proposal. That MOA, along with instructions on assembling the flag and proper flag etiquette, were provided with the OM memo.

General Counsel Meisburg explained that the use of the flags at elections was one way to enhance the solemnity and dignity of Board elections, given that they may represent the first time many persons have voted in a government-run election. The GC further explained that NLRB elections present a rare opportunity to emphasize the seriousness of the promise of Section 7 of the Act.

While not a complex procedure, erection of the flag does require a bit of mechanical dexterity. Therefore, all Board Agents were given thorough training in flag erection procedures and basic flag etiquette. Interestingly, while the flag itself was made in the United States, the flag hardware came from China. Nonetheless, the next time you are present for an NLRB election, you can expect to see old glory proudly displayed somewhere near the voting booth. Please note, however, that each regional office was given only three flags and Chicago, being an office with a relatively large case load, sometimes conducts more than three elections simultaneously. In addition, one of our flags currently is out of operation due to missing hardware. If your next election is run flagless, it is not for lack of patriotic spirit but only that we were a little short of inventory that day.

Of course, the display of the flag has had some unsurprising side effects. Objections already have been filed in another Region because a flag was not displayed at an election. However, those objections were administratively dismissed.

PROTECTING WORKPLACE DEMOCRACY

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Board Addresses E-mail Use For Union Activity at the Workplace

By Charles Muhl, Field Attorney

A quick Internet search reveals that the technology used to create e-mail was developed in the mid-1960s while commercial use of e-mail began in the late 1980s. Today, the use of e-mail in business operations is standard and widespread, with many employees spending significant portions of their workdays sending and responding to e-mails. Nearly 20 years after e-mail was introduced in a business context, the National Labor Relations Board finally weighed in with its view on whether employers may regulate employees' use of workplace e-mail systems for union and protected, concerted activity. In *Register-Guard*, 351 NLRB No. 70, issued on December 16, 2007, the Board held that employees have no statutory right under the National Labor Relations Act to use an employer's e-mail for Section 7 activity. The Board also modified long-standing precedent for determining when employer policies, including those regulating employees' use of e-mail, are discriminatorily enforced. Discrimination now is defined as an employer drawing a distinction in a policy along Section 7 lines. The Board decision was 3-2, with the majority composed of then-Board Members Battista and Kirsanow, as well as current Chairman Schaumber.

The Guard Publishing Co., producer of the daily *Register-Guard* newspaper in Eugene, Oregon, implemented a "Communications Systems Policy" in October 1996 after installing a new computer system which provided most employees with e-mail access. The policy stated:

> Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

Despite this policy, the Guard permitted and was aware of employees using the company's e-mail system to send and receive personal messages, including baby announcements, party invitations, offers for sports tickets, and requests for services. The Guard also permitted the e-mail system to be used to solicit support for a periodic charitable campaign of the United Way, but not for any other outside cause or organization.

In May and August 2000, the Guard disciplined its employee Suzi Prozanski, who also was the President of the Communications Workers of America local union representing Guard employees, for sending three e-mails to unit employees at their company e-mail addresses. The first e-mail clarified information provided by another employee regarding an earlier Union rally. The second e-mail asked unit employees to wear green to support the Union's position in contract negotiations, and the third asked employees to participate in the Union's entry to a town parade. The discipline issued to Prozanski cited the company's prohibition in its policy on "non-job-related solicitations."

In its decision, the Board began by concluding that the Guard's policy did not, on its face, discriminate against Section 7 activity and thus did not violate Section 8(a)(1). Critical to that finding was the Board's classification of e-mail as "company property," the use of which an employer could restrict based on Board precedent. The Board relied upon past cases finding no statutory right for employees to post union materials on an employer's bulletin board; to use telephones for Section 7 activity or other personal use; to show a prounion campaign video on an employer-owned television; or to use an employer's public address system to respond to anti-union broadcasts. The Board rejected the application of the Supreme Court's analytical framework in *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), in which the Court upheld a Section 8(a)(1) violation where an employer maintained a rule prohibiting all solicitation at any time on company premises. In doing so, the Board

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Employees Must Begin Interim Job Search Within 2 Weeks of Unlawful Termination or Lose Backpay

By Tom Porter, Compliance Officer

In *Grosvenor Orlando Associates, LTD.*, 350 NLRB No. 86, issued September 11, 2007, the Board, consisting of Members Battista and Schaumber with Member Walsh dissenting, found for the first time that "reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial two-week period. . ." following an unlawful loss of employment. Thus, a discriminatee risks losing out on a portion of backpay if a cognizable search for work does not begin within two weeks after an unlawful termination, layoff, or refusal to hire.

