



www.nlr.gov

NLRB Region 3

Outreach



February 2013

Ninth Edition

Buffalo Regional Office (716) 551-4931

Niagara Center Building

Suite 630, 130 S. Elmwood Avenue

Buffalo, NY 14202-2465

Albany Resident Office (518) 431-4155

Leo W. O'Brien Federal Bldg

11A Clinton Avenue - Rm. 342

Albany, NY 12207

In This Issue:

- Regional Director's Corner
- Hispanics United – Region 3 Social Media Case
- Interview With Board Member Richard F. Griffin, Jr.
- Significant New Board Decisions
- Board Asserts Jurisdiction Over Illinois Charter School
- Litigation News
- E-Filing

Regional Director's Corner

The Board is now knee deep in technological change both internally and in the issues presented in our cases. In our last edition I told you that the Agency was switching from paper to electronic files in an effort to improve access to records both internally and for FOIA purposes. Since October 1, 2012, our official case files have been electronic files. You can help us avoid spending



excessive time scanning documents and help in our efforts to maintain complete electronic files by filing your charges and submitting your evidence electronically on the Board's website at www.NLRB.gov. Please take a look at the last page of this newsletter where we provide some information on how to file documents electronically.

As you may also know from articles in The Buffalo News, The New York Times and other publications, a local case called **Hispanics United of Buffalo**, was recently decided by the Board finding that employees were unlawfully terminated for engaging in protected concerted activity by posting on Facebook about their working conditions. More details concerning this case are included in this newsletter, but I'm commenting on it here to alert you all that the working community, employees, employers and virtually everyone who is using social media every day, needs to understand what posting conduct is protected and what is not. We want to help the community by providing information to you not only in this newsletter but also through outreach events in the neighborhoods

• **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)

throughout our jurisdiction across New York State, to help clarify everyone's rights and responsibilities. If you are interested in having a speaker come to a local event or meet with your community group, please contact Patti Wideman (716)551-4966 or Greg Lehmann (518)437-4164. Additionally, the Region will be holding an open house in Buffalo this spring where we will address this issue with Board Chairman Mark Pearce. We will soon issue a save the date notice. Please consider attending to discuss this and other important issues with the Chairman and the Regional Office staff. I look forward to meeting you all.

Rhonda P. Ley,
Regional Director, Region 3

Region 3 Social Media Decision, First of It's Kind

The Board issued its decision in **Hispanics United of Buffalo**, 359 NLRB No. 37, on December 14, 2012, affirming the favorable Administrative Law Judge Decision (ALJD) the Region had received from Judge Arthur Amchan. This is the first case in the country litigated under the NLRA involving the termination of employees for their comments on a social media website (Facebook) about their working conditions. Region 3 attorney **Aaron Sukert** (pictured at right) investigated and tried the case, and then briefed it to the Board after Respondent filed numerous and extensive exceptions to the ALJD. The case involved an employee who, after hearing criticism from a coworker concerning the manner in which employees were performing their jobs and that the coworker intended to take her criticisms to management, posted to her Facebook page the coworker's allegation that employees did not do enough to help the organization's clients. The initial post generated responses from other employees who defended their job performance and criticized working conditions, including work load and staffing issues. After learning of the posts, Hispanics United discharged the five employees who participated, claiming that their comments constituted harassment of the employee originally mentioned in the post. The Board found that the employees' Facebook discussion was protected concerted activity within the meaning of Section 7 of the National Labor Relations Act, because it involved a conversation among coworkers about their terms and conditions of employment, including their job performance and staffing levels. The Board ordered Hispanics United to reinstate the five employees and awarded the employees backpay because they were unlawfully discharged.



The case has garnered media attention including articles in [The New York Times](#) and [The Buffalo News](#).

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.

Interview with Richard F. Griffin, Jr.

Interviewed By: Mary Elizabeth Mattimore, Deputy Regional Attorney



“I think that there is an important place for a vibrant labor movement in a functioning democracy.”

