

What's Brewing in Region 30

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FROM THE DIRECTOR'S DESK

As Regional Director, I welcome you to the second 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.

A common question or concern is what impact the two-member Board has had on local Regional operations. The question reflects the uncertainty of whether the two-member Board constitutes a valid quorum for decision making. A full Board consists of five members, appointed by the President and confirmed by the U.S. Senate. Each seat is for five years, staggered so that a seat comes up for reappointment every year. By tradition, the political party in the White House

has three seats on the Board, with the other party having the other two. Needless to say, the partisan divide existing in Washington for the past quarter century has affected the process for filling vacant Board

delegated all its powers to a three-member panel, of which the two members remaining on and after January 1, 2008 (one Republican and one Democrat) would constitute a quorum, asserted as being permitted by Section 3(b) of the Act. The Senate declined to take up President Bush's nominations (two Republicans and one Democrat) for the vacancies throughout 2008. In 2009, President Obama submitted three nominations (two Democrats, Craig Becker and Mark Pearce, and one Republican, Brian Hayes) to the Senate. While the Senate committee approved the nominations in 2009 and again in early February 2010, the full Senate has yet to act on the nominations (an effort to end a filibuster failed). The two-member Board, consisting of Democrat Wilma Liebman (designated as Chairman by President Obama in January 2010) and Republican Peter Schaumber (who had been design-



Irving Gottschalk, Regional Director

seats. A single vacancy now is rarely filled. Instead, two or more vacancies are allowed to arise so that ideologically balanced sets of appointees can be offered for confirmation.

The last fully constituted Board, appointed by President Bush, expired at the end of December 2007. In the last days of that period, the Board

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nated as Chairman by President Bush in March 2009), continued to serve and issue decisions through April 2, 2010. On March 27, 2010, President Obama gave recess appointments to Democrats Craig Becker and Mark Pearce; they were sworn in, respectively, on April 5 and April 7, 2010. Their nominations, along with that of Republican Brian Hayes, however, remain pending in the Senate.

During the ensuing 27 months, the two-member Board issued nearly 600 rulings, including more than 200 full decisions. This truly is a remarkable accomplishment. Chairman Liebman and Member Schaumber deserve full credit for subordinating their policy differences and agreeing to apply the law as it currently exists, regardless of how they would prefer the law to be. Nevertheless, some parties to the Board's decisions have challenged the authority of the two-member Board to act by appealing their decisions to the various U.S. Circuit Courts of Appeals across the country. At present, six Circuit Courts have ruled on the question, with five determining that the Board's reading of Section 3(b) is permissible and that the two Board members do constitute a proper quorum. The D.C. Circuit Court is the sole Circuit to decide otherwise. Appeals from both the Seventh Circuit and D.C. Circuit were accepted for review by the U.S. Supreme Court, with the Seventh Circuit's decision being treated as the lead case. Oral argument was held on March 23, 2010, and the Supreme Court's decision is expected by the end of its current term in around late June 2010.

Interestingly, the two-member Board's operations had no impact on Regional office operations. The Regional Director's authority to issue complaints derives from the General Counsel, so the Board's status has no impact on that function. Since the Board continued to issue decisions, the Region's post-decision compliance activities also continued without change. In the event the Supreme Court determines that the two-member Board did not constitute a proper quorum, it is simply not yet known what impact that will have on decisions already made, or what the new four-member Board might need to do to review, reconsider or reaffirm the vacated decisions. In the event the Supreme Court upholds the two-member Board's actions, then, of course, the Region's operations would remain unaffected.

In the meantime, Member Schaumber's term will expire August 27, 2010. If the Senate still has not acted on the pending nominations by then, the Board will then have three members. General Counsel Ronald Meisburg's term will expire August 13, 2010. His replacement also must be nominated by the President and confirmed by the Senate. Until that happens, the position could be temporarily filled by the President designating a senior Agency official as Acting General Counsel, or name a General Counsel by a recess appointment. It is

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S P O T T H E I S S U E S

(This occasional feature will present exaggerated scenarios to illustrate various ways in which unfair labor practice conduct or representation case problems might occur.)

