



NLRB Region 3

www.nlr.gov

Outreach



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Did You Know?

Workplace rights under the National Labor Relations Act

The National Labor Relations Board protects employee rights to join and support unions where they work.

The NLRB protects other employee rights as well.

Employees have the right to act together to raise workplace issues with their employer or to press for changes in wages or working conditions. Such employee actions are known as protected concerted activities.

Unlawful employer actions that are prohibited by the Act include:

- Threatening, disciplining, terminating, or otherwise retaliating against an employee for having engaged in protected concerted activities.
- Prohibiting employees from discussing or sharing information about their wages or working conditions.
- Prohibiting employees from talking about workplace issues on their own time.

Employers who violate the Act generally must cease their unlawful actions, assure employees of their rights, and pay backpay to make employees whole for losses suffered as a result of unlawful actions.

The National Labor Relations Act also protects an employee's right not to participate in unions or in other actions with employees. The Act does not require an employer to grant any specific employee or union demands.

• **How to File a Charge:**

Anyone may file an unfair labor practice charge with the NLRB. To do so, they must submit a charge form to any Regional Office. The form must be completed to identify the parties to the charge as well as a brief statement of the basis for the charge. The charging party must also sign the charge.

• Forms are available for download from the NLRB website. They may also be obtained from an NLRB office. NLRB offices have information officers available to discuss charges in person or by phone, to assist filling out charge forms, and to mail forms.

• You must file the charge within 6 months of the unfair labor practice.

• **When a Charge is Filed:**

The NLRB Regional Office will investigate. The charging party is responsible for promptly presenting evidence in support of the charge. Usually evidence will consist of a sworn statement and documentation of key events.

• The Region will ask the charged party to present a response to the charge, and will further investigate the charge to establish all facts.

• After a full investigation, the Region will determine whether or not the charge has merit.

Careful!

There are limits to the Act's protections.

The National Labor Relations Act protects employees who act together to raise workplace issues. Employees are *not* protected by the Act when they make complaints or demands for themselves alone.

The Act does *not* protect employees who engage in misconduct, even when the misconduct is intended to support concerted employee action. Threats, violence, or occupation of the employer's premises are among actions generally considered to be misconduct warranting discipline.

Although the right to strike is protected by the Act, an employer may permanently replace employees who are engaged in an economic strike. An employer may not permanently replace employees who are engaged in an unfair labor practice strike. When permanently replaced as a result of an economic strike, a striking employee is entitled to return to work only when a new position becomes available.

The Act provides for backpay to compensate employees for losses resulting from unlawful conduct, but the Act does *not* provide for fines, punitive damages, or, generally, for losses not directly resulting from lost employment.

The Act does *not* require an employer to grant employee demands.

The Act offers other protections and restrictions

The Act also protects an employee's right to join or support a union or to refrain from engaging in these activities.

The Act has procedures for determining by secret-ballot election whether a majority of employees in a workplace want a union to represent them in dealing with their employer over wages, hours, and working conditions.

Where a majority of employees show that they want union representation, the Act requires an employer to recognize and bargain with the union.

The Act requires both unions and employers to bargain in good faith.

The Act requires unions to represent their members fairly.

The Act prohibits unions from picketing neutral employers in order to get them to cease doing business with other employers with whom the union has a labor dispute.

After the Region Makes a Determination

If the Region determines that a charge has no merit—that the charged party has not violated the Act—it will dismiss the charge. The charging party has the right to appeal a dismissal.

If the Region determines that a charge has merit—that the charged party has violated the Act—it will attempt to settle the case. Unless there is a settlement, the Region will proceed to trial to obtain a finding of a violation and an order directing the charged party to undertake remedial actions. The charged party has appeal rights, including a right to a hearing, with a final decision subject to appeal to a federal court.

Remedies for Violations

When there has been a violation, the Act does not impose fines or other direct penalties. Rather, it requires a make whole remedy to correct the violation and its effects.

NLRB remedies require those who have violated the Act to cease the violation, to inform employees that they will respect their rights, to reinstate employees who have been unlawfully fired, and to pay compensation for lost earnings.

Regional Director's Corner



As my first year as Regional Director draws to a close, I am pleased to report it has been a very busy and successful year for the Region, and one which has been personally satisfying. While the Agency has been in the news as it awaits the confirmation of new Board members, the Region has had some notoriety as well for the

high impact cases it has been handling across the State of New York. Stay tuned for further updates, as cases involving employers such as Momentive, Deb El and Dresser Rand are litigated and/or resolved.