Richard F. Griffin, Jr. was sworn in as a Board Member on January 9, 2012, following a recess appointment by the President. His appointment is up at the end of the year.

Mr. Griffin previously served as General Counsel for International Union of Operating Engineers (IUOE). He also served on the board of directors for the AFL-CIO

Lawyers Coordinating Committee, a position he held since 1994. Since 1983, he has held a number of leadership positions with IUOE from Assistant House Counsel to Associate General Counsel. From 1985 to 1994, Mr. Griffin served as a member of the Board of Trustees of the IUOE’s Central Pension Fund. From 1981 to 1983, he served as a Counsel to NLRB Board Members. Mr. Griffin is a Fellow of the College of Labor and Employment Lawyers; he holds a B.A. from Yale University and a J.D. from Northeastern University School of Law.

Can you describe how you felt when you were appointed to the Board?

I was humbled to be chosen. I knew I had been vetted, but it [my appointment] came out of the blue.

You were born and raised in Buffalo, NY. What are your fondest memories of growing up in Buffalo?

I have to be selective when answering this question, because I have so many. I grew up in north Buffalo near Delaware Park. My siblings and I played sports in the street all day with our neighbors. We made up the rules and played without adult intervention. I was an avid reader and spent a lot of time at the Fairfield library branch on Amherst Street. I attended Nardin Academy for elementary school and then Canisius High School; when the Paramount 11 city bus dropped me off after school at Amherst and Colvin, I would walk home through Delaware Park and the Buffalo Zoo which was free at the time.

Your father is a prominent trial lawyer in Buffalo. Did he influence you to choose law as a career?

Both my parents influenced me; both were active in many things, including the civil rights movement, when I was growing up. My mother had five children in seven years then managed to return to school to get her PhD. She is now a chemist who works as an x-ray crystallographer

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.

(Interview Continued)

working at the Hauptman Woodward Institute in Buffalo. She recently received an award from the Women's Bar Association for her work with the Western New York TAP fund, which is involved in promoting women candidates for office, including women judges. As you indicate my father is a prominent trial attorney and, over the years, he has had many interesting cases. For example, he represented the plaintiffs in the Buffalo school desegregation case for many years. He also was appointed to represent Nation of Islam inmates at Attica prison who sued over the denial of religious services at Attica. An expert witness in the case was Malcolm X who I met when he came to dinner at our house. Law was definitely a topic of conversations in our home growing up.

What was your career path to the Board?

My interest in labor law began before law school. Between college and law school, I did volunteer work involving the J.P. Stevens boycott. But I went to law school wanting to become a Legal Services lawyer. I attended Northeastern University Law School which has a requirement that students work at four co-op jobs before graduating. My first job was in a Legal Services office in Charleston, S.C and I enjoyed it. However, when I returned from that job I took labor law and found it very interesting; this interest was solidified on my next co-op job when I worked in the UAW General Counsel's office in Detroit.

After I graduated from law school I got a job at the NLRB in Washington on Board Member John Fanning's staff as counsel from 1981 until December 1982. Our staff was then assigned to Chairman Donald Dotson and I worked for him for about 9 months. I then went to work in the Legal Department of the International Union of Operating Engineers, where I became the General Counsel in 1994, staying in that position until my appointment to the Board in 2012. There were about 400,000 members in the Operating Engineers at the time and, as in any large non-profit entity, I handled a wide variety of legal issues, not just NLRA issues. For instance, I was presented with issues under ERISA, the Landrum-Griffin Act, various employment laws, property and tax appeal issues, and political and legislative matters. I practiced management-side labor law representing the union as an employer, including Title VII claims and discharge arbitrations. I maintained a continued interest in NLRA issues and, in particular, participated over the years in a group effort to produce the Building Trades Organizers Handbook.

Do you have a typical day?

