



NLRB Region 11 OUTREACH

September, 2010

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ISSUE 3

In This Issue

Status of the Board	- 1
Regional News	- 2
Outreach	- 3
Representation News	- 3
Unfair Labor Practice Case Filings	- 4
Protected Concerted Activity	- 4

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 contain a brief statement of the basis for the charge. The charging party must also sign the charge. In order to be timely filed, charges must be filed within 6 months of the date of the alleged violation.

Forms are available for download from the NLRB website at www.nlr.gov. Forms may also be obtained from any NLRB office. NLRB offices have information officers available to discuss charges in person or by phone and to assist with filling out charge forms.

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

Status of the Board

On March 27, 2010, President Obama named Craig Becker and Mark Gaston Pearce as recess appointees to the National Labor Relations Board. Earlier, in July 2009, President Obama had nominated Craig Becker, Mark Gaston Pearce, and Brian Hayes to fill the three vacant seats on the National Labor Relations Board. On June 22, the Senate confirmed Pearce's nomination to the Board, as well as the nomination of Brian Hayes. Member Becker continues to serve a recess appointment.

Prior to these appointments, the Board had operated with just two members from December 2008 until March 27, 2010. During that period the two members, current-Chairman Wilma Liebman and former Member Peter C. Schaumber, whose term ended August 27, 2010, issued nearly 600 decisions, most of which were complied with or settled. However, as a result of challenges filed by several parties contending that the Board lacked the authority to issue decisions with only two members, the matter was presented to the Supreme Court for decision. On June 17, 2010, in a 5-4 decision, the Supreme Court held in *New Process Steel* that the National Labor Relations Act did not grant the Board the authority to issue decisions when only two of the Board's five seats were occupied.

The Board currently is considering the issues raised in pending two-member Board decisions, including two cases, Narricot Industries LLP, 11-CA-22048, and White Oak Manor, 11-CA-21786, which were processed by Region 11.

On June 18, 2010, Ronald Meisburg resigned as General Counsel of the Board, and three days later, President Obama appointed Lafe Solomon to serve as Acting General Counsel. Mr. Solomon had served previously as Director of the Board's Office of Representation Appeals. He will serve as Acting General Counsel for 210 days, or until a General Counsel is appointed and confirmed by the Senate.

Region 11 Staff

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Regional News

As you may have noticed, Region 11 has experienced several recent staff changes. Regional Attorney Patricia Timmins retired in May 2009 and Assistant to the Regional Director Howard Neidig retired in December 2009, at which time the positions of Regional Attorney and Assistant to the Regional Director were eliminated. Region 11 then became a two-manager region, with a Regional Director and Deputy Regional Director, a change in managerial structure that resulted from the decline in the Region's overall case intake and the related decrease in the size of the regional office staff.

Other staffing changes include the retirement of Tony Scott as Compliance Officer at the end of 2009. As well, effective the third week in September 2010, Valerie Bennett Queen resigned from her position as Field Attorney in order to spend time with her family and pursue personal interests in Raleigh, North Carolina. Jenny Dunn was promoted to the position of Compliance Officer in Spring 2010. Jenny joined the Agency in the Miami Resident Office, Region 12, in 2004, after completing a co-op program through Cleveland State University. She transferred to Region 11 as a field examiner in 2007. As well, Neneth Zink, who joined the Regional support staff in April 2009, was promoted to Litigation Support Assistant in June 2010. Ms. Zink is responsible for administrative matters related to the issuance of complaints and the scheduling of unfair labor practice hearings, as well as requests submitted under the Freedom of Information Act.

Other promotions in the Region include Jane North, who was appointed Regional Attorney in June 2009, and thereafter promoted to Deputy Regional Director in December 2009. Ms. North graduated magna cum laude from the University of Tennessee College of Law in 1984, after which she clerked for the Honorable Gilbert S. Merritt in the United States Court of Appeals for the Sixth Circuit in 1984-85. As well, in March 2010, Lisa Shearin was appointed Supervisory Field Attorney. Ms. Shearin graduated from the University of North Carolina – Chapel Hill School of Law in 1990. She worked in the Agency's Appellate Court Branch between 1990 and 1997, during which time she argued on behalf of the Board in the United States Courts of Appeals for numerous circuits. She joined the staff of Region 11 as a field attorney in 1997.

