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NLRB Region 3

Outreach

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Regional Director's Corner

In this day of ever changing technologies and the workplace changes that accompany them, the NLRB is joining the rest of the world in relying



on electronic data to manage its cases. What does this mean to us in Region 3? Well, it means that as of October 1, 2012, the Agency has decided that the official case files will be electronic files maintained in a system called NxGen. All documents that would have previously been placed in the paper file, including e-mails and telephone logs, will now be maintained in the ECF (electronic case file). What does it mean to you? It means you can greatly assist the Region by filing your documents electronically. The Board's website, found at www.NLRB.gov, provides a way for you to file your documents. When you file your documents using this tool, your documents are automatically sent to the Region and are easily reviewed and uploaded into our electronic file for your case. If you file paper documents, those documents must be scanned in order to be uploaded and maintained electronically. This takes a great amount of time and effort which can easily be avoided if you file documents electronically. We would greatly appreciate your cooperation by using the Agency's website to communicate with us. The upside for all of you is that as more documents are maintained in an electronic format, more case information will ultimately be readily available for you to review as well. If you have problems using the website please let us know, as improvements are being made every day.

• **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 or, they may file electronically through the Board's website at www.nlr.gov. 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 and serve it on the charged party 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.

• Please promptly present your evidence in support of any charge you file.

• 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.

(Regional Director's Corner Continued)

In addition to welcoming you to use the website for filing purposes, I recommend you to the site's search engine, where you can find Board decisions, ALJ decisions, Advice memos and Regional information as well. Each Regional office has a web page where updated information will be available on outreach events and cases of public interest. Any suggestions you may have for additional information you would like to see on the website and how we may better serve you are welcome. Remember we are available to meet with you and provide speakers on topics of interest and concern. I look forward to hearing from you.

Rhonda P. Ley,
Regional Director, Region 3

NLRB Launches Webpage on Protected Concerted Activity

The National Labor Relations Board has a new webpage that describes the rights of employees to act together for their mutual aid and protection, even if they are not in a union.

The page, at www.nlr.gov/concerted-activity, tells the stories of more than a dozen recent cases involving protected concerted activity, which can be viewed by clicking points on a map. Among the cases: A construction crew fired after refusing to work in the rain near exposed electrical wires; a customer service representative who lost her job after discussing her wages with a coworker; an engineer at a vegetable packing plant fired after reporting safety concerns affecting other employees; a paramedic fired after posting work-related grievances on Facebook; and poultry workers fired after discussing their grievances with a newspaper reporter.

Some cases were quickly settled after charges were filed, while others progressed to a Board decision or to federal appellate courts. They were selected to show a variety of situations, but they have in common a finding at some point in the NLRB process that the activity that the employees undertook was protected under federal labor law.

The right to engage in certain types of concerted activity was written into the original 1935 National Labor Relations Act's Section 7, which states that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all such activities."

That right has been upheld in numerous decisions by appellate courts

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 unless the charging party withdraws 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 before an administrative law judge to obtain a finding of a violation and an order directing the charged party to undertake remedial actions. The charged party has appeal rights, 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.

(Concerted Activities Webpage Continued)

and by the U.S. Supreme Court over the years. Non-union concerted activity accounts for more than 5% of the agency's recent caseload.

"A right only has value when people know it exists," said NLRB Chairman Mark Gaston Pearce. "We think the right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers."

Status of Board's Employee Posting Rules

On August 25, 2011, the Board issued a final Rule requiring employers subject to the National Labor Relations Act to post notices informing their employees of their rights under the NLRA. This notice-posting Rule was, after some delays, to become effective on April 30, 2012. However, the D.C. Circuit Court of Appeals has temporarily enjoined the NLRB's rule requiring the posting of employee rights, pending its decision on appeal. In addition, on April 13, 2012 the South Carolina District Court found that the NLRB lacked authority to promulgate the rule. The agency is appealing the District of South Carolina's decision. In view of the D.C. Circuit's order, and in light of the strong interest in the uniform implementation and administration of agency rules, regional offices will not implement the notice-posting Rule pending the resolution of the issues before the courts. Should the Board prevail, further guidance will be provided to the Regions and public.