My days have a certain amount of variety. Before work, I have practice for a competitive rowing team out of the Potomac Boat Club. At work I typically review case documents with my staff, which is comprised of a chief counsel, deputy counsel, two supervisory attorneys and nine attorneys (some part-time). By way of explaining the Board's decision making process, when an unfair labor practice case comes in on exceptions to an ALJ decision, the Board's Executive Secretary assigns the case to a

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.

(Interview Continued)

particular Board member. Within that Board member's staff, the case is assigned to an originating counsel who becomes familiar with the entire record in the case, including the transcript, exhibits, and brief. The originating counsel generates a bench memo with the facts, issues, parties' positions and a recommendation which is electronically posted for all Board members to review. One lawyer from each of the non-originating Board member's staff is typically assigned to review the case as well. That person will read the file material, consult with the originating counsel and meet with the Board member he or she works for. The Board member will, either alone or with other Board members, review the case materials, discuss the recommendations of the originating counsel and his or her staff person assigned to the case, and decide how to vote the case. The originating counsel prepares the initial draft of the opinion once there is a vote. The draft opinion is posted electronically and circulated, "like a round robin," among Board members and their staffs for modifications, edits and further collaboration. The entire process of issuing a final decision is very much a group effort.

What are some of the most difficult issues facing the Board? [See case descriptions below with links]¹

I'm not sure about difficult issues, but I can tell you what I think are some important issues before the Board. One issue is access for union representatives where discrimination is alleged. The standard the Board established in the **Sandusky Mall** case has been criticized by the circuit courts and we are trying to be responsive to that in the **Roundy's** case. We just decided **Kent Hospital**, which is I think an interesting area addressing nonmember dues objectors and the chargeability of lobbying expenses, where we have called for additional briefing. Then there are cases that have more of an impact on people that may not be as doctrinally important. For example, a recent case that affected a large number of people was **Mammoth Coal Company** which addressed whether a successor employer and its subsidiary refused to hire the union represented employees of the predecessor to avoid having to recognize the union as the bargaining representative. By contrast, **Alan Ritchey** which holds that an employer must bargain about certain disciplinary actions once a union is present but

¹ *Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied 242 F.3d 682 (6th Cir. 2001) (shopping mall owner violated Section 8(a)(1) of the Act by prohibiting peaceful union handbilling by union representatives on its property while allowing widespread charitable, political and other solicitation and distribution on its private property); *Roundy's Inc.*, 356 NLRB No.27 (November 12, 2010) (grocery store violated Section 8(a)(1) by prohibiting union representatives from handbilling in front of its stores where it had no property interest that authorized it to exclude the handbillers); *Kent Hospital*, 359 NLRB No.42 (December 14, 2012) (Board held that lobbying expenses are chargeable to objectors to the extent they are germane to collective bargaining, contract administration or grievance adjustment); *Mammoth Coal Company*, 358 NLRB No. 159 (September 28, 2012) (respondent and its wholly-owned subsidiary unlawfully refused to hire union-represented employees of the predecessor employer, refused to recognize and bargain with the union and unilaterally changed terms and conditions of employment); *Alan Ritchey, Inc.*, 359 NLRB No.40 (December 14, 2012)(discretionary discipline is a mandatory subject of bargaining and may not be imposed unilaterally, absent a binding agreement, usually a grievance-arbitration procedure, for resolving disputes over the discipline); *Piedmont Gardens*, 359 NLRB No. 46 (December 15,2012) (witness statements gathered by an employer during an investigation may be discoverable).

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).

(Interview Continued)

before a contract and grievance-arbitration clause is negotiated, is a doctrinally important case, but narrow in its application in that it only applies to pre-first contract cases after the union achieves representational status at a facility. Similarly, the recent cases on witness statements, **Piedmont Gardens**, and dues check-off, **WKYC-TV**, may be doctrinally important, but may not have a huge impact on a large number of employees.

Can you comment on recent cases involving "protected concerted" activity and social media?