Bob Owner, owner and president of ABC, Corp., is a people person. He loves his company, which is a small, yet financially strong, family owned business that has been in operation for the past 25 years, and he loves his employees. Recently, he received word that his employees wanted to organize and met with local union officials. In an effort to control the rumor mill, he held a mandatory meeting where he told his employees that he considered them part of his family and would not know what to do if his workers unionized. He told them that if his workers unionized he would have to close the shop. He asked his employees how could he improve their working conditions and offered them a \$.25 an hour raise if they would stop their organizing efforts. Bob told his employees that he did not want to see his employees swindled by the union's unfulfilling promises. Following this meeting, Tom Organizer held a meeting in an effort to console the employees' fears. He was able to secure more than half of the unit's signatures despite their hesitation. Tom Organizer later filed a Petition for Election with the local Region. Bob, in a frantic dismay, called a second mandatory meeting and told his employees he needed to permanently lay off certain employees because the recent economy has had a negative effect on his bottom line. One of the employees asked if ever there was a chance the impacted employees could return. Bob responded by saying "only once this union thing passes."

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REGIONAL NEWS

-Christina Lee, Field Attorney

On October 2, 2009, the Regional Director issued a Decision and Direction of Election in *Karmenta Center*, 30-RC-6761, concluding the Employer met its burden of establishing that the licensed practical wing nurses possessed the authority, in the interest of the Employer, to reward employees using independent judgment, in more than a merely routine or clerical manner. The sole issue was whether the licensed practical wing nurses, who were included in the petitioned-for unit, were supervisors within the meaning of Section 2(11) of the Act. In relying upon the holding of *Bayou Manor Health Center*, 311 NLRB 955, 955 (1993), the Director determined that the licensed practical wing nurses were statutory supervisors because they conduct annual employee evaluations that directly correspond to nursing assistants' wage increases. The Director was not dissuaded by the Union's argument that the wing nurses were not statutory supervisors because they were unaware of the evaluations' precise impact. The Union's argument failed to persuade the Director because the wing nurses were aware that the evaluations had *an impact* on wages being that their own wage increases were determined by their annual evaluations. See *Hillhaven Kona Healthcare Center*, 323 NLRB 1171, 1171 (1997) (Board said "[a]lthough the LPNs and RNs are not necessarily uniformly aware of the specific wage increase for which each employee is eligible as a result of a rating, they are aware that their evaluations have *an effect* on the employee's raise or employment status) (emphasis added). As such, the licensed practical wing nurses were excluded from the petitioned-for unit as Section 2(11) supervisors. Neither party filed a request for review.

On December 31, 2009, the Director issued a Decision and Order in *Wingra Redi-Mix, Inc.*, 30-UC-429, granting a unit clarification petition. The Employer-Petitioner filed a unit clarification petition seeking to exclude its employees employed at its Lake Mills and Stoughton, WI facilities. Petitioner is a multi-location employer with Wisconsin plants in

Fitchburg, Westport, Sun Prairie, Lake Mills and Stoughton. Petitioner's Fitchburg, Westport and Sun Prairie employees are covered under a "Madison area" agreement. The Respondent asked the Region to defer the matter to an arbitrator, which the Director denied because issues of accretion require the application of statutory policy. *The Boeing Comp.*, 349 NLRB 957, 957 (2007); *Advanced Architectural Metals, Inc.*, 347 NLRB 1279, 1279-1280 (2006). The evidence showed the Lake Mills employees had a separate and distinct identity because they were historically excluded from the Madison area agreement for more than a decade. The Director confirmed this exclusion because of the parties' pending arbitration, and the Board supports the processing of unit clarification petitions where a grievance has been filed and the arbitrator's award is contradictory to Board policy or where there is the potential for such contradiction. *In re Ziegler, Inc.*, 333 NLRB 949, 950 (N.L.R.B.) (2001); *Williams Transportation*, 233 NLRB 837, 838 (1977). The Director also determined that the Sundby employees did not share an overwhelming community of interest with the Madison area bargaining unit employees because there was a lack of shared common day-to-day supervision, and the factors weighing in favor of accretion did not outweigh those against accretion. Neither party filed a request for review.