As discussed in *Grosvenor*, the General Counsel bears the burden of showing the gross backpay due to each discriminatee in a compliance proceeding. The burden then shifts to the respondent to establish any affirmative defenses to mitigate its backpay liability, including a discriminatee's willful loss of interim earnings. A respondent can meet that burden by showing that discriminatees failed to exercise reasonable diligence in searching for interim work, a requirement the Board imposes for discriminatees to be entitled to backpay. Long-standing Board precedent also held that the sufficiency of a discriminatee's search for work is evaluated based upon the entire backpay period, rather than isolated portions of it, and that discriminatees need not instantly seek new work. Nonetheless, where a discriminatee unreasonably delays an initial search, the Board will toll backpay for that period, but then commence the period if and when a reasonably diligent search begins. See *Marlene Industries Corp.*, 183 NLRB 50 (1970).

SHORT FORM BACK PAY SHEET

Case Name_____ Case No._____
Full Name _____
Address _____
Phone # _____ Cell # _____
E Mail Address _____

Respondent Employer_____
Position_____
Date of Hire_____ Date of Termination_____
Days and Hours Worked Per Week_____
Hourly Rate of Pay_____
Gross Weekly Pay _____
Fringe Benefits _____ CBA? (Y/N)_____
SS # _____(for location purposes only)

Interim Earnings

Employer _____
Address _____ Phone # _____
Position _____
Date of Hire _____ Date of Separation _____
Reason for Separation _____
Days and Hours Worked Per Week _____
Hourly Rate of Pay _____
Gross Weekly Pay _____
Fringe Benefits _____ CBA? (Y/N) _____
Alternate Contact _____
Address _____
Phone # _____ Cell #_____
E Mail Address _____

Please remind the discriminatee that, in order to be eligible for backpay, s/he must make a reasonable search for work. S/he should be urged to maintain records of his or her attempts to find work, including the date work was sought, name of the company, name of person to whom s/he spoke, the position sought and the response to the application for work.

Board Agents may be using this form sooner in unfair labor practice cases to collect discriminatees' interim earnings data

The *Grosvenor* Board found that certain discriminatees who were discharged by the Respondent after beginning a strike should have begun at least some search for work in the two weeks following the discharges, despite the fact that many of the individuals were engaged in picketing in support of the strike at that time and anticipated returning to their jobs in light of the strike. Moreover, many of the discriminatees were elderly, had limited skills and education, limited transportation, and a long history of employment with the Respondent. Nonetheless, the Board characterized their conduct in not immediately searching for interim work as "idleness" not to be rewarded with backpay.

In his dissent, Board Member Walsh admonished the majority for failing to evaluate the discriminatees' search for work based on the entire backpay period, rather than the first two weeks. He noted that the entire backpay period in the case was 6 1/2 years and that all of the discriminatees found alternate employment in the first quarter following their discharges. This contrasted with the decisions relied upon by the Board to show that backpay periods had been tolled for 4-8 weeks, because the overall backpay periods in those cases were much shorter than 6 1/2 years.

Although the majority stated that it was not establishing a per se, two-week rule, "unusual circumstances" will have to be present for a discriminatee to justify not beginning a job search immediately. Thus, despite the Board's contention, the requirement in a routine case appears to be that discriminatees must begin searching for work in the first two weeks following a loss of employment.

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Update on Region 13 *Dana* Cases

By Gail Moran,
Assistant to the Regional Director

The Board's September 2007 decision in *Dana Corp.*, 351 NLRB No. 28 (discussed extensively in Volume 2, Issue 1 of The ChiRO Update) held that "no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition." The decision further held that a collective bargaining agreement executed on or after the date of voluntary recognition would not bar such a petition unless the required notice and 45 day period had expired without a petition having been filed.

The notification to the Region of a card-based voluntary recognition agreement triggers an obligation by the Region to prepare and make available to the parties *Dana* notices that advise employees of their right to test a union's majority status. Region 13 has instituted a team of Board agents to handle the Region's procedural obligations under *Dana*. Upon notification to the Region of a voluntary recognition agreement, the designated agent provides the requisite number of *Dana* notices to the employer and union within three business days. The agent then follows the case through the filing of a representation petition or, alternatively, closing of the case after the 45-day period if no petition is filed and Certification of Posting of the notices is secured. In processing these recognition agreements, the Region does not pass upon the appropriateness of the recognized unit nor alter the unit description in any fashion.

To date, the Region has processed 15 Dana petitions. In two of those cases, decertification petitions were filed within the 45 day period. In one case, the petition is being held in abeyance pending the investigation of serious unfair labor practice charges; in the other case, the recognized union entered into a stipulated election agreement and prevailed in the election by a fairly substantial margin. No objections to the election were filed. Four cases remain open in the "posting period."