NLRA and Immigration Issues

The Supreme Court in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S.137 (2002), concluded that the Immigration Reform and Control Act (IRCA) prohibits the Board from awarding backpay to any individual who was not legally authorized to work in the United States during the backpay period. An employee's work authorization status is however, irrelevant to the merits of an unfair labor practice complaint, and only becomes a triable issue at the compliance stage of Board litigation. See [GC Memo 02-06](#), "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc." for a more detailed discussion of this issue.

The Board has recently held that a respondent may not go on a "fishing expedition" to explore whether employees have legal authorization to work in the United States. In Flaum Appetizing Corp., 357 NLRB No. 162 (December 30, 2011) the Board struck down the respondent's affirmative work authorization-based defenses, with regard to 11 discriminatees under IRCA, to the extent they were entirely unsupported by evidence. The respondent alleged that none of the 11 employees were

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.

(NLRA and Immigration Issues Continued)

entitled to work in the United States under IRCA, and thus none were entitled to backpay although they were unlawfully discharged. The respondent provided no evidence with regard to the employees it attempted to disqualify. In striking respondent's defenses the Board concluded that, "IRCA does not require that the Board permit baseless inquiry into immigration status in every case in which reinstatement or backpay is granted." *Id.* slip op. at p.7. Rather, "permitting such re-verification [of work authorization status] ... without sufficient factual basis ... would invite a form of abuse expressly prohibited by IRCA, and would contravene ordinary rules of procedure and undermine the policies of the Act." *Id.* The Board did however allow the respondent to elaborate on its immigration-related defenses as to 4 other discriminatees who had testified in the underlying unfair labor practice hearing that the green cards they had presented to the employer when hired were not their own.

Thus, respondents can pursue immigration – related defenses in compliance proceedings to the extent that it has a reasonable basis for doing so, and subject to the limitations set forth in [Flaum](#).

New Off-Duty Access Policy Cases

The Board recently ruled in [Sodexo America, LLC.](#), 358 NLRB No. 79 (July 3, 2012), that a hospital policy limiting access of off-duty employees to the facility violated Section 8(a)(1) of the Act. The no-access policy at issue states: "Off-duty employees are not allowed to enter or re-enter the interior of the hospital or any other work area outside the hospital except to conduct hospital-related business." The policy defined "hospital-related business" as "the pursuit of the employee's normal duties or duties as specifically directed by management." The Board noted that, as in [Saint John's Health Center](#), 357 NLRB No.170 (2011), another recently decided access case involving hospitals, the policy violated the Act because it allowed the employer unlimited discretion to decide when and why employees may access the facility.

Recent Representation Law Developments at the NLRB

By: Paul J. Murphy, Assistant to the Regional Director

On April 30, 2012, the National Labor Relations Board's new rules for processing representation cases took effect. The much publicized changes were implemented to streamline the hearing process and appeals of regional director determinations of pre- and post-election issues. Among other changes, the rules afforded hearing officers, with approval from regional directors, discretion to limit pre-election litigation of some individual voter eligibility issues, and to instead litigate the issues if necessary after the election. The rules also streamlined Board review. In this regard, parties historically have been required to seek review of a regional

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.



(Recent Representation News Continued)

director's direction of election, if at all, before the election, and to seek review of all other issues by filing a second request for review after the results of the election were certified.

The new rules provide that all issues will be reviewed upon one request, after certification, rather than splitting the review in two. These changes would reduce unnecessary litigation. The new rules also make regional directors' decisions on objections and challenges final and binding unless the Board, in its discretion, grants a request for review. Previously, in most cases, the Board was required to conduct a de novo review of post-election issues.

The NLRB operated under these rules for two weeks, during which time approximately 150 petitions were filed. Two of those petitions were filed in Region 3 during that period and in both cases, the parties entered into stipulated election agreements. Thus, at least initially, the implementation of the new rules did not impact the processing of these cases.