In *Milwaukee City Center, LLC*, 30-UC-419, the Director issued a Decision and Order granting the Union-Petitioner's request for unit clarification and accreted the baristas and head baristas to the existing bargaining unit. The Employer is a hotel, and the disputed employees work for Starbucks, which opened a franchise located inside of the Employer's hotel.

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unlikely there would be no General Counsel at all.

I encourage you to write to the newsletter's editor, Attorney Christina B. Lee at Christina.lee@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.

F O I A

Percy Courseault, Deputy Regional Attorney & FOIA Officer

The Freedom of Information Act (FOIA), as amended by the "Openness Promotes Effectiveness in our National Government Act of 2007" is a law providing public access to U.S. government records. Upon written request, agencies of the United States government are required to disclose those records, unless they can be lawfully withheld from disclosure under one of nine specific exemptions in the FOIA. As the Region's FOIA officer I will review the FOIA request to ensure that it

meets the essential elements: the request must be in writing, be directed to the office where the records are located, and contain a return mailing address for the requester. The request must reasonably describe the records sought in a manner that permits their identification and location. In addition, it must contain a statement assuming financial responsibility for the necessary costs associated with the request. The request for records shall not be deemed received for purposes

of the applicable time limit for response until a written assumption of financial liability is received. For additional information regarding the Agency's FOIA policy please see Section 102.117 of the Board's Rules and Regulations and/or the Agency's FOIA manual both of which are available on the Agency's website under the Publications tab.

R E G I O N A L N E W S C O N T I N U E D

The Board in *Milwaukee Center*, 354 NLRB No. 77, slip op. at 3 (2009), determined the Director erred in reaching this conclusion and reversed the decision. In its analysis, the Board honed in on the critical factors used in establishing accretion and held there was no employee interchange or common day-to-day supervision between the Starbucks and bargaining unit employees. In footnote 15, Chairman Leibman expressed her agreement with the Director that the similarity of skills and training of the Starbucks and unit employees weighed in favor of an accretion finding. However, member Schaumber found that to be insufficient as the baristas' and head baristas' training was far more detailed and rigorous than that received by the unit employees. In considering additional accretion factors, the Board held the hotel and Starbucks did not functionally integrate their operations, there was minimal contact between the disputed and bargaining unit employees, and that Starbucks exerted a significant degree of control over its employees' terms and conditions of employment. The Board determined that these above mentioned factors outweighed those factors in favor of accretion.

EIGHT HOURS FOR WORK... EIGHT HOURS FOR REST... EIGHT HOURS FOR WHAT WE WILL!!

June Czarnezki, Asst. to the Regional Director's Secretary

This was the slogan on posters carried by several members of a Boy Scout troop in Bay View, Wisconsin on a Sunday morning. The same slogan carried by thousands of men on the same spot over 100 years before.

Members of Boy Scout Troop 252 and I visited the site of an important and tragic labor dispute in Milwaukee history as part of their American Heritages merit badge.

Known as the Bay View Rolling Mills massacre, the site is now com-

memorated by the State of Wisconsin with a sign and park.

On May 5, 1886, seven people were killed when the governor of Wisconsin ordered the militia to fire on mostly Polish laborers fighting for an 8-hour work day. One of the fatalities was a 13-year-old boy, an innocent bystander.

At the time, this was part of a huge labor movement sweeping the country. There were fatalities in the Chicago Haymarket Square area as well.

Although their effort was unsuccessful, the sympathies of the public contributed to the formation of the Socialist Party in 1892 and to citizens voting in Milwaukee's

"sewer socialists" in 1910.

The socialist political era in Milwaukee lasted over 60 years. Lots of good things happened during their reign including establishing old-age pensions, unemployment insurance and public housing.

The eight-hour workday wasn't signed into law until 1917.

I feel it's important and helps children learn history when they see first hand the historic events right in their own backyard. It becomes real for them. And makes them aware of the struggles and sacrifices workers made for things we take for granted today.

I CONOZCA SUS DERECHOS! (KNOW YOUR RIGHTS) PREGUNTAS Y RESPUESTAS SOBRE SUS DERECHOS COMO EMPLEADO BAJO LA LEY NACIONAL DE RELACIONES DEL TRABAJO (LNRT)

Renée Medved, Field Attorney

¿Cuáles son mis derechos básicos como empleado bajo la NLRT?