In several of these cases, the employer was engaged in a seasonal industry, and entered into the recognition agreement after offers of employment had been extended to the workforce but work had not yet commenced. Thus, to meet the notification requirements under *Dana*, the Region provided sufficient *Dana* notices to be mailed to each individual employee.

The Region has not yet been presented with any contract bar issues related to non-compliance with *Dana* requirements, nor has it been presented with any issues relating to unit composition or scope.

Notification to the Region of a card-based recognition agreement can be made by either an employer or union. A copy of the recognition agreement and any related documents, such as an arbitrator's certification of majority, should be submitted along with contact information for the parties. If you wish to submit notification to the Region of such a recognition agreement, you may hand-deliver it to the Region, or send it by mail, facsimile, or through the Region's e-filing system. Please direct all such notifications to the attention of the Assistant to the Regional Director, Gail Moran, at 312-353-0516.

Region 13 Co-Sponsors Labor Conference

After months of preparation and several early morning planning sessions by the Conference Planning Committee, the first jointly sponsored labor seminar between Region 13 and Chicago-Kent College of Law came to fruition on June 19, 2008. From all accounts, the all-day conference was a resounding success. Approximately 250 labor professionals attended, which included a mix of attorneys looking for continuing legal education credits as well as a significant number of other professionals such as union business agents and human resource representatives drawn in by the various workshops offered.

This was the first major private sector labor law conference sponsored by Region 13 in Chicago in several years. The makeup of the Conference Planning Committee was indicative of the diversity of the attendees at the conference. The 18 members of the committee included private practitioners representing management, labor organizations, and individuals, as well as professionals from corporate entities and various organizations such as the Management Association of Illinois, the Chicagoland Chamber of Commerce, and the Federal Mediation & Conciliation Service. Regional Director Joe Barker and Assistant Regional Director Gail Moran represented Region 13 on the committee.

The number of speakers, panel members, and presenters indicates the ambitious breadth of the conference. Fifty-six professionals from major Illinois law firms, professional organizations, universities, and government agencies donated their time and effort to prepare papers and presentations for the conference. Eleven members of the Region 13 staff served in this capacity: RD Joe Barker, DRA Paul Hitterman, DRA Rich Kelliher-Paz, SA Jessica Muth, SX Dan Nelson, FA Rich Andrews, FA Lisa Friedheim-Weis, FX Liz Galliano, FA Neelam Kundra, FA Charlie Muhl, and FX Paul Prokop.

The highlight of the conference was the keynote address by Board Member Wilma Liebman, who gave a frank discussion about the need to update the NLRA due to the significant changes that have taken place in the American workplace since the last major revision in 1947.

The conference opened with welcome announcements from RD Barker and Professor Marty Malin of Chicago-Kent College of Law. Professor Matt Finkin from the University of Illinois College of Law followed with a provocative presentation titled "The NLRB as an Administrative Agency." Despite the rather vanilla title, the presentation itself was anything but. One of the themes, echoed by Member Liebman, was that legislative paralysis has resulted in no major labor law reform in the U.S. for 50 years. As a result, the President in power influences the direction of labor relations policy through appointments to the NLRB.

Professor Finkin's presentation was followed by two lively panel discussions moderated by Professor Bob Bruno of the University of Illinois at Chicago and Professor Henry Perritt of Chicago-Kent. Six panelists from Chicago law firms and organizations, including the Chicago Federation of Labor and Service Employees International Union Local 1, comprised each panel, which provided for lively debate and audience participation. One topic was "Neutrality and Card Check Agreements and Voluntary Recognition," during which the Board's *Dana* decision provided considerable fodder for debate. The second panel, "The NLRA in the Electronic Workplace," found plenty to discuss regarding the Board's recent *Register-Guard* case.

Lunchtime provided the rather unique feature of allowing attendees to eat while attending any one of five table topic discussions facilitated by a Region 13 professional and at least one representative each from the management and labor community. Topics were Salting, Use of Section 10(j), Scope of Section 7, Special Remedies, and Supervisors.

After Member Liebman's keynote address, two concurrent tracks of workshops provided attendees with the chance to participate and analyze labor issues that arise in such areas as "Ethical Issues in Settlement," "Outsourcing: Leased Employees, Independent Contractors, Owner-Operators, Impact of the Illinois Classification Act," "Ethical Conflicts in Representation," and "Secondary Pressure: Banners, Rats, Street Theater." Principally aimed at non-labor law practitioners, two other workshops dealt with the practical aspects of handling representation cases and unfair labor practice cases before the NLRB.

The success of the conference encouraged all the participants to make this a regular bi-annual event with visions of even increasing the amount and diversity of the participation and topics.