On May 14, 2012, Judge James E. Boasberg, a District of Columbia District Court judge, in *Chamber of Commerce et al v. NLRB*, decided that the rules were not properly implemented because only two members of the Board participated in amending the rules. Based on his finding that Board Member Hayes was not present and did not participate in the vote to adopt the rules, he determined that the Board lacked a quorum and the rules were improper. As a result of Judge Boasberg's ruling, the Board suspended implementation of the rules, and devised a mechanism to address the approximately 150 petitions that were filed while the rules were still in effect. As a result, the parties received notice that the rules under which their petitions had been processed were suspended. The parties were asked to execute an acknowledgement waiving any objections they might have to the initial processing of the petition under the suspended rules. The notification also advised them if they elected not to sign the waiver, the process would be re-started and any prior stipulated election agreements or hearings would be ineffective. In both of Region 3's cases, one of the parties elected not to sign the waiver and totally new stipulated election agreements providing for later election dates had to be obtained. Ironically, Region 3 received 11 representation petitions in the three weeks following the suspension of the rules in contrast to just the two that were filed while they were in effect.

On June 11, 2012, the Board filed a motion with Judge Boasberg, asking him to alter or amend his earlier judgment. The thrust of the argument in support of the motion is that the Court's decision was based on a factual error, and that Member Hayes was present, but elected not to participate. In other words, he was not absent, he abstained. For those who are interested, the Board's brief in support of this motion can be found on the NLRB's website, under the Cases and Decisions/Special Litigation Briefs and Motions tab. The Court denied the motion on July 27, and the Board's pending appeal to the D.C. Circuit was filed on August 7.

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 employee's 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).

Changes in Deferral Policies

By: Aaron Sukert, Field Attorney

General Counsel (GC) and Operations Management (OM) memoranda have recently issued concerning deferral to arbitral awards and grievances settlements. These memoranda, which are summarized below, can be found on the Board's public website at (www.nlr.gov).

GC 11-05: *Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases.*

GC 11-05 seeks to afford greater weight to safeguarding employees' statutory rights, by applying a new framework to the post-arbitral review of deferral cases and review of grievance settlements. The Board has not officially adopted these standards, but they are the standards proposed and advocated by the Acting General Counsel (AGC) in cases to the Board concerning these issues.

In accordance with GC 11-05, when engaging in post-arbitral review of deferred cases alleging Section 8(a)(1) and (3) violations, the AGC contends that the Board should determine if the party urging deferral has met its burden of demonstrating that:

- (1) the contract had the statutory right incorporated in it, or the parties presented the statutory issue to the arbitrator; and
- (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.

If the party urging deferral has met its burden, the Board will defer as long as the arbitral award is not clearly repugnant to the Act (palpably wrong, ie., not susceptible to an interpretation consistent with the Act).

According to GC 11-05, regarding grievance settlements, the Board should not defer to a pre-arbitral-award grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice issues. Where the evidence demonstrates that the parties intended to settle the underlying unfair labor practice charge, the Board should continue to apply current non-Board settlement practice, including review under the standards of Independent Stave Co., 287 NLRB 740, 743 (1987).

GC 12-01: *Guideline Memorandum Concerning Collyer Deferral Where Grievance-Resolution Process is Subject to Delay.*

This GC memorandum instructs Regions to submit to the Division of Advice any cases where employees were being deprived of their statutory rights because of a lengthy period of Collyer deferral. The AGC seeks to have the Board change its existing policy and no longer routinely defer Section 8(a)(1) and (3) cases where arbitration will not be completed within a year. The memo also modifies casehandling instructions to Regions to avoid deferring to arbitration in Section 8(a)(1) and (3) cases (and some 8(a)(5) cases) forecast to languish over a year.

If arbitration is not likely to be completed in less than a year, the Region will consult with the parties and discriminatees as to whether deferral is inappropriate based upon the frustration of the Board's remedial

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(Changes in Deferral Policies Continued)

ability and whether deferral would cause any undue disadvantage for the Charging Party. The Region will submit to the Division of Advice accordingly.

For Section 8(a)(1) and (5) cases which implicate individuals' statutory rights, involve serious economic consequences, and are not likely to be completed within a year, the Region may at its discretion proceed in the same manner as the Section 8(a)(1) and (3) cases explained above.