The Region continues its participation in numerous outreach events, meeting with members of the labor community and bar, as well as students and community groups across the State, in order to ensure access to our services, transparency to our procedures, and develop an ongoing dialogue with the community we serve. In furtherance of this objective, Region 3 conducts Coffee with the Board events at various locations in the Region. If you wish to be invited please contact Outreach Coordinator Sandra Larkin at 716-551-4946 or via email at Sandra.Larkin@nlrb.gov. I will be conducting a Coffee with the Board outreach meeting at the Federal Building in Syracuse, N.Y. on April 6, 2010. Please consider attending. I also invite you to visit our website at www.nlrb.gov to learn more about the services we provide. Please contact our information officer if you have any questions arising out of issues in your workplace or if we can be of service to you as a member of the labor relations community or provide speakers to address your constituent groups. You may call (716) 551-4931 for this purpose. Please utilize the website to e-file documents with us as well.

In this 75th anniversary year, the Agency is proud of its accomplishments and looks forward to a productive future. Region 3 will be celebrating this anniversary at a conference on May 14th which will be attended by several well known individuals from Agency headquarters including Deputy General Counsel John Higgins and perhaps, if confirmed, one of the new Board members. I will conduct a practices and procedures meeting following the conference and hope to meet with you there.

Rhonda P. Ley, Regional Director

How to File a Representation Petition

Filing NLRB representation petitions can be simple and convenient. An NLRB Information Officer can assist you in completing a petition form. Our contact information is on page one of this newsletter. If you complete the petition yourself, keep in mind these helpful tips:

- Know which Regional office will handle your petition. Region 3 covers all of New York except New York City.
- Long Island, Orange, Putnam, Rockland and Westchester Counties. Persons may also obtain service at Region 3's Resident Office located in Albany, New York.
- Prepare your petition on our website at: www.nlr.gov (filing instructions detailed).
- Know the job titles used by the Employer and the employee shift schedules.
- Provide the Region with authorization/membership cards (or other proof of interest) signed and dated by at least 30 percent of the employees in the petitioned-for unit.
- Although 91% of elections are conducted pursuant to election agreements, be prepared for a hearing by knowing: (1) the employer's operations; (2) the community of interests of various employee job categories; and (3) who the "supervisors" are. Hearings are typically held 10-14 days from date the petition was filed.
- Be prepared for the election to be conducted within 42 days from the date the petition was filed.
- Always call the assigned Board agent with questions or concerns.

SAVE THE DATE!

Attend Our May 14, 2010 Conference Celebrating the 75th Anniversary of the National Labor Relations Board

Region 3 of the National Labor Relations Board, Cornell University-School of Industrial and Labor Relations and the Labor and Employment Law Section of the New York State Bar Association are pleased to announce a program focusing on private sector labor relations under the National Labor Relations Act.

This program is designed for those individuals who are interested in obtaining the latest updates on important issues. The program this year is a celebration of the 75th anniversary of the National Labor Relations Board. John Higgins, Deputy General Counsel NLRB, Washington, D.C. and Professor James R. Gross, Cornell ILR and NLRB Historian will join practitioners to speak at the conference.

Topics include:

- ❖ Notable Board Cases – Looking Forward
- ❖ Protected Concerted Activity
- ❖ Bargaining and Waiver/Contract Coverage
- ❖ Issues in the Division of Advice

The conference will be held at the Hearthstone Manor, Depew, NY. Contact Paul J. Murphy for registration information at (716)551-4935 or email at Paul.Murphy@nlrb.gov.

CLE Credit Pending

Litigation News

Region 3 recently received a favorable decision from an ALJ in one of the largest cases Region 3 has litigated in quite some time, **Dresser-Rand and Local 313, IUE-CWA, AFL-CIO (JD-04-10)(January 29, 2010)**. The case involved multiple charges against Dresser-Rand Company at its Painted Post, NY facility. The hearing was held for several weeks and the Region filed a lengthy brief before the ALJ in excess of 100 pages. The complaint alleged numerous Section 8(a)(1), (3), and (5) violations arising out of an economic strike, the Employer's lockout of employees, and the discharge of several strikers for their asserted picket line conduct. The complaint also alleged that the Employer had suspended an employee for engaging in protected activity after his recall to work, when the employee, during a department meeting, responded to the Employer's inquiry about employee safety concerns, by stating that there were too many "scabs" and salaried employees in the department to be safe. The ALJ found that the Employer: violated Section 8(a)(3) by locking out economic strikers and employees who abandoned the strike, but not their nonstriking permanent replacements; violated Section 8(a)(5) by unilaterally implementing a procedure for returning strikers after the lockout; and violated Section 8(a)(3) by returning to work crossover employees before returning

Section 7 of the National Labor Relations Act (NLRA) gives employees the rights to:

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for their benefit and protection
- Choose not to engage in any protected activities

Non-Union Protected Concerted Activity

Q: Does the NLRA protect activity with other employees for mutual aid or protection, even if you don't currently have a union?