Agency Clarifies Approach to Disclosing Affidavits Pursuant to the Freedom of Information Act (FOIA)

By Richard Kelliher-Paz, Deputy Regional Attorney

The federal Freedom of Information Act (FOIA) provides persons with the right to request records from any federal agency, like the NLRB, where a written request for information is made which reasonably describes the records sought and is in accordance with any published rules setting forth the procedure to be followed to make such a request. 5 U.S.C. § 552. Seeking to enhance the transparency of government operations, President Lyndon Johnson signed FOIA into law on July 4, 1966, and it went into effect in 1967. Although FOIA does permit the disclosure of federal records, the Act also contains nine exceptions pursuant to which certain records are not disclosable to the public. 5 U.S.C. §§ 552(b)(1) through 552(b)(9).

In Region 13, one of the documents that frequently is the subject of FOIA requests are affidavits provided to the Region during the investigation of unfair labor practice charges. Furthermore, affiants also frequently ask during unfair labor practice investigations whether the fact that they are providing an affidavit or the contents of their affidavits will be disclosed to the charged parties. The short answer is that the Agency will not disclose affidavits in response to a FOIA request pursuant to certain of its exceptions.

Exemptions 7(A) and (D) of FOIA are the most common reasons that copies of affidavits cannot be provided to requestors, and apply to both open and closed NLRB cases. 5 U.S.C. §§ 552(b)(7)(A) and 552(b)(7)(D). Exemption 7(A) permits an agency to withhold records included in a case file in a pending or prospective proceeding when disclosure could reasonably be expected to interfere with enforcement proceedings. Exemption 7(A) also applies to closed cases, when disclosure may interfere with the investigation or enforcement of a related pending proceeding. Once a case is closed, Exemption 7(D) permits an agency to withhold records, like affidavits, that reasonably could be expected to disclose the identity of a confidential source. Exemption 7(D) protection applies where the source provided information under an express assurance from the federal government of confidentiality or in circumstances from which an assurance could reasonably be inferred. The longstanding practice and policy of the NLRB has been to provide express written assurances of confidentiality to affiants prior to their submission of an affidavit under oath. The specific language contained at the beginning of every Board affidavit states as follows: "I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed unless it becomes necessary for the government to produce the affidavit in connection with a formal proceeding." In addition, prior to taking affidavits, Board Agents will advise the person giving the affidavit of its confidentiality.

Of course, circumstances do exist under which the NLRB must disclose a witness affidavit. The classic example of such disclosure is when a person testifies as a witness on behalf of the General Counsel in an unfair labor practice hearing. After the witnesses' direct testimony, Respondent, through its counsel, may request to see any affidavits the witness provided pursuant to the *Jencks* rule. Recently, the NLRB added an attachment to affidavits which lists all 16 circumstances under which the Agency may be required to disclose records and documents, including affidavits, from its investigations to other government agencies and outside parties. However, the attachment to the affidavit does not constitute a waiver of confidentiality nor does it represent a change in Agency policy towards maintaining confidentiality of the affidavit pursuant to FOIA or the Privacy Act.

Finally, the Region also does not divulge personal information belonging to individuals that may be protected by Exemption 6 of FOIA or the Privacy Act. This includes phone numbers and addresses, bank account and credit card information, status as employed or unemployed, medical records, citizenship data, and social security numbers. Corporations and labor organizations do not have any protectable privacy interests, but other FOIA exemptions may preclude the disclosure of some of their records.

First Contract Bargaining Cases (*cont.*)

of potential relief in cases involving initial contract bargaining violations: Section 10(j) relief and special remedies as part of the Board's order.

When the General Counsel announced his initiative, the courts had long recognized the need for interim Section 10(j) relief to protect the representational choice of employees. The Agency frequently had obtained temporary injunctions in cases involving violations of Section 8(a)(1), (3), and (5) during the period after certification. For example, in 2005, Region 29 successfully litigated a 10(j) case where, during negotiations for a first contract, the employer engaged in surface bargaining, discharged the union steward, and made promises of wage increases and promotions conditioned on employees voting to decertify the union. In another initial contract bargaining case in 2004, Region 20 won an injunction against an employer who engaged in surface bargaining, refused to provide requested information to the union, threatened employees with job loss, and discharged two open union supporters.

The General Counsel also believes that special remedies may be appropriate for unfair labor practices committed during initial contract bargaining. He has directed Regional Offices to routinely consider the possibility of seeking such remedies, including a new full certification year, notice reading and publication, union access to bulletin boards, and other means of communication. Other remedies could include periodic reports on the status of bargaining, and bargaining and/or litigation expenses.

Region 13 has fully embraced the General Counsel's initiative and been one of the leading Regional Offices in the country in submitting first bargaining cases for 10(j) consideration by the General Counsel and the Board, and in seeking special remedies.