OM 12-43: *Additional Guidance Concerning Collyer Deferral in Cases Involving 8(a)(3) or 8(a)(1) Discriminatees.*

OM 12-43 provides guidance on the implementation of GC 12-01 and addresses the following:

(1) clarifies that GC 12-01 includes Section 8(a)(1) cases involving discipline for protected concerted activity unrelated to union activity, but not other Section 8(a)(1) violations; (2) describes a slight change in the language in the *Collyer* letter; (3) describes the process for sending out the show cause letter and handling the responses; (4) sets forth the evidence that should be sought to determine if a matter will likely be deferred for more than one year including the history of arbitration between the parties, backlog of pending grievances, how grievances are prioritized if at all, and the grievance settlement rate; (5) provides an example of Section 8(a)(5) cases implicating Section 7 rights or having a serious economic impact on employees such as-employee layoffs after unilateral subcontracting; and (6) states that the one year period referenced in GC 12-01 runs from the date of the deferral letter.

OM 12-43 also notes that the principles set forth in GC 12-01 are equally applicable to cases eligible for deferral pursuant to Dubo Mfg. Corp., 142 NLRB 431 (1963).

New Meaning for Section 7 in the Facebook Age

By Barney Horowitz, Albany Resident Officer

In the Region's Fall 2011 newsletter, my colleague, Ron Scott, summarized the evolving state of the law regarding the National Labor Relations Act and social media. Evolution is the appropriate word because even as of the mid-July submission of this update, the Board has yet to decide a case addressing social media issues. Three Acting General Counsel ("AGC") Memoranda--OM 11-74 (August 18, 2011), OM 12-31 (January 24, 2012), and OM 12-59 (May 30, 2012), have issued along with a number of administrative law judge ("ALJ") decisions which have provided thoughtful consideration, albeit not the final word, as to the social media-NLRA relationship. The OM Memoranda are available on the Board's website under "Reports and Guidance" tab. The ALJ decisions are available on the Board's website under the "Cases & Decisions" tab.

Learn More: Visit Us Online!

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.

Region 3 Has its Own Web Page

You can now access link the [Region 03 Web Page](#) through the NLRB website, www.nlr.gov using the find your Regional Office link. Or use the link provided in this article.

On the [Region 03 Web Page](#) you can find upcoming events that are planned in Region 3 as well as recent outreach activities and Regional Office news.



(New Meaning for Section 7 Continued)

At this point it is clear that what constitutes protected, concerted activity (“PCA”) on Facebook conceptually is not much different than that which has been traditionally found protected under Section 7 of the Act. For example, in Bettie Page Clothing, JD(SF) 21-12 (April 27, 2012), the ALJ found employee complaints about working conditions posted on Facebook to be protected regardless of whether they were made in a social media platform. It appears from the cases to date, that textbook PCA has the same application in virtual space as it does on the factory floor. There are some novel applications in social media cases, such as where an employee was given the Act’s protection simply by clicking the “like” button under a comment on a Facebook posting that criticized his employer’s calculation of tax withholding. Triple Play Sports Bar and Grille, JD(NY)-01-12, (January 3, 2012). At root, however, traditional Board law is being applied here without the need for great adaptation.

Where there has been adaptation is in two areas. First, is the loss of protection issue, where the activity is otherwise PCA but there is a question of whether the conduct is so offensive or disloyal that it has exceeded the permissible Section 7 boundaries. The AGC has taken the position in OM 12-31, p. 24-25, that in evaluating statements on Facebook a different approach may be warranted. The AGC noted that these postings, while not directed to the general public, can reach a much broader audience than an exchange that takes place at the office water cooler. Therefore, the AGC moves beyond the traditional “workplace disruption” analysis, as set forth in Atlantic Steel, 245 NLRB 814 (1979), to suggest that the alleged disparagement of the employer’s products and services be considered as well. This approach has not yet been addressed by an ALJ, let alone the Board. Interestingly, this issue will intersect with another case of the non-cyber variety as the Second Circuit in NLRB v. Starbucks Corporation, 679 F. 3d. 70 (May 10, 2012), has recently found the Board’s Atlantic Steel standard inadequate for treating an employee’s use of obscenities in front of a customer. The case has been remanded for development of a new standard for customer-witnessed behavior, presumably one that will apply to more than just baristas.

The other issue relates to social media policies. Finding the sweet spot between the need of an employer to protect its reputation and to control the message versus the right of its employees to enjoy Section 7 protected speech is not easy in the absence of Board pronouncements. The AGC attempted to address this concern in OM 12-59 which treats only social media policy issues. The last of the seven cases discussed, where the entire policy was found lawful, is perhaps the most instructive. The critical distinction between the elements of this policy and others found overly broad was that the employer provided examples of proscribed conduct. This clarification was seen as essential, so that an employee would not “reasonably construe” an otherwise ambiguous rule as interfering with Section 7 rights.