A: Yes. For instance, employees not represented by a union, who walked off a job to protest working in the winter without a heater were held by the Supreme Court to have engaged in concerted activity that was protected by the NLRA and that they could not be lawfully discharged for such action.

(Litigation News Continued)

employees who had remained on the strike for its duration. The case was handled by Senior Field Attorneys Ron Scott and Nicole Roberts from Region 3's Buffalo office (pictured at the right).

In Iroquois Nursing Home, Inc., (JD -57-09) (November 25, 2009), an employee was reinstated to her job and another



employee's weekend and first shift hours were restored after Region 3 received a favorable decision from an administrative law judge in. The complaint alleged, and ALJ Earl E. Shamwell, Jr. found, that the Employer suspended and then discharged an employee for her union activities, and disciplined two other employees because of their union activities, in violation of Section 8(a)(1) and (3) of the Act. The ALJ further found that the Employer had denied another employee weekend work hours and opportunities to work on the first shift because she had engaged in union activities, in violation of Section 8(a)(1) and (3) of the Act. The ALJ found that the Employer violated Section 8(a)(1) of the Act by refusing to allow an employee to have a union representative at an investigatory interview in violation of the employee's rights as articulated in NLRB v. J. Weingarten, Inc., 420 U.S. 251(1975). The Employer did not file exceptions to the decision of the ALJ which automatically became the Board's decision and order. The Employer was required to post a notice to employees informing them, among other things, that it would not interfere with employees' Section 7 rights, including denying employees' requests for the presence of a union representative during an investigatory interview. The Employer was also required to offer reinstatement to one employee, expunge any reference to the unlawful discipline from the files of the two disciplined employees, and restore weekend and first shift hours to another employee. Two employees were made whole for any loss of earnings and other benefits suffered as a result of the Employer's discriminatory actions. The case was successfully litigated before the ALJ by Region 3 Field Attorney Gregory Lehmann who works in the Albany Resident Office.

Region 3 also obtained a significant settlement in **Towne Gardens, LLC and Harmony Security and Maintenance, LLC**. The Region issued a complaint alleging that the Employers individually, or as alter egos and/or a single employer, or joint employers, violated Section 8(a)(1) and (3) of the Act by discharging bargaining unit employees because of their membership in the union. The complaint also alleged that the Employer violated Section 8(a)(1) and (5) of the Act by unilaterally altering terms and conditions of employment by changing the wage rates of employees; eliminating health,

Don't Tell Me I Can't Talk About My Wages!

The National Labor Relations Act (NLRA) protects the rights of both unionized and non-unionized employees. The NLRA protects employee rights to join and support unions where they work, to participate in protected concerted activities with other employees, and to refrain from participating in such activities. Under the NLRA, two or more employees have the right to act together to raise workplace issues with their employer or to press for changes in wages or other working conditions. Such employees actions are known as protected concerted activities.

Employer rules which have a tendency to chill employees in the exercise of these rights violate the NLRA. In this regard, the Board has held, among other things, that employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid. The mere maintenance and announcing of these rules is a violation, even if these rules are not enforced. Juniper Medical Center Pavilion, 346 NLRB 650 (2006).

(Litigation News Continued)

dental, pension and vacation benefits; unilaterally changing work performance standards, laying off and/or terminating employees for economic reasons; requiring employees to sign independent contractor agreements; eliminating overtime pay; and subcontracting bargaining unit work without providing the union with notice and an opportunity to bargain. The matter settled shortly before the hearing opened when the Employer agreed to enter into a non-Board settlement agreement with the union. In the settlement agreement, the Employer agreed to a backpay remedy, placement of the alleged discriminatees on a preferential hiring list, and agreed to recognize and bargain with the union in good faith for a new collective-bargaining agreement.

