

# What's Brewing in Region 30

NATIONAL LABOR RELATIONS BOARD

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**FROM THE DIRECTOR'S DESK**

As Regional Director, I welcome you to the third edition of *What's Brewing in Region 30*. Our goal is to provide useful information that explains the Region's practices and procedures, discusses and illuminates Board decisions and General Counsel guidance memoranda, introduces Regional personnel to you, and provides a forum for your comments, questions and other feedback.

Region 30 has had a recent change in its managerial structure. Supervisory Attorney Paul Bosanac retired in early July 2010 after a distinguished 32-year NLRB career. Paul litigated several significant cases over the years, not least of which included *Chicago Tribune*, *U.S. Marine Corporation* (later bought out by *Brunswick Corporation*), and *Greyhound Bus Lines*. Each of these cases concerned significant issues arising under labor law such as the limits on an employer's right to impose unilateral changes in the face of difficult bargaining; limits on a successor employer's right to decline to

hire certain of the predecessor's employees to avoid a bargaining obligation with the union; and limits on an employer's right to impose unilateral changes upon difficult bargaining and an ensuing



**Irving Gottschalk, Regional Director**

lengthy strike, and limits on the union's right to enforce its strike while not intimidating employees who choose not to support the strike. Paul was also an active contributor to labor law journals, and, in 2009, had a book published by the American Bar Association entitled "Litigation Logic: A Practical Guide to Effective Argument."

In mid-July 2010, senior trial attorney Anita O'Neil was selected to be our new Supervisory Attor-

ney. Anita has been with the Region for 10 years, during which time she investigated and litigated many of the Region's most difficult and challenging cases. She has already taken an active interest in the cases being investigated by the field examiners and attorneys on her team, and will be very effective in ensuring the completeness and timeliness of the investigations and that the myriad of legal issues have been carefully researched and analyzed. We are very appreciative of having Anita in this most important position.

Since our last edition, the U.S. Supreme Court issued its decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635, 188 LRRM 2833 (June 17, 2010). The Court held the two-member Board, which functioned from January 2008 through March 2010 and issued nearly 600 rulings and decision, did not constitute a proper quorum of the normally five-member Board.

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## From the Director's Desk, Continued

As a result of two recess appointments in April 2010, Senate confirmations of two of the three nominations submitted by President Obama, and the late August 2010 expiration of Board member Peter Schaumber's (R) term, the Board has had a proper quorum and, at present, has four sitting members: Chairman Wilma Liebman (D) and Members Craig Becker (D), Mark Gaston Pearce (D) and Brian Hayes (R). While Member Schaumber was still serving, the Board determined that the nearly 500 decisions by the two-member Board in cases that had since closed would remain closed. Of the remainder, five cases had been enforced by a federal circuit court and remanded to the Board for ensuing action; the full Board determined that those cases would be treated as final *because* they had been enforced and thus further challenges to the two-member Board's authority to act could no longer be raised. The full Board determined that ALJ decisions underlying the other 95 cases would be reviewed and new Board decisions reached. While many new decisions were reached while Member Schaumber was still in office, the now four-member Board is continuing to reconsider the remaining two-member Board cases. The Board's progress can be followed by checking the NLRB's website, at [www.nlr.gov](http://www.nlr.gov), and clicking on the link "Information on Two-Member Board Decisions."

As previously reported, General Counsel Ronald Meisbur (R) left office on June 18, 2010. Effective June 21, 2010, President Obama appointed long-tenured Board attorney Lafe E. Solomon (D), the Director of the Board's Office of Representation Appeals, as Acting General Counsel. Mr. Solomon's appointment will last for up to 210 days, a period that can be renewed, but his actual tenure as Acting General Counsel could end sooner, upon the appointment and/or confirmation of a new General Counsel. Mr. Solomon has announced his interest in pursuing policies that will "make a difference" and enhance enforcement of the National Labor Relations Act. His just-issued GC memorandum on streamlined procedures for processing Section 10(j) injunctive relief matters arising in "nip in the bud" union organizing discharge cases is in keeping with that goal.

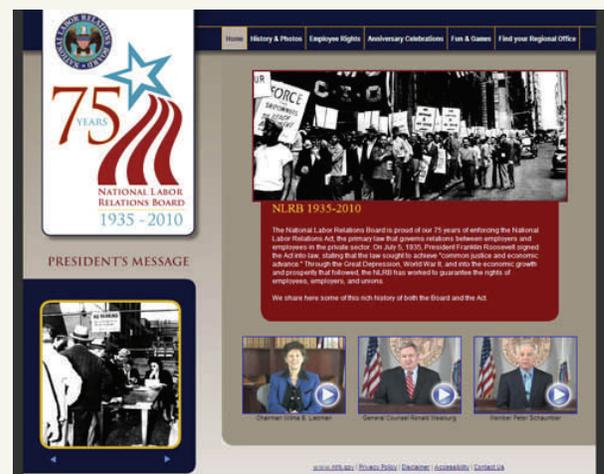
The current Board has, in the following two decisions issued on August 27, 2010, indicated its interest in reconsidering decisions made by previous Boards. In *Rite*