For example, in *Kronos Products*, a complaint issued based on our belief that the Employer engaged in surface bargaining over the course of the certification year. Even though the parties had met in over 36 negotiations, the complaint alleged that the Employer delayed the commencement of bargaining for over three months; held lengthy caucuses that were unproductive for resolving issues, responding to proposals or making counter proposals; repeatedly required the Union to go over its proposals without offering any counter proposals, suggestions or feedback to further negotiations; failed and refused to engage in negotiations concerning economics; started bargaining sessions late and ended bargaining sessions early; and delayed submission of its own proposal for over five months from the commencement of the first bargaining session.

In addition to considering 10(j) injunctive relief, the complaint initially sought special remedies which included 1) an extension of the certification year by nine months; 2) a requirement that the Employer bargain on request of the Union for a minimum of 15 hours a week and in back-to-back sessions until an agreement or lawful impasse was reached or until the parties agreed to a respite in bargaining; 3) the preparation of written bargaining progress reports every 15 days, to be submitted to the Regional Director and to the Union to provide the Union with an opportunity to reply; and 4) an order that the Employer make whole employee negotiators for any earnings lost while attending bargaining sessions. The remedy was later modified to eliminate the bargaining report requirement because it was believed the Union could itself inform the Region of any problems and because to require scheduled reports would reduce the time the parties could devote to productive bargaining.

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First Contract Bargaining Cases (*cont.*)

On the day of trial, but before the opening of the record, the parties entered into an informal settlement agreement that provided for an extension of the certification year for six months rather than the nine sought in the complaint. In the settlement, the Employer admitted to the commission of bad faith bargaining, and admitted that the unfair labor practices tainted a decertification petition that was pending so as to allow for its dismissal even though we had already held the election and impounded the ballots. The Employer also agreed to 15 hours of negotiations a week absent consent to the contrary from the Union or for reasonable cause shown to the Regional Director, in exchange for which the Union agreed to drop its request for the reimbursement of any lost wages for its employee negotiators.

General Counsel Meisburg recently reported that in the two years since he embarked on his initiative regarding first contract cases, the Division of Advice in Washington had evaluated nearly 200 cases in which Regional Offices made recommendations concerning the appropriateness of special remedies and/or Sec. 10(j) proceedings. The Division of Advice authorized such special remedies as *Mar-Jac* extensions of certification years from 6 to 12 months, bargaining schedules, multi-facility posting, union access to bulletin boards, payment of union negotiation expenses (including lost employee wages), and bargaining reports to the Region. Of these remedies, specific bargaining schedules were authorized in cases involving refusals to meet at reasonable times. In one case where the employer's contract with the Air Force had only a few months left to run, a bargaining schedule of 12 hours per week was sought in the complaint and in the 10(j) request. Similarly, the Division of Advice authorized that a specific bargaining schedule be sought in two cases where the employers engaged in such conduct as repeatedly ignoring union requests to schedule bargaining sessions, cancelling sessions, arriving to sessions late, insisting that the union read its proposals aloud at the table, interrupting sessions with lengthy caucuses, and leaving sessions early. Reimbursement of bargaining expenses for the unions was also sought because the unfair labor practices had caused the unions to waste resources in futile fruitless bargaining.

The Division of Advice also authorized seeking the remedy of union access to employer bulletin boards in a case where the employer made numerous threats of discharges and promises of benefits, and solicited employee signatures on an anti-union petition after the union was certified. The employer then closed and created an alter ego, which discharged all the employees and refused to recognize the union. It was believed that union access to bulletin boards was needed to increase the union's ability to communicate with the reinstated and new employees.

The General Counsel has recently noted that it is too early to comprehensively assess the effect of his initiative with respect to first contract bargaining. However, preliminary statistics indicate that during the last two years the percentage of charges alleging that employers have refused to bargain with a newly certified union during initial contract situations has dropped from almost 50% to 25%. There has also been a decline in the merit rate of first contract charges from 44% in the three-year period before the initiative to 37% in the last two years. While these changes may only be aberrations or due to fewer representation petitions being filed, General Counsel Meisburg believes that his announced commitment to address these situations has had some effect on those numbers and that the use of 10(j) and special remedies has sent a clear message of the Agency's commitment to protecting freely chosen collective bargaining.

Parties can anticipate that Regions, including Region 13, will remain vigilant in assessing whether certain types of unfair labor practice allegations during first contract bargaining warrant consideration of special remedies or injunctive relief. This includes allegations of chronic delay in meeting or outright refusal to meet at reasonable times; refusal to provide information needed for bargaining; surface bargaining; unilateral changes; discharge of union leaders/negotiators/key supporters; mass discharges; discriminatory subcontracting that decimates or eliminates the bargaining unit; tainted withdrawal of recognition at the end of the certification year; and breaches of settlement agreements during the initial contract bargaining.