The recent cases on protected concerted activity, such as the **Hispanics United** case, involve people getting together to discuss employment concerns in the new context of social media. These cases are really a manifestation of the bedrock principles of the NLRA coming up in different contexts because there are new means by which employees communicate their age-old concerns to one another. People are frequently surprised to learn that the NLRA applies outside of facilities organized by unions. There are certain interesting differences in the social media protected concerted activity cases. In the traditional case, conversations that people might have in a bar about their employment would disappear into thin air, and you would be dependent on people's memories of what was said. Now those types of conversations are preserved in electronic e-mail strings afterward. It is an important area.

The statistics indicate that there has been a significant decline in unions in this country. Where do you see the Board and unionization in 10 years?

It is difficult as a government official to speak to labor movement activity since we are neutrals and not involved in the labor organization. However, I think that there is an important place for a vibrant labor movement in a functioning democracy. The statute [NLRA] maintains its importance as the primary law governing private sector labor relations in this country.

POSTSCRIPT

Member Griffin is not the first Board member with Buffalo ties. Sarah Fox who served on the Board from 1996-2000, like Member Griffin, is a Buffalo native. In addition, Region 3 is proud of the number of its alums who have ascended to the Board. The current chairman, Mark Pearce, started his legal career in Region 3 and worked here 15 years before entering private practice in Buffalo. John Truesdale, who served on the Board 4 times between 1977 and 2001, started his career with the NLRB as a Region 3 field examiner in the late 1940's. Ralph Kennedy was appointed to the Board by President Nixon in 1970 and served five years. Although he worked as a Regional Director in St. Louis and Los Angeles prior to his appointment, he started his career with the NLRB as a field attorney in Region 3 during the late 1940's. Finally, Bob Hunter, who was on the Board from 1981-1985, initially worked in Region 3 as a field attorney in the late 1960's early 1970's.

REGION 3 STAFF

All staff can be contacted via email using the following format: firstname.lastname@nlrb.gov

Buffalo Office

- Jesse Feuerstein, Field Attorney
- Renee Hutt, Field Examiner
- Michael Israel, Regional Attorney
- Barbara Keough, Office Manager
- Kevin Kitchen, Field Attorney
- Sandra Larkin, Compliance Officer
- Linda Leslie, Field Attorney
- Rhonda Ley, Regional Director
- Mary Mattimore, Deputy Regional Attorney
- Paul Murphy, Assistant to the Regional Director
- Patricia Petock, Field Examiner
- Lillian Richter, Supervisory Field Attorney
- Nicole Roberts, Field Attorney
- Claire Sellers, Field Attorney
- Aaron Sukert, Field Attorney
- Patricia Wideman, Field Examiner

Albany Resident Office

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

Significant Decisions from the Board

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

In the latter part of 2012, the Board issued a handful of decisions that overruled established precedent, or applied existing precedent to novel fact patterns in a manner that either clarified the law or arguably staked out new ground. Two of the decisions address parties' post-contract expiration bargaining obligations, and three other cases could impact how employers investigate employee misconduct and implement discipline.

In **The Finley Hospital**, 359 NLRB No. 9 (2012), the newly certified union and employer negotiated a one-year contract that incorporated the employer's past practice of providing its nurses, depending on their placement within the salary range, with either a three percent wage increase or equivalent lump sum payment on their anniversary dates. The contract clause that provided for the increases stated "[for] the duration of this Agreement, the Hospital will pay...", but was silent about the fate of the anniversary adjustments upon the agreement's expiration. After the contract terminated, the Employer unilaterally discontinued the anniversary adjustments and informed employees that it would not provide any increases until negotiations for a new agreement were completed.

The Employer defended its actions by noting that the expired contract only required it to pay the increases for the duration of the agreement. The Board disagreed. The Board noted that the collective-bargaining agreement established only a contractual obligation to pay the anniversary adjustments, but that the mere expiration of the agreement did not relieve the Employer of the obligation to maintain the status quo during bargaining for a new contract. In this case, the recurring three percent anniversary adjustment was part of the status quo, and could not be unilaterally discontinued unless the expired collective-bargaining agreement clearly and unmistakably permitted the employer to do so. In this case, it did not.