*Aid Store #6473 and Lamons Gasket Company*, 355 NLRB No. 157, the Board invited interested parties to brief whether *Dana Corp.*, 351 NLRB 434 (2007) [recognition bar restrictions] should be reconsidered. In *UGL-UNICCO Service Company*, 355 NLRB No. 155, the Board invited interested parties to brief whether *MV Transportation*, 337 NLRB 770 (2002) [elimination of successorship bar] should be reconsidered. The Board issued two other decisions on August 27, 2010, resolving long-pending contentious issues. In *United Brotherhood of Carpenters and Joiners of America, Local Union 1050 (Eliason & Knuth of Arizona, Inc.) (Northwest Medical Center)(Ra Tempe Corporation)*, 355 NLRB No. 159, the Board determined the Union did not engage in unlawful secondary conduct in violation of Section 8 (b)(4)(ii)(B) by peacefully displaying large, stationary banners bearing a message directed to the public, unaccompanied by active picketing or other confrontational conduct. In *International Association of Machinists and Aerospace Workers, AFL-CIO and IAM Local Lodge 2777 (L-3 Communications Vertex Aerospace LLC)*, 355 NLRB No. 174, the Board determined the matter of whether the Union could lawfully require a *Beck* objector to annually renew his or her objection was properly analyzed under the standards of a union's duty of fair representation, and that in this case, because the Union could not adequately justify its annual renewal requirement, the requirement was arbitrary and thus a breach of its fair representation duty. Previous new Boards have decided that such reviews of predecessor opinions and changes in the Act's interpretation were appropriate; it appears this new Board will continue that pattern.

I encourage you to write to the newsletter's editor, Attorney Christina B. Hill at [Christina.hill@nlrb.gov](mailto:Christina.hill@nlrb.gov), with any questions, comments or suggestions you may have regarding what you read in these pages or any other issue of concern. All such correspondence will be carefully reviewed and answered. We also will print appropriate correspondence and our replies, though edited as may be necessary to protect privacy interests or due to space considerations. I look forward to discussing what we do and learning from you about what we can do to improve the quality of our public service.

## Celebrating 75 Years

In celebration of the National Labor Relations Act's 75th Anniversary, the Agency launched a website commemorating the Act's history and its achievements. We encourage each of you to visit <http://www.nlr.gov/75th/index.html> for more information.



# Region 30 News

## Board Decisions

In *Pabst Theater Foundation*, 355 NLRB No. 32 (2010), the Board granted the Region's motion for default judgment, and ordered the Employer to cease and desist from refusing to collectively bargain with the Union by unduly delaying the execution of the parties' collective bargaining agreement. The Region is currently seeking to enforce the Board's order.

In *United Kiser Services*, 355 NLRB No. 55 (2010), the Board dismissed the Region's complaint on the grounds the Charging Party Union had constructive knowledge of the Employer's having recognized a different union for employees performing bargaining unit work at a point earlier than alleged in the complaint, thus the allegations were time barred under Section 10(b) of the Act.

In *Advantage Fire Sprinkler*, 355 NLRB No. 82 (2010), the Board granted the Region's motion for summary judgment and ordered the Employer to cease and desist from failing to collectively bargain with the Union by refusing to provide the Union with relevant and necessary information upon request. Settlement pursuant to subsequent contempt proceedings has been reached and the Employer's compliance is being monitored.

## Administrative Law Judge Decisions

In *Western States Envelope Company*, 30-CA-18296, (2010), the ALJ concluded that the Employer committed multiple violations of Section 8(a)(1) of the Act by threatening employees with unspecified reprisals and interrogating them about whether they sought assistance from the Union. The ALJ also included the Employer violated Section 8(a)(1) and (3) of the Act by laying off and terminating its employee because he assisted the Union and engaged in protected concerted activities.

In *Teamsters Local 200*, 30-CB-5303, (2010), the ALJ concluded that the Union committed multiple violations of the Act. The Union operated an exclusive hiring hall from January 1, 2007 to the present, where it referred employees for employment opportunities to Bechtel Construction Company to work at its Elm Road Project in Oak Creek, Wisconsin. The Union operated its hall without consistently publicizing the hall's criteria for referring applicants, and from March 11, 2008, it failed to consistently use and publicize objective criteria for warehouse jobs available at the Elm Road project, thus violating Section 8(b)(1)(A) of the Act. The Union also violated Section 8(b)(1)(A) of the Act by not providing its members and applicants with copies of its job referral lists, rules, policies and procedures.