In regard to budgetary issues, the Agency received adequate funding to accomplish its mission in Fiscal Year 2010, which ends September 30, 2010 and it is anticipated that the Agency will receive adequate funding for Fiscal Year 2011.

Outreach

In this calendar year, the NLRB is celebrating the seventy-fifth anniversary of the National Labor Relations Act and Region 11 is celebrating its sixty years of existence. As part of the celebration, Region 11 and the ABA Committee on Practice and Procedure under the NLRA have scheduled a luncheon seminar for November 19, 2010. The featured speaker will be Board Member Mark Gaston Pearce. A panel will respond to Member Pearce's remarks, with Dave Prouty, Chief Labor Counsel for Major League Baseball Players Association and former general counsel for UNITE! and UNITE HERE! speaking on behalf of labor, and Fred Suggs, Shareholder in the Ogletree Deakins law firm, speaking on behalf of management. Among the topics to be discussed will be the impact of the Supreme Court's decision in *New Process Steel*. There will also be a discussion of the changes in the kind and numbers of cases being filed in Region 11. The program fee is \$25.00, and you may register at <http://constangy.com/communications-events.html>. For additional information, you may contact Deputy Regional Director Jane North at 336-631-5212.

Members of the Regional staff are available to speak to organizations. You may contact our outreach coordinator Nancy Wilson at (336) 631-5230 or via e-mail at nancy.wilson@nlrb.gov for additional information and to make arrangements.

Representation Case News

The downward trend in the Region's representation case filings which began several years ago appears to have stabilized. In Fiscal Year 2009, which ended September 2009, 28 petitions were filed, which was considerably less than the previous fiscal year. Through August 31 of current Fiscal Year 2010, however, 26 petitions have been filed, eight of which were filed in July and August. The Region is not aware of any factors that may be influencing the number of representation case filings. In regard to election results, during FY 2010, 7 elections resulted in certifications of representatives, and 5 resulted in certifications of results. In all, the petitions filed in FY 2010 covered a total of approximately 1,600 employees. Several petitions including one which involves 150 employees are pending final determination.

The current fiscal year has also seen a decrease in the filing of voluntary recognition (VR) cases resulting from the Board's decision in *Dana Corporation*, 351 NLRB 434 (2007), which modified recognition bar and contract bar principles. During the first eleven months of FY 2010, only two VR cases were filed, compared with ten in the prior fiscal year. The *Dana* decision requires that, in situations in which an employer voluntarily recognizes a union, the employer and/or union must notify the Board of the recognition, in order to set in motion the process by which employees will be notified that they

have forty-five days to file a decertification petition. In the absence of either the employer or the union's taking this action, neither the recognition itself nor any resulting collective bargaining agreement will serve as a bar to the processing of a subsequent representation petition. On August 31, 2010, the Board issued a Notice and Invitation to file Briefs in *Rite Aide Store #6437*, 31-RD-1578, and *Lamons Gasket Company*, 16-RD-1597, for possible reconsideration of the *Dana* decision. Briefs are due on November 1, 2010 and Responsive briefs are due November 15, 2010. Also, in a pending case in the Region 11, *Basic Contracting Services, Inc.*, 11-RC-6742, a union that received recognition and signed a collective bargaining agreement, without a VR case having been filed and *Dana* notices having been posted, is seeking reversal of the *Dana* decision.

Unfair Labor Practice Filings

The number of unfair labor practice case filings has been holding relatively steady in the past several years. In FY 2009, a total of 489 cases were filed in Region 11. As of early September 2010, a total of 466 cases had been filed for FY 2010. These numbers still represent a downturn from previous years, when, by way of example, case filings numbered 571 in FY 2003, and 582 in FY 2002.

In regard to the type of charges being filed, we have also seen a significant change in that area, with a substantial upswing in individually-filed charges asserting that various kinds of discipline, mostly terminations, were issued in retaliation for employees engaging in protected concerted activities. Thus, during the past two fiscal years, almost 40 percent of the Category 3 filings, that is, cases involving allegations most central to the achievement of the Agency's mission, have been based on allegations of protected concerted activities leading to discipline. Whether as a result of the Region's outreach efforts in educating the public about the reach of Section 7 of the Act, or because of an overall change in the labor and employment environment, this situation may signal a new phase in the work of the Region. For more detailed information about this category of cases, see the article entitled "A Quick Look at Protected Concerted Activity" in this newsletter.