The Board noted that its holding was consistent with the "dynamic status quo" doctrine, and compared it to cases in which employers were prohibited from ceasing benefit fund contributions or providing employees with severance benefits upon lay-off just because the contract had expired. It also provided examples of cases in which the collective-bargaining agreement clearly relieved the employer of its obligation to maintain the status quo after the agreement expired. Thus, had the agreement in **The Finley Hospital** contained language stating that the Employer's obligation to pay wage increases terminated at the expiration of the agreement, the employer could have unilaterally discontinued them.

The Finley Hospital seemingly has the greatest implications for those parties whose contracts provide for set amount raises on a specified date, or incorporate compensation systems that award employees for reaching longevity benchmarks or achieving certain performance levels. In these circumstances, absent clear and unequivocal language in the expired agreement permitting the employer to discontinue the raises, there is a strong likelihood that any unilateral action will be unlawful.

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.



(Significant Decisions from the Board Continued)

In December, the Board issued a second decision that impacts an employer's post-contract bargaining obligation. In **WKYC-TV, Gannet Co., Inc.**, 359 NLRB No. 30 (2012), the Board overruled **Bethlehem Steel**, 136 NLRB 1500 (1962), and held that an employer's obligation to check-off dues survives the expiration of the contract and is, therefore, not subject to unilateral termination. The Board concluded that the **Bethlehem Steel** rule, which permitted employers to discontinue dues check-off after the collective-bargaining agreement expired, was based on what it described as the false premise that dues check-off clauses implement union security agreements, which by statute do terminate upon a contract's expiration. The Board noted that dues check-off and union security agreements are actually independent of each other as exemplified by the experience in "right-to-work" states where union security agreements are illegal, but contracts still often include dues-check off agreements. It also determined that the unequivocal language of Section 302(c)(4) of the Act, which exempts dues check-off arrangements, from the general prohibition of employer payments to unions, clearly contemplates that the arrangement survives the expiration of the contract. The Board noted that as long as an employer's check-off obligation does not terminate upon a contract's expiration, there is no basis to differentiate it from any other term and condition of employment. As a result, like the vast majority of contract terms, an employer will have to maintain a dues check-off arrangement while the parties negotiate unless the union consents to its discontinuance or the parties reach impasse. The Board recognized in **WKYC-TV, Gannet Co., Inc.**, that it was abandoning 50 years of precedent, and therefore, would only apply the holding prospectively. Accordingly, it dismissed the complaint.

As noted earlier, the Board also issued three decisions that address how employers investigate and discipline for employee misconduct. In **Banner Estrella Medical Center**, 358 NLRB No. 93 (2012), the Board re-affirmed that a blanket practice or policy forbidding employees from discussing ongoing investigations violated Section 8 (a)(1) of the Act. The Board noted that Section 7 protects an employee's right to discuss ongoing investigations and potential disciplinary issues. It re-affirmed its position that an employer attempting to forbid discussions about matters under investigation must show that it has a legitimate business consideration that outweighs an employee's Section 7 rights. Under this test, any general ban on such discussions violates the Act. Instead, an employer can only justify such a ban if it determines and establishes, on a case- by-case basis, that witnesses need protection, evidence could be destroyed or fabricated, or it needs to guard against a cover up.

In another case that may affect how employers investigate employee misconduct, the Board overruled 35 years of precedent and held for the first time that witness statements gathered by an employer during an investigation may be discoverable. **Piedmont Gardens**, 359 NLRB No. 46

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!!