The Union further violated Section 8(b)(2) of the Act from April 14-15, 2008 to the issuance of the judge's decision by failing to refer its member, and others similarly situated, for warehouse job opportunities at the Elm Road Project. The Union also engaged in such conduct for reasons other than the failure to pay dues, in further violation of Section 8(b)(1)(A) of the Act. By engaging in the above-mentioned conduct, the Union caused the Employer to violate Section 8(a)(3) of the Act. Lastly, the Union did not refer its member for job opportunities at the Elm Road Project from August 23, 2008, to the issuance of the judge's decision, because the member engaged in dissident internal union activities, thus further violating Section 8(b)(1)(A) of the Act.

## Board Agents New to the Region!!!

**Eric and Tabitha Boerschinger** transferred to Region 30 from the Brooklyn office. Eric is a Field Examiner and began his career with the Agency in Los Angeles where he worked from 1999 until his transfer to the Brooklyn office in 2005. Tabitha is a Field Attorney and began her career with the Agency at the Peoria office where she worked from 2000 until 2002, when she transferred to the Brooklyn location. The couple recently relocated to Milwaukee this September.

**Rachel Centinario** joined Region 30 this summer as an attorney. She is a May 2010 graduate of the University of Wisconsin Law School and worked here as a legal intern during the Spring 2010 semester.

## **Ninth Circuit Spoils Grocers Attempts to Gain Upper Hand in Contract Negotiations Through Profit Sharing with Competitors in the Event of Strike or Lockout**

- Andrew Gollin, Field Attorney

### **Introduction**

In *California v. Safeway, Inc.*, \_\_\_ F.3d \_\_ (9<sup>th</sup> Cir. August 17, 2010), the State of California filed suit against four supermarket chains that entered into a "mutual strike assistance agreement" which contained a provision allowing them to share profits in the event of a strike or lockout. The State of California claimed the profit-sharing provision violated Section 1 of the Sherman Act. Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The central issue was whether the profit-sharing provision, which otherwise constituted an unlawful restraint of trade, was excused from compliance under the nonstatutory labor exemption because it constituted an economic weapon used by the employers in their efforts to prevail in a labor dispute with the unions that represented their employees. Recently, the U.S. Court of Appeals for the Ninth Circuit issued its decision, holding that the non-statutory labor exemption did not apply, and that to exempt an anticompetitive agreement simply because it was entered into to help employers prevail in a labor dispute would be contrary to the fundamental principles of both labor and antitrust law. *Id.* at slip op. 1 (internal citations omitted).

### **Decision Summary**

Albertson's, Vons (for which Safeway, Inc. is the parent company), Ralphs and Food 4 Less are supermarket chains operating in Southern California. Ralphs, Albertson's and Vons, which are the three largest supermarket chains in that region, and possess a commanding share of the market, had a collective bargaining agreement with various local unions affiliated with the United Food and Commercial Workers. The agreement was set to expire on October 5, 2003. Food 4 Less had a separate agreement with the same local unions which was set to expire four months later. In July and August 2003, Ralphs, Albertson's and Vons agreed with the unions that the three chains would act as a multiemployer bargaining unit for the purpose of negotiating a successor to their expiring contract. The employers' primary goal was to decrease labor costs, in particular, the cost of health insurance.

In 2003, prior to the commencement of bargaining, the four supermarket chains sought to protect themselves in the event the unions engaged in whipsaw tactics (i.e., unions strike or picket only one of the chains) by entering into a Mutual Strike Assistance Agreement in which Ralphs, Albertson's, Vons, and Food 4 Less agreed that they would all lock out their union employees within 48 hours of a strike against any one or more of them. The controversial aspect of this agreement was a "revenue sharing provision." This provision stated that, in the event of a lockout or strike, any firm that earned revenues above its historical share of the combined revenues of all four firms would redistribute 15% of those surplus revenues among the other chains according to a fixed formula. The purpose of the profit sharing provision was to maintain each employer's pre-labor dispute market share. Food 4 Less was included in the agreement to share profits despite being outside the multiemployer bargaining unit and despite having a separate collective bargaining agreement with unions that was expiring at a different time, the successor to which was to be negotiated separately. Additionally, the chains agreed to share profits under the same formula in the event that Food 4 Less was struck during its later, separate collective bargaining process. Under the terms of the agreement, profit sharing was to continue for two full weeks after the termination of any strike or lockout. Thus, in the event that a strike or lockout involving the three largest supermarket chains in Southern California caused members of the public to patronize Food 4 Less, one of the next largest supermarket chains in the region, Food 4 Less was required to share its extra profits with the strike-bound employers.

The profit-sharing provision covered 859 Ralphs, Albertson's and Vons stores and 101 Food 4 Less stores in the Southern California area. According to estimates, the four chains accounted for approximately 60% of the market share for the Los Angeles-Long Beach metropolitan area, and at least 70% of the market share for the San Diego metropolitan area.