Register-Guard (cont.)

distinguished between the traditional, face-to-face solicitation at issue in that case with restrictions on e-mail, which do not prohibit such communication. The Board rejected any special exception for e-mail, despite its unique properties, by delineating the similarities between e-mail and telephone communication.

With respect to the appropriate analysis for an allegation that a facially-valid policy has been discriminatorily enforced by an employer, Board precedent prior to *Register-Guard* recognized a violation where an employer allowed non-work-related uses of its equipment while prohibiting Section 7 uses. An application of that standard to the facts of *Register-Guard* admittedly would have resulted in Prozanski's discipline being unlawful, because the company permitted employees to use its e-mail system for personal uses. Rather than so finding, the Board instead overruled its precedent and instituted an alternative standard which had been applied by the U.S. Court of Appeals for the Seventh Circuit in *Fleming Co. v. NLRB*, 349 F.3d 968 (7th Cir. 2003) and *Guardian Industries v. NLRB*, 49 F.3d 317 (7th Cir. 1995). In those cases, the Seventh Circuit defined the concept of discrimination as the unequal treatment of equals, meaning an employer policy which treated organizational notices of a charity different from an organizational notice of a union would be discriminatory but a policy which treated personal items for sale or personal postings different from an organizational notice of a union would not, because those latter two policies were like comparing apples and oranges. The Board agreed, saying that unlawful discrimination now will consist of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status. Thus, drawing lines on a non-Section 7 basis is permissible. This includes allowing charitable solicitations but not non-charitable ones; allowing solicitations of a personal nature but not a commercial one; or allowing business-related uses but not non-business-related ones.

Applying the new standard to Prozanski's discipline, the Board found that the discipline for providing the clarification of information on the Union rally remained unlawful because the company allowed similar personal e-mails from employees. However, the latter two e-mails, which urged unit members to support the Union by taking certain actions, were solicitations to support a group which the Guard did not otherwise permit—except for the solicitation for the United Way. The Board discounted that solicitation in a footnote by saying it was an isolated exception.

Board Members Liebman and Walsh dissented from the majority's decision and would have found that any employer policy which banned all non-work-related "solicitations" was presumptively unlawful absent special circumstances. Furthermore, the dissenters would not have overturned the long-standing Board standard for determining discriminatory enforcement. First, the dissent took exception to the Board's casting of e-mail as just another piece of communications equipment that should be treated the same as bulletin boards, telephones, and scrap paper. Noting that e-mail can accommodate thousands of multiple, simultaneous, and interactive exchanges, the dissent noted that e-mail easily could be distinguished from other finite and limited communications resources. Moreover, Members Liebman and Walsh stated that, even if the Guard had a property interest in its e-mail system, no showing was made that permitting the e-mails at issue somehow interfered with its property interest, i.e. by imposing additional costs or slowing the operation of the system. Second, on discriminatory enforcement, the dissent highlighted the fact that Section 8(a)(1) gives employees an affirmative right to engage in union activity, as opposed to just being free from discrimination based on that activity as guaranteed by Section 8(a)(3). Thus, if a policy reasonably tends to interfere with that affirmative right, an employer must provide a legitimate and substantial business justification for imposing the restriction on that right. If an employer were going to draw a line between permissible and impermissible communications and the line infringed on Section 7 rights, the employer would have to provide a business justification that outweighed the right of employees to engage in that activity.

Following the *Register-Guard* decision, General Counsel Meisburg issued a memo (GC 08-07) on case developments in this area in an attempt to give guidance to practitioners on what conduct he viewed as lawful and

(Continued on page 11)

Register-Guard (cont.)

unlawful. (The GC memo is available on the Internet at http://www.nlrb.gov/research/memos/general_councel_memos.aspx.) Following these guidelines, the GC issued a complaint against a health care institution which alleged that it discriminatorily enforced a facially valid no-solicitation rule. The rule prohibited solicitation for any purpose during work time and in immediate patient care areas. However, the employer permitted solicitations in violation of the rule for commercial and personal reasons but disciplined employees who engaged in union solicitations. The GC also issued a complaint against an employer which discriminatorily re-promulgated and disparately enforced an otherwise valid rule prohibiting non-business e-mail communications, where the employer re-instituted the rule for anti-union reasons and only disciplined employees for rule violations when the e-mail involved union solicitations. Finally, the GC found that an employer discriminatorily enforced its electronic communications policy in a case where it terminated an employee who e-mailed a group petition to the company's Board of Directors seeking to develop a method for employees to directly submit their workplace concerns.

The Board found no statutory right for employees to use workplace e-mail for union or protected, concerted activity.