(Significant Decisions from the Board Continued)

(2012). The Board, in doing so, abandoned the bright-line rule created in **Anheuser-Busch**, 237 NLRB 982 (1978), which exempted witness statements from disclosure in any case in which the witness was given an assurance of confidentiality, in favor of the balancing test set forth by the Supreme Court in **Detroit Edison Co. v. NLRB** 440 U.S. 301(1979). Thus, in any future case, in which a union can establish that witness statements are relevant to its representation duties, any employer asserting a confidentiality interest, first bears the burden of establishing that interest, and then, that its confidentiality interest outweighs the union's need for the information. (There may be instances where the roles will be reversed and an employer will seek statements obtained by a union, but experience teaches that unions are most frequently the party that requests witness statements.) In addition, any party relying on a confidentiality interest in these circumstances must seek an accommodation from the party seeking the information. The Board argued that its new test does not create any additional risk that unions or their members will intimidate or harass potential witnesses, because even prior to **Anheuser-Busch**, the law required employers in most instances to furnish witness names, and/or a summary of the witnesses' information. Once again, the Board acknowledged that it was overruling established precedent, and indicated that the new balancing test would only be applied prospectively.

In another case that will unquestionably affect the manner in which some employers implement discipline, the Board held that discretionary discipline is a mandatory subject of bargaining and may not be imposed unilaterally, absent a binding agreement, establishing a process, usually in the form of a grievance-arbitration procedure, for resolving disputes over the discipline. **Alan Ritchey, Inc.**, 359 NLRB No. 40 (2012). The Board recognized, however, that discipline bears unique characteristics that distinguish it from other terms and conditions of employment and imposed a more limited obligation to bargain than what exists for most mandatory subjects.

Even employers with established disciplinary policies and practices, that allow for discretion on the level of discipline, absent an exigent circumstance that requires the immediate removal of an employee from the work force, must notify the union and provide it with an opportunity to bargain about the discretionary aspect of its decision. The Board limited the bargaining obligation by freeing the employers from the traditional requirement to refrain from implementation until impasse or agreement is reached. Although an employer must notify the union and allow for bargaining prior to implementation, it does not have to hold the discipline in abeyance, pending impasse or agreement, as long as it continues to bargain post-implementation.

Alan Ritchey, Inc. offers examples of the circumstances in which this holding would be applied. The employer had a policy that allowed it to discipline for a number of employee conduct issues. Perhaps the best illustration of its exercise of discretion was its variable responses to

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.

(Significant Decisions from the Board Continued)

absenteeism. In fact, one employee received a verbal warning for 62 unexcused absences, but a second was terminated for having only 10. The Board observed that it was this exercise of discretion that has to be bargained before discipline could be imposed. (If the employer had never previously disciplined anyone for excessive absenteeism, an entirely different bargaining obligation would have existed.)

As noted earlier, the bargaining obligation created by the **Alan Ritchey, Inc.** decision does not apply when the parties have an agreed-upon means, usually grievance/arbitration, to resolve disputes over discipline. Thus, the decision will have the greatest impact on parties negotiating their initial contract following certification. On a less frequent basis, it will apply when the parties continue to negotiate post-contract expiration but do not extend the dispute resolution mechanism established by the expired agreement.

Board Asserts Jurisdiction Over Illinois Charter School

By: **Barney Horowitz, Albany Resident Officer**

The Board recently issued its most significant decision to date on whether charter schools are exempt from coverage under the Act. In **Chicago Mathematics & Science Academy Charter School**, 359 NLRB No. 41 (2012), the Board addressed whether the private, not-for-profit corporation that established and operated a charter school was exempt as a political subdivision within the meaning of Section 2(2) of the Act. The Board rejected the Union's position, that the charter school was part of the public school system funded almost entirely by public monies. Rather, it found, applying the Supreme Court's "political subdivision" test, that the charter school was neither created by the state nor were its board members subject to appointment or removal by public officials. The Board asserted jurisdiction because the school itself controlled most, if not all, matters of the employment relationship, i.e., the hiring and firing of employees and the provision of benefits.

The case could be significant in upstate New York given the large number of charter schools. However, the Board made clear that the decision did not establish a bright line rule, but rather noted that it applied to the facts of the operation of a school under the particular provisions of Illinois law. Nevertheless, the case is worth a close read for any interested party.