On October 11, 2003, the unions struck local Vons stores. Pursuant to their agreement, Ralphs and Albertson's (but not Food 4 Less) locked out their union employees the next day. The unions initially picketed all three supermarket chains but stopped picketing Ralph's stores on October 31, 2003. Selective picketing of Vons and Albertson's stores continued until February 2004, when a new labor contract was reached and the strike ended. Pursuant to the profit sharing agreement, Ralphs and Food 4 Less paid Vons and Albertson's approximately \$142 million for the strike period, and \$4.2 million for the two-week period following the strike.

The State of California later filed suit against the four employers, alleging that by entering into the agreement with the profit-sharing provision, they had engaged in an unlawful combination and conspiracy in violation of [Section 1](#) of the Sherman Act. The employers moved for summary judgment, claiming that the nonstatutory labor exemption applied to the profit-sharing provision. The district court denied the motion. The State of California then filed for summary judgment seeking a ruling that the profit-sharing provision violated Section 1, which the district court also denied.

Continued on next page.

On appeal, in a decision written by Judge Stephen Reinhardt, the Court of Appeals for the Ninth Circuit found that the profit-sharing provision violated Section 1 of the Sherman Act and was not entitled to exclusion under the nonstatutory labor exemption. The Court began by reviewing the profit-sharing provision under the traditional “per se” standard. The “per se” standard applies to those practices that the courts have held are manifestly anticompetitive and lack any redeeming virtues and, therefore, are classified as illegal without examination as to their effects on the market. After reviewing the evidence and relevant case law, the Court held the evidence was insufficient to prove that the profit-sharing provision was unlawful under the per se standard. The Court then analyzed the provision under a quasi “quick look” standard. Under the “quick look” standard, an agreement is violative if an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets, and there is no evidence that the arrangement has any procompetitive effects. In applying this “quick look” standard, the Court ultimately concluded that the profit-sharing provision created a great likelihood of anticompetitive effects, and that such effects are not outweighed or neutralized by any plausible procompetitive benefits. *Id.* slip op at 10-11. In reaching this conclusion, the Court rejected the employers’ argument that the provision serves a procompetitive purpose, because the provision would increase their chances of winning the labor dispute and would effectively reduce the wages and benefits they would be required to pay their employees, which in turn would increase their ability to lower prices and compete more effectively with other companies. The Court specifically stated:

It is a primary objective of our nation's laws to protect the rights and interests of working persons, and to enable them to obtain a fair and decent wage through collective action. Reducing workers' wages and benefits is hardly an objective that would justify a violation of our antitrust laws or a benefit so substantial to the public as to overcome the deleterious consequences of anticompetitive conduct. We see no reason, even if we had the authority to do so, to set aside the ordinary principles governing antitrust law in order to unbalance the carefully developed legal structures relating to our laws governing collective bargaining; nor do we see any reason or justification for assuming the function of increasing the economic power of employers to the disadvantage of their employees. *Id.* at slip op. 17 (internal citations omitted).

The Court then turned to the employers’ principal contention, which was that because the profit-sharing provision was entered into in anticipation of a labor dispute, and the provision constituted part of the employers’ method of dealing with such a dispute, the provision should be excused from the federal anti-trust laws under the nonstatutory labor exemption. The Court began its analysis into this contention by reviewing the historical evolution of the nation’s antitrust laws, their (in)application to collective bargaining, and the development of the nonstatutory labor exemption to the Sherman Act. The Court noted as follows:

The logic behind the [nonstatutory labor] exemption is simple: it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves and with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Accommodating the congressional policy favoring collective bargaining and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited non-statutory exemption from antitrust sanctions. *Id.* at slip op. 19 (internal citations and quotations omitted).

However, the Court recognized that not every restraint on competition that employers and employees might impose through the collective bargaining process is immune from antitrust review. Specifically, the Court noted that in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 234 (1996), the U.S. Supreme Court explained that the “implicit [(nonstatutory labor)] antitrust exemption ... applies where needed to make the collective bargaining process work.”

The Court concluded that profit-sharing arrangements are not traditionally regulated under labor law principles, and do not raise issues that are suitable for resolution as a matter of labor law, by the National Labor Relations Board, or by the courts that review or implement Board rulings. In other words, the Court concluded that profit sharing is not “needed to make the collective bargaining process work.” As such, it rejected the employers’ arguments under *Brown* and held the profit-sharing provision at issue did not fall within the nonstatutory labor exemption. The Court held as follows:

To the extent that defendants argue that other responses would leave them open to economic pressure from the unions, the answer is obvious: the collective bargaining process contemplates that the respective parties will incur economic pressures and that those pressures will lead to a resolution of the dispute. Labor unions face the severe economic pressure that a lockout of its members causes. Employers face the economic pressures that a loss of profits may produce. The purpose of the nonstatutory exemption is not to suspend the consumer protections afforded by the antitrust laws in order to shift the balance in economic pressures that the parties may bring to bear in the course of labor disputes. That balance results from the now well-established functioning of the bargaining process—a process the operation of which has been authorized by Congress after balancing the rights of employers and their employees, and adopting a system it deemed fair to both sides. A surfeit of concern for employer strength in labor disputes would be contrary to Congress's intent to ensure that employees have sufficient strength to negotiate with their employers.