Discriminatees Must Begin Immediate Search for Work

On September 11, 2007, the Board issued its decision in Grosvenor Orlando Associates, LTD., d/b/a The Grosvenor Resort, and its general partners Grosvenor Properties, Ltd., Donald E. Werby and Robert K. Werbe, 350 NLRB 1197(2007). In this decision, the Board found “that reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial 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, for instance, in cases involving 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.**

These cases and others are posted on the NLRB website, <http://www.nlr.gov/research/decisions/index.aspx>.

Representation News

In Dana Corp., 351 NLRB 434(2007), the Board 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 unit employees' receiving notice of the voluntary recognition. An employer, and/or rival union, that is a party to the voluntary recognition “...must promptly notify the Regional Office of the

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firstname.lastname@nlrb.gov

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- Renee Hutt, Field Examiner
- Michael Israel, Regional Attorney
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- Chari-Lynn Koppel, Field Attorney
- Sandra Larkin, Compliance Officer
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Albany Resident Office

- Barnett Horowitz, Resident Officer
- Gregory Lehmann, Field Attorney
- Kelly Moore, Field Examiner
- Alfred Norek, Field Attorney
- David Turner, Field Examiner

(Representation News Continued)

Board, in writing of the grant of voluntary recognition” if it seeks the eventual protection of recognition and contract bars. Id. at p.10. The notification to the Regional Office must include a copy of the recognition agreement, which must be reduced to writing and must describe the unit and the date of recognition. Id. at p.10. Upon receipt of the requisite notice of voluntary recognition, the Region will send an official NLRB notice to the employer to be posted in conspicuous places at the workplace 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. If no petition is filed within 45 days from the date of the posting of the notice, then the union’s status as collective-bargaining representative may not be challenged for a reasonable period of time.

Since **Dana Corp.** issued in September 2007, Region 3 has had 14 such cases in which the parties have notified the Region of a voluntary recognition agreement, and the Region has sent out the 45-day notices required by **Dana Corp.** In each instance, the 45-day period passed without an RD or rival petition being filed. Further information about the **Dana Corp.** decision is set forth in Operations-Management Memorandum 08-07, available on the Board’s website.

Outreach Corner

- ❖ October 2 to October 4, 2009 - Rhonda P. Ley, Regional Director conducted a workshop on NLRB Updates: What to Expect from an Obama Board, before the NYSBA Labor and Employment Law and Dispute Resolution section.
- ❖ October 14, 2009 - Paul Murphy, Assistant to the Regional Director, and Lillian Kleingardner, Supervisory Attorney, lectured at a SUNY Buffalo, undergraduate collective-bargaining class on investigating a Section 8(a)(3) allegation. Approximately 50 undergraduate students attended the lecture.
- ❖ October 15, 2009 - Region 3 presented a "Coffee with the Board" at the Albany Resident office. Presenters included Regional Director Rhonda P. Ley on new NLRB initiatives; Regional Attorney Michael Israel on litigation issues and injunctive relief, and Resident Officer Barney Horowitz, on UNITE-HERE issues.
- ❖ October 22, 2009 - Labor and Employment Relations Association (LERA) Buffalo, Rochester and Syracuse Chapters presented a program entitled "Labor Relations in Challenging Times." Regional Director, Rhonda P. Ley conducted a workshop on accessing the NLRB website; Regional Attorney Michael Israel presented on injunctive relief, and Assistant to the Regional Director, Paul J. Murphy presented on possible changes in Board law with a new NLRB Board. Approximately 100 to 150 regional practitioners attended.

Learn More: 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 website, www.nlr.gov, contains a great deal of additional information about the protections of the Act, Board policies and procedures, and how to contact the nearest Regional Office.

(Outreach Corner Continued)

- ❖ November 12, 2009 - Alfred Norek, Albany Resident Office Field Attorney, spoke to students at the Public Interest Field Placement class at Albany Law School.
- ❖ November 19, 2009 - Michael J. Israel, Regional Attorney and William Herbert, Deputy Chair of NYS PERB, lectured at the Labor and Employment Relations Association (LERA) breakfast regarding employee and union's use of employer property, including virtual property, and off-premises and off-duty activities.
- ❖ January 28, 2010 - Rhonda P. Ley, Regional Director addressed the New York State Bar Association, Labor and Employment Law Section, along with Regional Directors from Regions 2 and 29.