The evidence in that case showed that the employer's e-mail policy permitted reasonable personal use of the company's e-mail system and that employees frequently used their computers for personal purposes. Thus, the employer's claim that the employee had improperly used its e-mail system could not stand, because the distinction drawn was between personal uses that did not involve Section 7 activity and those that did.

In contrast, the GC found it lawful for an employer to maintain a rule which barred union officials from sending e-mails to company managers who worked at company facilities other than the one at which the union represented employees.

The *Register-Guard* decision is just the tip of the iceberg when it comes to the Board dealing with issues raised by new technologies in the workplace. One fundamental question still open is whether employers should be required to furnish employees' personal e-mail addresses as part of an *Excelsior* list in a representation case. Newer communications' technologies—text messaging, blogs, electronic corporate campaigns—undoubtedly will create new situations for the Board to address in the future.

Board & ALJ Decisions to be Served Electronically

On June 6, 2008, the Board announced a pilot project for issuing and serving final decisions of the Board and Administrative Law Judges electronically. Currently, such decisions are served on the parties via U.S. mail and posted on the NLRB website, www.nlrb.gov, on the third business day following issuance. Pursuant to the pilot project, the Board will issue 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 will be posted on the website (E-Issuance) the following business day at 2:00 p.m. Eastern Time. However, 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. In July 2008, parties may opt in to the pilot program by registering for E-Service. Parties with cases pending before the Board or the Division of Judges will receive a mailing from the Agency with instructions on how to do so. In August 2008, the Board will launch E-Issuance, and parties who have registered for E-Service will begin receiving notification of decisions in their cases via e-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.

RECENT REGION 13 OUTREACH ACTIVITIES

By Dan Nelson, Field Examiner Supervisor

The NLRB's Outreach Program helps to educate the citizens we serve and provides needed services to those who rely upon the NLRB to enforce the statute. Regional Staff are ready and willing to make presentations to employers, unions, community organizations, and any other group interested in learning about the NLRB. A sample of the Region's recent outreach activities follows.

In April, Field Attorney Lisa Friedheim-Weis taught classes to union members and officers at the University of Illinois at Chicago, Labor Education Program, explaining the basics of unfair labor practice charges, representation petitions, and developments in NLRB case law.

On May 14th, several NLRB representatives and labor law practitioners participated in a presentation sponsored by the Labor and Employment Relations Association that focused on the practical aspects of processing representation petitions before the NLRB. A broad range of issues that arise in handling representation petitions was discussed by the employer and union representatives in attendance.

On May 16th, Field Attorney Lisa Friedheim-Weis delivered a speech to a large group of attendees at the Regina V. Polk Women's Leadership Conference on how the NLRB impacts collective bargaining.

Additionally, in the last several months, several Region 13 Board agents including Field Attorney Brigid Garrity and Field Examiners Elizabeth Galliano and Chris Lee were invited into graduate school and college classrooms to present on general NLRB topics such as unfair labor practices and representation petitions, often giving students their first exposure to the NLRB.

On June 12th, Field Attorney Helen Gutierrez made a presentation on the functions of the NLRB to 14 Hispanic members of the Chicago Workers Collaborative organization. The Collaborative is a coalition of faith and community-based organizations which seeks to raise the standards for low-wage workers in the state of Illinois. Day laborers from temporary staffing agencies participate in the organization as staff and volunteer members.

On June 20th, Region 13 Field Examiner Cathy Brodsky and Supervisory Examiners Wally Hoffman and Dan Nelson spent the day speaking to about 25 Boilermakers Union members about unfair labor practices, often leading to insightful practical discussions about issues that Union stewards and members confront on a regular basis.

If you are interested in having a presentation regarding any NLRB-related topic, please contact the Region's Outreach Coordinators, Charles Muhl or Paul Prokop, by calling 312-353-7570.

Congressional Testimony (*cont.*)

successful in 59.2% of those elections. Thus far in FY2008, the Board has conducted 737 elections with a union success rate of 57.1%. Mr. Schaumber stated his opinion that NLRB administrative procedures work very well in terms of both time and efficiency. He also addressed criticism of the NLRB by indicating that the Agency is expanding efforts to reach employees who are unaware of the National Labor Relations Act as well as closely monitoring cases involving unfair labor practices during initial organizing drives and first contract negotiations.

Senator Tom Harkin, a co-sponsor of the pending Employee Free Choice Act, asked why the NLRB does not keep statistics on the number of employees terminated during specific periods, such as immediately preceding an election. Mr. Schaumber agreed that this data would be worth having and that the Agency has discussed improving its overall data collection.