Based on the foregoing, the Court held that the profit sharing provision at issue violated Section 1 of the Sherman Act and that the State of California was entitled to summary judgment.

## A Mighty Poor Dog Won't Wag Its Own Tail

-Christina Hill, Field Attorney

At the end of 2007, two of the four Board members' terms were scheduled to expire. To ensure the Board's ability to function once these terms expired, on December 27, 2007, the four-member Board delegated its full authority to three members, and effective January 1, 2008, only two members remained. The two members' delegated authority expired automatically on March 27, 2010, once the Board's membership returned to three members. For the 27 months the two-member Board operated, it reigned with the intent to ensure industrial peace, which is evidenced by the fact it issued almost 600 decisions. But, the members' time in office did not go unchallenged. The federal appellate courts were asked the question whether the two-member Board had the authority to continue issuing decisions. The courts were split. To resolve this conflict, the U.S. Supreme Court granted certiorari in *New Process Steel*, and, in a 5-4 decision, 560 U.S. \_\_\_\_ (2010); 130 S. Ct. 2635 (2010) it held two members cannot exercise its delegated authority when the delegee group's or Board's membership falls below three members.

The Court's ruling centered on its interpretation and application of Section 3(b) of the Act, which may be broken down into the following clauses: the delegation clause that permits the Board's full powers to be vested in any group consisting of at least three members; the quorum clause that states the quorum requirements for the Board is three members, and for any delegee group, it is at least two members; and the vacancy clause, which states no Board vacancy shall impair the right of the remaining members to exercise full Board authority. *Id.* at slip op. 5-6.

Undeniably, Section 3(b) allowed the four-member Board to delegate its full powers to a three member group, but the narrow issue before the Court was whether that group could still maintain its delegated powers once its and the Board's membership fell to two members. The Court's negative holding was based, in part, on three reasons. First, its interpretation of the Act was meant to give meaningful effect to all of the clauses in Section 3(b) because to allow a contrary reading would essentially permit the Board to function with only two members in perpetuity. The Court said that:

Interpreting the statute to require the Board's powers to be vested at all times in a group of at least three members is consonant with the Board quorum requirement, which requires three participating members "at all times" for the Board to act. The interpretation likewise gives material effect to the three-member requirement in the delegation clause. The vacancy clause still operates to provide that vacancies do not impair the ability of the Board to take action, so long as the quorum is satisfied. And the interpretation does not render inoperative the group quorum provision, which still operates to authorize a three-member delegee group to issue a decision with only two members participating, so long as the delegee group was properly constituted. Reading § 3(b) in this manner, the statute's various pieces hang together—a critical clue that this reading is a sound one. *Id.* at slip op. 6.

Second, the Court held that if Congress intended to allow the Board to function with only two members on an ongoing basis, then the Act would have explicitly stated such, as it did pre-Taft Hartley Amendments. Operating with only two members contravenes the current requirement that the Board maintains at least three members, and, according to the Court, the government did not present evidence establishing Congress intended such an opposite approach to the Act. *Id.* at slip op. 7. Lastly, the Court held its interpretation was consistent with the Board's long standing policy to restore a delegee group to three members once a member's term expired. *Id.*

The Government's arguments did not persuade the Court away from its position. The Government argued that Section 3(b)'s plain terms supported the two-member Board's actions, that a vacancy in the delegee group had no effect, and that public policy supported its efforts to ensure the Board's efficiency. The Board's desire to fully function did not go unnoticed. The Court said it was not insensitive to the Board's wanting to remain in operation, and it acknowledged how the Board's turnover and delays in appointments and in the confirmation process have negatively impacted the Board. *Id.* at slip op. 7-13. Nevertheless, despite understanding the Board's political position, the Court ended its decision with a less comforting colloquial expression saying that the Act "does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died." *Id.* at slip op. 14.

In response to the U. S. Supreme Court's decision in *New Process Steel*, the Agency created a public website that identifies all 595 impacted cases. The website is part of the Agency's initiative to create and encourage transparency. The website may be accessed simply by going to [www.nlrb.gov](http://www.nlrb.gov). Once on the main webpage, to the far right, is a section called *My NLRB*. Click on this section, and, note, you do not have to sign-in with a username or password. On the following page, to the far right, click on the section called *Two-Member Cases*. Once accessed, you can sort through the impacted cases either by case status or name.