Speakers Available

Members of the Region's staff are available to make presentations before any community group, including labor practitioners and unions, classroom groups, the staff of a legal services clinic or a community service agency, as well as those members of the public that they serve, to describe the Act's protections, how the Region investigates and resolves unfair labor practice charges, or any NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please don't hesitate to telephone Regional Director Rhonda Ley at (716) 551-4938; Regional Attorney Michael Israel (716) 551-4947; Assistant Regional Director Paul Murphy (716) 551-4935; or, in the Albany area, Resident Officer Barney Horowitz (518) 431-4156.

E-Filing with the NLRB

The National Labor Relations Board strongly encourages you to use the Agency's E-Filing System to file documents electronically in unfair labor practice and representation cases with the Office of the Executive Secretary, the Division of Judges, the General Counsel's Office of Appeals, and Regional, Subregional and Resident Offices.

The NLRB E-Filing System cannot yet be used to file a charge or petition to initiate proceedings with the Agency. However, the system makes filing all other documents easier and more efficient, thus streamlining the process.

To file documents electronically with the NLRB, go to the Agency's website at www.nlr.gov. You can access the E-Filing System from the Agency's home page by hovering over the "E-Gov" tab then selecting either "My NLRB" or "E-Filing" from the drop-down menu.

If you are registered with "My NLRB," you may log in by entering your user name and password. You can E-File documents without registering or logging in, but you are strongly encouraged to register to use the log in feature. Registration will speed E-Filing because your contact information will already be in the system. Registration will also allow you

Contact the Region:

There is always an information officer available at an NLRB Regional Office to answer general inquiries or to discuss a specific workplace problem or question. The information officer can offer information about the Act and advice as to whether it appears to be appropriate to file an unfair labor practice charge. If filing a charge does appear to be appropriate, the information officer can assist in completing the charge form.

The information officer at Region 3 may be reached by telephone at:

1-866-667-6572
(Toll free)

or

716-551-4931 (Buffalo)
518-431-4155 (Albany)

Para información en Español llame al:

1-866-667-6572
(Toll free)

TOLL FREE NUMBER:

The Agency also has a toll free telephone number that offers a general description of the Agency's mission, referrals to other related agencies and access to an Information Officer based upon the caller's telephone number. A Spanish language option is also available. Toll free access is available by dialing:

(TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

(E-Filing Continued)

to edit your contact information, view information about your pending case(s) with the Agency, and sign up for electronic issuance of Board and ALJ decisions.

You begin the E-Filing process by entering the case number and clicking "Search Case." After the system finds the case, simply follow the directions for filing your document.

The new e-filing policy and conditions are found in the instructions for e-filing with the Board's Office of the Executive Secretary, the General Counsel's Offices in Washington, the Regional Offices, and the Division of Judges on the Board's web-site at mynlrn.nlrn.gov/efile. In addition, e-filing frequently asked questions can be found at mynlrn.nlrn.gov/efilingfaq.

If you have any questions, consult the e-filing section of our website at www.nlrn.gov or call and ask an information officer (716) 551-4931.

White House Announces Three NLRB Nominations

On July 9, 2009, the White House announced the nominations of Craig Becker, Mark Gaston Pearce, and Brian Hayes to fill the Board's three current vacancies. If they are confirmed by the Senate, the Board will be at its full complement of five members for the first time since December 2007. The three nominees will be voted on together by the full Senate. The candidates nominations have been held up primarily because of a hold placed on Craig Becker's nomination by Senate Republicans. The Pearce and Hayes nominations have not generated controversy but cannot move forward without Becker. Becker's nomination is currently being considered in the Senate.

Craig Becker currently serves as Associate General Counsel to both the Service Employees International Union (SEIU) and the AFL-CIO. Becker's term would expire December 16, 2014.

Mark Gaston Pearce is a founding partner in the Buffalo, NY law firm of Creighton, Pearce, Johnsen & Giroux, where he practices union-side labor and employment law. From 1979 to 1994, he was an attorney and District Trial Specialist for the NLRB in Buffalo, NY. Pearce would have a term ending August 27, 2013.

Brian Hayes currently serves as the Republican Labor Policy Director to the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP). Hayes would have a term ending December 16, 2012.

The current Board members are Chairman Wilma B. Liebman and Member Peter C. Schaumber. Chairman Liebman's term expires on August 27, 2011 and Member Schaumber's term ends August 27, 2010. By tradition, three of the five seats on the Board are filled by the same political party as the President in office.

Rhonda P. Ley, Regional Director
National Labor Relations Board, Region 3