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.

Litigation News

By: Michael J. Israel, Regional Attorney

Region 3 recently received several administrative law judge (ALJ) and Board decisions. If you are interested, you can find the full text of the decisions on the Board's website, www.nlr.gov under the "cases & decisions" tab.

The Region received a favorable Board decision in **Carr Finishing Specialties and G.P.C Construction**, 358 NLRB No. 168 (Sept. 28, 2012). The ALJ had found that Carr and GPC were alter egos/single employers and that they violated Section 8(a)(5) of the Act by failing to recognize the Union as the bargaining representative and by failing to apply the terms of the collective-bargaining agreement to unit employees. Respondent filed exceptions to the ALJ's decision, and the General Counsel (GC) and the Union filed limited cross-exceptions concerning the scope of the remedy found appropriate by the ALJ. The Board denied Respondent's exceptions and granted GC's exceptions on the remedial issue. This was a difficult case (it was pending before the Board for two years) with a great outcome. Region 3 attorney **Linda Leslie** investigated, tried and briefed this case to the Board.

We recently received a full win in **Ace Masonry, Inc., d/b/a Ace Unlimited and Bella Masonry, LLC, alter egos**, Case 3-CA-73540, et al., in a decision by ALJ Geoffrey Carter on December 12. The case was litigated by Albany Resident Office attorneys **Greg Lehmann** and **Brie Kluytenaar**, based on charges investigated by Resident Officer **Barney Horowitz** and field examiner **Kelly Moore-LaMotta**. The ALJ found all allegations of the complaint, including that Ace and Bella are alter egos, and that Respondents violated Section 8(a)(5) of the Act by failing to apply the collective-bargaining agreements Ace had entered into with the three Charging Party Unions, the Bricklayers, Laborers and Carpenters. The ALJ also found that Respondents had unlawfully refused to provide the Bricklayers and Laborers with information relevant to whether Bella was an alter ego of Ace.

The Region also received a favorable administrative law judge's decision (ALJD) on December 7, in **Allied Barton Security Services**, Case 3-CA-78926, et al. This was a difficult Section 8(a)(3) and (4) suspension and termination case that required considerable and detailed investigatory and trial work to establish a prima facie case under **Wright Line**, 251 NLRB 1083 (1980), and to rebut Respondent's asserted reasons for the suspension and termination of the Charging Party Union's president. The case was litigated in the Buffalo office by attorney **Jesse Feuerstein**, and was investigated by field examiner **Pat Petock**.

In other litigation news, in December, the Region filed a petition for injunctive relief under Section 10(j) of the Act in federal district court (WDNY), in **Land Air Express of New England, Inc.**, Cases 3-CA-077620 and 3-CA-078819. An administrative complaint in these cases issued in November alleging that Land Air, at its Buffalo terminal, had

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.

(Litigation News Continued)

bargained in bad faith for an initial contract with a newly-certified union, Teamsters Local 375, unlawfully withdrew recognition from the Union, and had refused to furnish requested information for bargaining to the Union. Shortly after filing the petition for injunctive relief, Land Air agreed to settle the case, and signed a Board settlement agreement requiring it to recognize the Union, bargain in good faith and furnish the requested information. The settlement agreement also extended the Union's certification year by six months.

Law Students

Region 3 partners with the State University of New York at Buffalo School of Law, and other law schools, to provide externship opportunities for students throughout the year with the Region. Law students with an interest in labor law are selected to spend a semester or summer working in Region 3 primarily as volunteers. In February, SUNY Buffalo law students Earl Cantwell III and Marshall Bertram will join us for a semester.