## Region 30's Feds Help Feed Milwaukee Families

*-Rachel Centinario, Field Attorney*

Due to the economic crisis, those living in poverty are no longer unfamiliar faces. They are our neighbors, our friends, and our families. In Milwaukee alone, a startling 23% of residents, and 31% of children, are living in poverty. In light of such dire circumstances, in 2009 President Obama signed into law the Serve America Act. The Act created the *United We Serve* initiative, whereby the Office of Personnel Management (OPM) launched the *Feds Feed Families* campaign in an effort to address the plight of our impoverished community by encouraging federal employees to donate food to a local food bank. In 2009, the campaign generated donations by federal employees of over 1 million pounds of food to local food banks.

When the *Feds Feed Families* campaign was initiated this past July 2010, Region 30 immediately pledged its support by donating 74 pounds of food to the Hunger Task Force of Milwaukee during the first month of the campaign. Despite being one of the Regions with the fewest number of employees, Region 30 was the only Region of the National Labor Relations Board to have participated in the first month of the campaign. After learning this, Region 30 was even more motivated to meet its goal of donating 150 pounds of food by the end of the two-month campaign. By September 14, the final day of the campaign, Region 30 had donated 206 pounds of food to the Hunger Task Force, thus exceeding its goal by 56 pounds!

Looking forward, Region 30's primary volunteer activity this fall will be the Combined Federal Campaign (CFC). The CFC is a three-month long campaign, running from September 15, 2010 until December 15, 2010, which encourages federal employees to make donations either through check or payroll deductions to various charities of their choice. Last year, Region 30 donated \$3,438.00 through the CFC. This year, Region 30 hopes to meet its goal of donating \$4,000.00 through the campaign. With various fundraising activities set to occur throughout the next three months, such as a Chili Cook Off, a Card Tournament, a Bake Sale, and a Coin Drive, Region 30 is off to a great start.

## Hispanic Heritage Month

*-Renée Medved, Field Attorney*

Hispanic Heritage Month is celebrated from September 15 to October 15 each year. Hispanic Heritage Week was initially established under President Lyndon Johnson in 1968, and expanded to cover the span of a month by Ronald Reagan in 1988. September 15 is the anniversary of independence for Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. Mexico and Chile celebrate their independence on September 16 and 18, respectively. Columbus Day, or Día de la Raza, also falls within this 30 day period.

The 2010 theme is "Heritage, Diversity, Integrity and Honor: The Renewed Hope of America." During this month, we reflect on the rich diversity among Hispanic Americans and celebrate the remarkable contributions that Hispanic Americans have made, and continue to make, to this nation.

As President Obama states in his presidential proclamation to commemorate this important month, "This month, we honor Hispanics for enriching the fabric of America, even as we recognize and rededicate ourselves to addressing the challenges to equality and opportunity that many Hispanics still face. In reflecting on our Nation's rich Hispanic heritage, let us take pride in our unique and vibrant history, and recommit to a shared future of freedom, prosperity and opportunity for all."

Trivia:

Q: Who was the first Hispanic woman to be appointed to the National Labor Relations Board? (Answer at bottom of page.)

## Spot the Issues

*-Christina Hill, Field Attorney*

In January 2009, Mr. Faithful Union Member was injured off of the job and missed work. Following his recovery, he asked his Employer to reinstate him, and the Employer denied his request. He then went to his Union and asked to file a grievance. The Union's Vice President took Mr. Faithful's statement and told him that the Union would take this matter to arbitration. A few weeks later, the Union's Vice President told Mr. Faithful that the grievance was currently going through the arbitration process. Throughout the summer months no one from the Union contacted Mr. Faithful with an update on his grievance despite the fact he made several attempts to speak with anyone who would give him some information. Finally, in early spring 2010, he spoke with the Union's Shop Chairman who told him that the Employer offered to reinstate Mr. Faithful, but the Union rejected the offer. The Shop Chairman also told Mr. Faithful that it looked as though the Vice President dropped the ball on the grievance, but that he would take care of the it from that point on. Still hearing no response from the Union by April 2010, Mr. Faithful filed a charge with the NLRB alleging his Union violated Section 8(b) (1) (A) of the Act. **Will Mr. Faithful prevail and why?** (See last page for the answer.)

## REGION 30 CO-SPONSORS LERA'S FOURTH ANNUAL ONE DAY CONFERENCE

On November 16, 2010, the Wisconsin Chapter of LERA will present its Fourth Annual One Day Conference at the Hyatt Regency in Milwaukee. The conference is co-sponsored by Region 30. The chapter's current president is Irving Gottschalk, Regional Director, and the secretary-treasurer is Field Examiner Suzanne Clement.

The highlight of this year's conference is the luncheon speaker, **Board Member Mark Gaston Pearce**. There will be 8 workshops as well, with continental breakfast, snacks, and lunch included in the registration fee. All attendees will also receive a book containing the biographies and outlines of each speaker.