Our New Electronic Filing System is in Place

The entire Agency has transitioned from its old Case Automated Tracking System (CATS) to an integrated web-based database and case management system code-named "NxGen." In NxGen, all case documents will be uploaded into the system so that they may be retrieved electronically. Documents not received electronically must be manually scanned into the system. Accordingly, we ask that whenever possible you submit documents to us in electronic form. Your assistance will be greatly appreciated!!

(New Meaning for Section 7 Continued)

While [OM 12-59](#) is helpful, the AGC has had mixed results at the trial level. In General Motors, LLC, JD-27-12 (May 30, 2012), the ALJ failed to adopt the AGC's analysis in several critical respects. The ALJ found that the prohibition against incorporating GM logos, trademarks or other assets "in any posts" was lawful because it applied to all employees and was not motivated by anti-union animus. The ALJ also found privileged the policy instruction to "treat everyone with respect...offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline..." The ALJ held that the policy did not interfere with Section 7 rights, because employees would simply view the rule as an expectation that they conduct themselves with "general notions of civility." Finally the ALJ also was of a different mind as to GM's policy asking employees "to think carefully about friending co-workers" and that "communications that would be inappropriate in the workplace are also inappropriate online." While noting that the policy was ambiguous, the ALJ found that the section appeared to rise only to the level of a suggestion with no discipline attaching and for that reason was permissible. Finally, the ALJ examined the section of the policy which required employees "to report any unusual or inappropriate social activity to the system administrator." As the policy was a general one and not linked to PCA, the ALJ found no violation.

If nothing else the General Motors case makes the point that the intersection between the NLRA and social media is still under construction. Stay tuned.

Region 3 Litigation News

By: Michael J. Israel, Regional Attorney

The Region has received several significant Administrative Law Judge and Board decisions since the Region's Fall 2011 Newsletter. The full text of these decisions can be found on the Board's website under the "[Cases & Decisions](#)" tab.

In E.I. DuPont de Nemours & Co., Case 3-CA-27828, ALJD dated January 4, 2012, ALJ Jeffrey Wedekind found that DuPont violated Section 8(a)(5) of the Act by making unilateral changes in employee benefits. The case presented a difficult issue as to whether the parties had intended that a collective-bargaining agreement containing a waiver of the right to bargain over changes in such benefits extended beyond an initial contract extension, to the period of time when the unilateral changes were implemented. The ALJ found that the parties had not intended the contract to extend past an initial agreed-upon extension and thus, that DuPont violated the Act by later implementing unilateral changes in benefits during a contractual hiatus. The case was litigated by Region 3 Attorney Ron Scott, and is pending before the Board on DuPont's exceptions to the judge's decision.

NLRB Releases Videos on Website

In its continuing effort to enhance the public's ability to transact business with the Agency, the NLRB now features the following videos on our site at www.nlr.gov:

“**Introduction to the NLRB Public Website**, which provides viewers with a guided tour of the Agency's website; **How to use CiteNet**, which explains how to use the Agency's electronic legal research database of Board and court decisions dating from 1002; and the “**Representation Case**” video, which is designed to inform the public about the role of the Agency in conducting elections.

(Litigation News Continued)

In Newburg Eggs, Cases 3-CA-27834 and 3-RC-11918, involving a number of Section 8(a)(1) allegations arising during a union organizing campaign, an ALJ, in an April 2011 decision, found all violations alleged in the complaint, including Section 8(a)(1) allegations that the Employer, at a number of captive-audience meetings held shortly before a rerun election, had solicited grievances and remedied or promised to remedy these grievances, informed employees it had fulfilled a promise of benefit, and implied to employees that it would be futile to select the UFCW as their bargaining representative. One of the most interesting allegations pertained to the Employer's hiring of a bilingual human resources manager. The ALJ found that Newburg violated Section 8(a)(1) of the Act when its president told the employees that he was giving them a valuable company-paid benefit by hiring the HR manager who could communicate with them in Spanish and help them address and remedy their grievances. The ALJ also set aside an election the Region had conducted and ordered a new election based on objections filed by the UFCW to the Employer's conduct in the election, which objections had been consolidated for hearing with the unfair labor practice case. The Employer filed exceptions with the Board to the ALJ's decision. On December 31, 2011, the Board issued a decision (357 NLRB No. 171) adopting the ALJ's findings concerning the solicitation of grievances and the announcement to employees that Newburg had hired a bilingual HR manager who would help them address and remedy their grievances, and denying Newburg's exceptions on those allegations. The Board reversed the ALJ on two of the Section 8(a)(1) violations he had found concerning the alleged futility statements and promise of benefits. Finally, the Board adopted the ALJ's finding that Respondent had engaged in objectionable conduct in the related R-case, setting aside the results of a second election and agreeing that a rerun election was necessary based on the unfair labor practices and certain of the Union objections. This case was briefed to the Board by Region 3 Albany Residence Office Attorney Brie Kluytenaar.