In contrast to Mr. Schaumber, Board Member Wilma Liebman offered her opinion that the NLRA is an aging statue in need of comprehensive reform, pointing out that Congress has not revised the statute in over 60 years. Ms. Liebman stated that one of the principal aims of the NLRA is to equalize the bargaining power between unions and employers. The Dunlop Commission, a federal advisory panel, reported in 1994 that one third or more of newly certified unions failed to reach a first contract, whereas the estimate of this figure from the late 1950s was only 14%. More recent research by John-Paul Ferguson and Thomas Kochan of the Sloan School of Management at the Massachusetts Institute of Technology, using NLRB and FMCS data, suggests that the filing of an election petition leads to a first contract in only one out of five cases. Thus, Ms. Liebman told the Committee that it is fair to ask if the NLRA is still working. She stated that between FY1997 and FY2006, there was a 41% drop, from 6,179 to 3,637, in representations petitions being filed with the Agency. Ms. Liebman indicated that increasingly unions are turning away from the NLRB and seeking voluntary recognition instead, given the length of time it takes to obtain certification, employees being vulnerable to coercive tactics during organizing campaigns, and weak NLRB remedies failing to deter unlawful action.

Senator Arlen Spector, who has expressed concern with delays in the resolution of NLRB cases, asked whether the available remedies are too weak, if they are seen by employers as the cost of doing business, and whether Congress should double or triple back pay awards and seek attorneys' fees. Ms. Liebman stated that scholars view the NLRB remedies as notoriously weak. The NLRA was one of the first significant employment laws passed by Congress, and later statues have authorized stronger remedies such as compensatory and punitive damages not included in the NLRA.

Grosvenor (cont.)

Following the issuance of the *Grosvenor* decision, the General Counsel advised Regional Offices to place greater emphasis on compliance issues, including a discriminatee's search for interim employment, during the initial stages of case processing. Board Agents now are expected to advise discriminatees who have lost their jobs of their obligation to search for work as early as possible, both when persons visit an Information Officer in a Regional Office and when a discriminatee provides an affidavit in support of an unfair labor practice charge. Depending on the issues presented by a charge, Board Agents may incorporate facts about a discriminatee's search for interim employment in the affidavit itself. Discriminatees will be urged to keep careful records of when and where they sought employment following the termination of their employment.

The necessity for discriminatees to maintain careful records of their efforts to obtain interim employment was 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 discriminatees," the burden shifts to the General Counsel to provide evidence concerning the extent of the discriminatee's job search.

Region 13 traditionally has made initial inquiries into compliance matters upon taking a discriminatee's affidavit, so little will change in terms of operational procedure other than to educate discriminatees of their obligations in this regard. Thus far, the impact of *Grosvenor* on compliance processing of unfair labor practice cases in Region 13 has been minimal. No cases have yet presented a discriminatee who failed to search for interim work immediately after being unlawfully discharged.

Board Operating at 40% of Capacity

New Year's Day 2008 brought more than just football watching, hangovers, and, in Illinois, the indoor smoking ban. It also marked the expiration of the recess appointments of Board Members Kirsanow and Walsh following the adjournment of the U.S. Senate. This followed on the heels of the expiration of former Chairman Battista's term on Dec. 20, 2007, leaving the Board with two active members for 2008—Peter Schaumber and Wilma Liebman—and three open positions.

As it has done in the past when this occurred, the Board temporarily delegated its power to issue decisions and orders in unfair labor practice and representation cases to Members Liebman, Schaumber, and Kirsanow on Dec. 20, 2007, when all three were active members. (Similarly, the Board also delegated its authority to initiate and prosecute Section 10(j) injunction proceedings to General Counsel Meisburg.) After Member Kirsanow's term expired at the end of the year, the two remaining members still could issue decisions—assuming of course that they actually agree on a case disposition—as a quorum of the three-member group to whom the authority was delegated. Such delegation is authorized pursuant to Section 3(b) of the National Labor Relations Act, as well as a legal opinion issued by the Office of Legal Counsel of the U.S. Department of Justice in 2003, which opined that the Board could continue to issue decisions if it delegated its authority to three members and at least two remained.

Although President Bush nominated three individuals, including former members Battista and Walsh, to fill the vacancies in January 2008, the Senate has not acted upon those nominations and is not expected to until after the November 2008 Presidential election. In the meantime, Mr. Battista returned to a private law firm and thus, in March 2008, President Bush appointed Member Schaumber as Chairman. For the foreseeable future, it appears the Board will be operating at 40 percent of its full capacity. Nonetheless, in the first six months of 2008, the two-member Board issued 105 decisions, or approximately 17 1/2 per month. In the last six months of 2007, the five-member Board issued 172 decisions, or roughly 28.7 per month. Forty percent of 172 is 69 decisions or 11 1/2 per month. Thus, the two-member Board is performing well, at least comparatively and quantitatively speaking.

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