Subjects of the workshops are Domestic Partner Benefits; Interest Based Bargaining; EEOC Mediation Process; Update of Fair Labor Standards Act, Work-Life Balance: Changes and Union and Employer Expectations, Impact of Social Networking, Emotional Components of Layoffs for Employers, Employees, Survivors, and Health Benefits and the Health Care Reform Act. CLE credits will be sought. Last year's conference was given 7.5 credits.

Registration fees are \$100 for members, \$125 for non-members and \$40 for students/retirees. Parking is an additional \$8 for the day. The Hyatt will grant government rates for anyone wish-

ing to stay overnight.

Contact Secretary-treasurer Suzanne Clement at 414-297-3883 or Suzanne.clement@nlrb.gov for further information concerning the conference, memberships, or monthly luncheons. A brochure concerning the conference or a schedule of the monthly luncheons (held at Alioto's in Wauwatosa, WI) will be sent upon request.



### LABOR AND EMPLOYMENT RELATIONS ASSOCIATION (LERA)

September 10 - **Is the Stimulus Package Working?** Scott Adams, speaker

October 8 - **Changes at the National Labor Relations Board since the Supreme Court Ruling in New Process Steel**; Irv Gottschalk, speaker

November 16 - **Fourth Annual One Day Conference** to be held at the Hyatt Regency Milwaukee (see above for details)

December 10 - **"Race to the Top" and its impact on teachers and students**; MPS Superintendent Gregory Thornton, speaker

January 14 - **Updates on the WERC**; Peter Davis, speaker

February 11 - **State of Arbitrations**; David Jarvis, speaker

March 11 - **Role of the Arbitrator**; Amedeo Greco, speaker

April Dinner meeting - dates and speaker information to follow. Elections will be conducted for the new officers at this meeting

All luncheons and the dinner will be held at Alioto's Restaurant, 3041 N. Mayfair Road, Wauwatosa, WI 53222.

Luncheon registration begins at 11:30 am, lunch will be served at noon, and the speaker will begin around 12:15 PM.

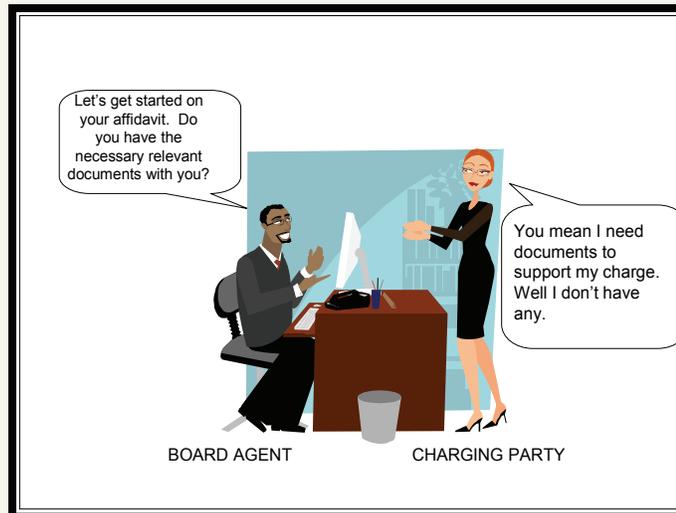
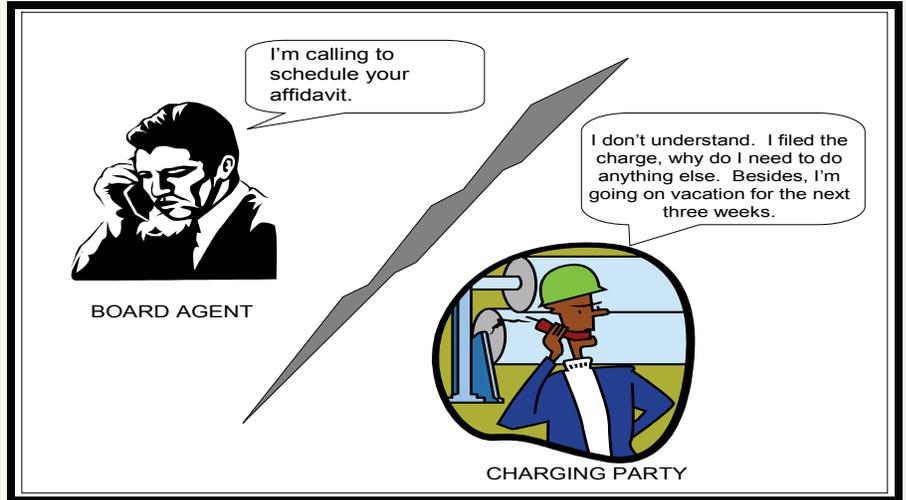
Cost - members \$15, non-members \$20, students/retirees \$10. Regular, organizational, and student/retiree memberships are available. For further information on the luncheons or memberships, contact Suzanne Clement, secretary-treasurer at Suzanne.clement@nlrb.gov or 414-297-3883.