The Region also received a favorable decision in New York Air Brake, Cases 3-CA-28158, -65279, ALJD dated May 24, 2012. ALJ John Clark found that the Employer had violated Section 8(a)(5) of the Act by refusing to furnish information to the Union in a timely fashion pertaining to a grievance issue and by making a unilateral change in its policy concerning material that may be posted on union bulletin boards. The Union had sought information concerning overtime worked by bargaining unit employees in order to prepare for a meeting with the Employer about a grievance it had filed over the Employer's changes in the assignment of overtime work. While the Employer did provide the information to the Union, it delayed in doing so, and only after the Union had made repeated requests for the information. As noted by the ALJ, case law establishes that an employer's unreasonable delay in furnishing information is as much a violation of Section 8(a)(5) of the Act as a refusal to furnish information at all. Concerning the bulletin board issue, the Employer had removed notices

Our Service Standards

- We will attempt to answer your questions about the case, consistent with the confidentiality rights of the other persons and the Privacy Act.
- If necessary we will provide bilingual services if we are given sufficient notice of that need.
- We will provide the same treatment to all persons regardless of race, sex, religion, national origin, age, political affiliation, sexual orientation or disability.
- Our facilities are accessible to persons with disabilities. Please let us know if you will need an accommodation.

If you wish, you may be represented by an attorney or other representative of your choice.

(Region 3 Litigation News Continued)

the Union had posted on bulletin boards that had been exclusively used by the Union for at least 38 years. The ALJ found that, while there is no statutory right to the use by a union of bulletin boards in an employer's facility, the Employer was required to bargain with the Union concerning the use of the bulletin boards because the Union had obtained the unrestricted right to use the bulletin boards as a result of long-standing past practice. The case was litigated by Region 3 Attorney Kevin Kitchen.

Region 3 Co-Sponsored May Labor Law Conference

On May 11, 2012, Cornell University, ILR School presented a well-attended and informative labor and employment law program cosponsored by Region 3 and the New York State Bar Association. Approximately 100 people attended the program which covered recent developments on critical labor relations issues before the NLRB. Board Chairman Mark Pearce and Lafe Soloman, the Acting General Counsel were the luncheon speakers. Region 3 presenters were ARD Paul Murphy, Albany Resident Officer Barney Horowitz, Supervisory Attorney Lillian Richter and Field Attorneys Greg Lehmann, Aaron Sukert, and Brie Kluytenaar. Lori Ketcham, Special Ethics Counsel from Washington, DC also gave a presentation on ethics and social media.

Welcome Aboard!

Region 3 Extends a Warm Welcome to the Following New Staff Members

Steven Davis joined Region 3 in June as a student co-op. He will be working in the office until November 30. Previously, Steve attended Indiana University of Pennsylvania and received his Bachelor's Degree in Secondary Social Studies Education and is currently finishing up his Master's studies in Employment and Labor Relations. He will be graduating in December 2012.



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NLRB Region 3 Outreach

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.



Shameia Josey joined Region 3 in June as a Student Co-op. Shameia will be working in the Buffalo office until November 30. She received her B.S in Business Management from Robert Morris University and will be graduating from Indiana University of Pennsylvania in December 2012, with a Master's in Employment and Labor Relations.

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

To receive this newsletter electronically send an email including:

- ❖ Name
- ❖ Agency
- ❖ Email address(es)

to: Katy.Domagala@nlrb.gov