A Quick Look at Protected Concerted Activity

Protected concerted activities continue to percolate in Region 11 as well as in other Regions throughout the country. The NLRB's website (www.nlr.gov) defines protected concerted activities as follows: **The National Labor Relations Act (NLRA) protects employees' rights to engage in protected concerted activities with or without a union, which are usually group activities (2 or more employees acting together) attempting to improve working conditions, such as wages and benefits.** An employer violates Section 8(a)(1) of the NLRA when it takes an adverse action against an employee for engaging in protected concerted activity. There are generally three major areas which are frequently disputed in these types of cases:

1) whether the activity is concerted in the first place (unlike union activity, in which concerted activity is presumed); 2) whether the activity is protected; and 3) whether the employer was, in fact, motivated by the concerted activity when it took its adverse action.

The most classic and readily apparent concerted activity involves two or more employees actually engaging in a joint action at the same time to better their working conditions, such as two employees asking their manager for a raise during a conversation. However, the concept of “concert” is not so restrictive as to limit itself to such activities. In determining whether there is concert in the first place, the biggest challenge is often in determining when a single employee’s actions can be deemed to be concerted. One employee may be deemed to have engaged in concerted activity in many instances; for example, a lone employee speaking to a manager on behalf of himself and others, and making this clear by using such phrases as “we” and “us,” would be engaged in concerted activity.

The seminal case on what constitutes concert is *Meyers Industries*, 268 NLRB 493 (1984)(*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), cert. denied, 474 U.S. 948 (1985), reaffd., 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988). Among other things, *Meyers* held that concert would not be presumed and to be concerted, individual employee activity must “be engaged in with or on the authority of other employees” *Meyers I* at 497.

Since *Meyers*, there have been no substantial changes in the area of concerted activity. However, certain doctrines regarding ostensibly single employee action which have been deemed to be concerted have gained traction over the last 25 years. For example, an employee’s comments at a group meeting in which other employees are present have been found to be concerted, regardless of whether those employees join in. See *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 669-670, 676 (2007). Similarly, a single employee’s later action has been found to be a “logical outgrowth” or a continuation of earlier concerted activity. *Mike Yurosek & Son, Inc.*, 310 NLRB 831, 831 (1993), enfd. 53 F.3d 261 (1995).

In regard to whether conduct is protected, the Board accords some leeway to employees for impulsive and offensive behavior occurring in the course of concerted activity. The Board distinguishes those cases in which employees “exceed[] the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives” from those in which “the misconduct is so violent or of such character as to render the employee unfit for further service.” *Allied Aviation Fueling of Dallas, LP*, 347 NLRB 248, 253 (2006), enfd. 490 F.3d 374 (5th Cir. 2007) (citation omitted).

Here is a brief sampling of recent interesting cases dealing with whether the activity was protected or concerted. For a very recent look at activity that retained the protection of the Act despite an employee’s profane outburst, see *Plaza Auto Center, Inc.*, 355 NLRB No. 85, slip op. at 2-3 (2010) (in private meeting with employer’s owner and two sales managers about employer’s policies and compensation, employee’s outburst that included extremely crude and demeaning language, directed specifically to the owner, did not lose the



protection of the Act; among other things, Board relied on fact that meeting took place in the presence of only management officials and that during the meeting management twice unlawfully threatened employee that if he did not like the employer's policies, he could quit). Two fairly recent two-member Board decisions include the following: *Los Angeles Airport Hilton Hotel and Towers*, 354 NLRB No. 95, slip op. at 1 & n. 3 (2009)(Employer's physical pushing of employee to keep him from engaging in concerted activity violates Section 8(a)(1)); *AKAL Security, Inc.*, 354 NLRB No. 11, slip op. at 4-5 (2009) (meeting in which guards discussed issues that impacted their safety was concerted; however, Board concluded that because meeting took place during operational hours and created a breach in security, it was unprotected).

It is clear from the above that concerted activity remains a vital and exciting area for the National Labor Relations Board. It is anticipated that as cyberspace either supplants or coexists with a traditional workplace, there will be new permutations regarding what constitutes concert and what communications are considered protected in an email or other electronic format.