## Be Prepared When Presenting Evidence in Support of Your Charge

-Richard Neuman, Compliance Officer

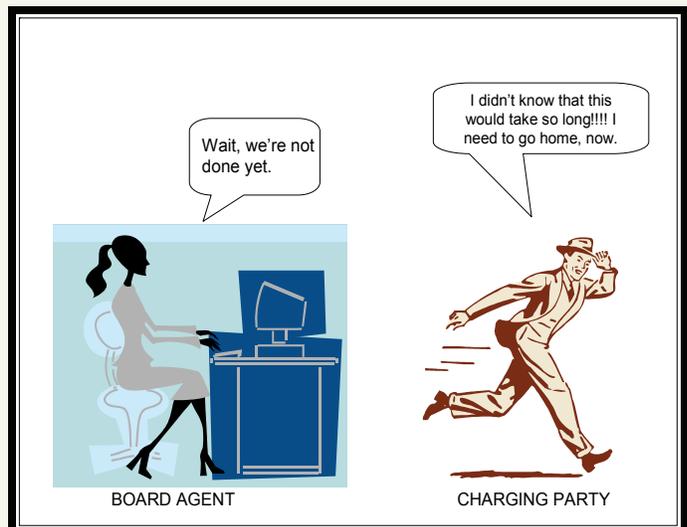
The following are a few pointers to keep in mind when presenting evidence in support of your charge:

- All charges need to be supported by sworn statement (affidavit) taken by the Board.
- At the affidavit please bring all relevant documents, contracts and correspondence with you. You can also provide them in advance of your scheduled affidavit.



- You should be prepared to discuss the events surrounding the charge in chronological order.
- Plan ahead, the sworn statement may take several hours, so please plan parking and transportation accordingly.

- When filing a charge, be prepared to present your evidence within a week of filing the charge.
- Affidavits are confidential statements, and it is advised that only legal representatives, if any, be present for the taking of these statements to maintain this confidentiality.



**THE DUMMIES' GUIDE TO THE  
LENGTH OF RECESS APPOINTMENTS**

When a Board Member receives a recess appointment—as happened when **President Obama** recessed Board Members **Craig Becker** and **Mark Gaston Pearce** on March 27—there often is confusion about the length of the recess appointment. The U.S. Constitution states that “[t]he President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” A “session,” for purposes of the recess appointment clause, refers to the period between the reconvening of the Senate after a sine die adjournment and the next sine die adjournment. Under the Constitution, Senate sessions begin on January 3 and continue until sine die adjournment, usually in October or November of that same year.

A recess appointment expires at the end of the Senate’s *next* session or when an individual (either the recess appointee or someone else) is nominated, confirmed, and permanently appointed to the position, whichever occurs first. If the President makes a recess appointment *between* sessions of the same or successive Congresses, that appointment will expire at the end of the following session. For example, if the President had made recess appointments to the Board during the period between the adjournment of the first session of the current Congress at the end of 2009 and before the current session began on January 3, 2010, those appointments would have expired when Congress adjourns in the fall of 2010. However, if the President makes the appointment during a recess in the middle of a session, that appointment will expire at the end of the *following* session. In the latter case, the duration of the appointment will include the rest of the session in progress plus the full length of the session that follows.

Member Pearce was subsequently confirmed on June 22, 2010, to a full term that will expire on August 27, 2013. Because the recess appointment of Member Becker occurred during a recess in the 2nd session of the current Congress, his term will not expire until the end of the 1st session of the next Congress, which begins on January 3, 2011, and will end sometime in late 2011. Thus, absent Senate confirmation to a full term, Member Becker will serve as a Board Member for at least the next 18 to 20 months. It is noteworthy that the appointments of Members Becker and Pearce were among the group of 15 appointees that constituted President Obama’s first use of the recess appointment power during his initial 14 months in office.

**Spot the Issues, Continued**

Yes, Mr. Faithful will prevail. In *Local 3036*, 280 NLRB 995 (1986), the Board held the Union breached its duty of fair representation because it performed in a perfunctory manner; this case was the inspiration for our Spot the Issues piece. In *Local 306*, the Board held the Act was violated because the union committed itself to arbitrating its member’s grievance, and it failed to provide any reason as to why it abandoned its position. The union’s failure to provide an explanation for its actions arose above the level of mere negligence. Additionally, the Board held the charge was not time barred under Section 10(b) of the Act because the member did not have clear and unequivocal notice six months prior to the filing of the charge that his union was not pursuing his grievance due to the fact that the Union gave continued assurances that it was pursuing the grievance.



**Please contact the Region to speak  
at your next event.**

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