Bajo la LNRT, usted tiene derecho a formar o tratar de formar una unión, hacerse miembro de una unión o ayudar a una unión a organizar a sus compañeros de trabajo. También, tiene derecho a participar en actividades protegidas y concertadas. Por último, tiene derecho de negarse a hacer cualquiera o todas estas cosas.

¿Qué son "actividades protegidas y concertadas"?

Las actividades protegidas y concertadas son actividades de un grupo de empleados o de un empleado por parte de otros compañeros que procuran modificar las condiciones de trabajo. Por ejemplo, si unos empleados van juntos a hablar con un supervisor para presentar una queja de condiciones peligrosas en el trabajo, eso sería una actividad protegida y concertada. Otro ejemplo de una actividad protegida y concertada es si un empleado escribe y firma una carta a un supervisor por parte de sus compañeros sobre estas mismas condiciones. Lo importante es que la actividad es concertada y que la actividad tiene que ver con las condiciones de trabajo. Recuerde que las condiciones de trabajo no son limitados al pago y horario, pero incluyen cosas como seguridad en el trabajo, reglas de trabajo y como un supervisor se porta con los empleados.

Tengo más preguntas a cerca de mi situación específica en el trabajo, ¿Qué puedo hacer? Estamos a su servicio. Llámenos a 414-297-3861. La oficial de información discutirá su situación y le ayudará si desea someter una carga. Información esta dispuesta a usted mientras las horas de servicio – lunes a viernes, 8:00 a.m. a 4:30 p.m.

K N O W Y O U R R I G H T S !

Questions and answers about your rights as an employee under the National Labor Relations Act (NLRA)

What are my basic rights as an employee under the NLRA?

Under the NLRA, you have the right to form or try to form a union, become a member of the union or help a union organize your coworkers. Also, you have the right to participate in protected concerted activities. Finally, you have the right to refuse to do any or all of these things.

What are protected concerted activities?

Protected concerted activities are the activities of a group of employees or of one employee on behalf of their coworkers to try to change their working conditions. For example, if some employees go together to their supervisor to complain about dangerous working conditions, this would be a protected concerted activity. Another example of a protected concerted activity is if an employee writes and signs a letter to the supervisor on behalf of his coworkers about these same conditions. The important thing is that the activity is concerted and that the activity has to do with working conditions. Remember that working conditions are not limited to pay and the schedule, but include things like job safety, work rules or how a supervisor treats employees.

I have more questions about my specific situation at work. What can I do?

We are at your service. Call us at 414-297-3861. The information officer will discuss your situation and assist you if you wish to file a charge. Information is available during our business hours – Monday through Friday, 8:00 a.m. to 4:30 p.m.

SPOT THE ISSUES CONTINUED

Stories like this one, while exaggerated for illustration, are not uncommon. Out of fear and a poor understanding of employees' rights, many employers violate the Act by engaging in unfair labor practices. Bob's behavior exhibited these problems.

1. Bob Owner violated Section 8(a)(1) of the Act when he told employees he would close his shop if his workers unionized .
2. Bob Owner violated Section 8(a)(1) of the Act when he made a promise to increase employees' wages if they stopped their organizing efforts.
3. Bob Owner violated Section 8(a)(1) of the Act when he impliedly told employees they were being laid off because of their organizing activities.
4. Bob Owner violated Section 8(a)(1) of the Act when he solicited grievances from employees in exchange for them discontinuing their organizing activities.
5. Bob Owner violated Section 8(a)(3) of the Act when he permanently laid off employees in retaliation for their union activity, and despite his comment that the lay off was due to the recent economy his likely true motive was expressed by his comment that the impacted employees' chances of return were only possible "once this union thing passes."

Potential remedies include interim injunctive relief, back pay for the impacted employees, the posting of a Notice to Employees, a Settlement Agreement, and, in certain other circumstances, may also include a bargaining order in lieu of an election, if it is determined that Bob Owner's conduct made the holding of a free and fair election impossible.