Al Norek Retires from the Albany Office after 39 Years

On October 1, 2012, Field Attorney Al Norek retired after 39 years of government service. Al spent his first five years working in the Board's Division of Advice before transferring to the Albany Resident Office in 1978. "Prolific" is the word that best defines Al over his long career. He tried well over 100 cases with many notable victories. Career highlights include **Indeck Energy Services**, 350 NLRB 417 (2007), a landmark Section 8(e) case which spanned 12 years from first hearing to final determination; **Torrington Industries**, 307 NLRB 809 (1992) which helped define an employer's work relocation obligations under Section 8(a)(5); and **Highland Hospital**, 288 NLRB 750 (1988) where he successfully defended a challenge to the status of **New York State Nurses Association (NYSNA)** as a labor organization where the Employer claimed that it was tainted by the influence of its supervisory members.



Most recently, Al won a major case in **Times Union**, 356 NLRB No. 169 (2011), where the Region alleged that the Employer violated the Act by

(Al Retires Continued)

placing 11 employees slated for layoff on paid leave without giving the Union timely notice and an opportunity to bargain, and by permanently laying off those employees without first bargaining to a lawful impasse. The favorable Board decision resulted in a settlement where affected employees received over \$600,000.

Al was not only a skilled trial attorney. He also excelled at settling cases. By finding common ground with the parties, time and again he effectuated the purposes of the statute by resolving difficult cases short of trial. Al, a true renaissance man of good cheer, was one of a kind. All of Region 3 will miss him and wishes him well in retirement.

Ron Scott Retires from Region 3, Buffalo After 24 Years

Region 3 bids a fond farewell to Field Attorney Ron Scott, who retired on December 31, 2012 after a distinguished career of 24 years with Region 3. Ron routinely handled some of the most difficult cases in the Region. Some highlights include **E.I. DuPont**, (2012 WL 212112), a case that 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 the unilateral changes extended beyond an initial contract extension, to the period of time when the unilateral changes were implemented. In addition, he tried **Dresser Rand**, 358 NLRB No. 79 (2012) a significant case where the Board found that the Employer violated the Act by locking out full-term strikers and former strikers who abandoned the strike (“crossovers”) but not other unit employees, and reinstating crossovers ahead of full-term strikers. The Board also found that the Employer violated the Act by failing to bargain over the process of returning strikers to work.



Ron was also very successful in the compliance area, and after conducting depositions was involved in settlement discussions resulting in significant backpay amounts to affected employees. Ron will spend time with his family and pursue other professional and personal interests. In addition to his trial skills, Ron was well known for his sharp wit, wry sense of humor and superb writing skills. We will all miss him and wish him well in his retirement!

Region 3 Bids Farewell to Brie

Region 3 bids a fond farewell to field attorney Brie Kluytenaar from the Albany Resident office. Brie is relocating downstate and leaving the agency. We wish her well!

Welcome Aboard!

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

Claire Sellers is joining us from the Hartford, CT office. She has been with the Agency for two and one-half years in which time she has gained a fair amount of trial experience including cases like **Triple Play Sports Bar & Grill** and **Gaylord Hospital**. Prior to joining the Agency, Claire attended the State University of New York at Buffalo (UB) Law School. Claire graduated from UB Law School cum laude and was awarded the Dale S. Margulis Award for making the greatest contribution to UB Law and the Buffalo community while in law school. While at UB, Claire clerked at Lipsitz Green Scime Cambria, LLP, the Public Employee Relations Board, and for the Honorable Judge Telesca in the Western District of New York. Claire also volunteered at the Erie County Bar Association Volunteer Lawyers Project and won the In-house Volunteer of the Year award in 2008. Prior to attending law school, Claire was a teacher in New York City and Quito, Ecuador. Claire lives with her husband, and their two dogs. They are expecting their first child in March. She is excited to return to Buffalo and join the Region 3 team.



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

Please file your documents electronically.



It's fast and easy at www.nlr.gov

.....

During the NLRB investigation, you may be asked to provide a position statement or evidence — such as a collective bargaining agreement or personnel documents — to help investigators make an informed decision. The agency encourages all parties to file these documents electronically. It's easy to do, and ensures that your government resources are used efficiently.

To e-file, go to the agency's website at www.nlr.gov, click on "e-file documents," and enter the 10-digit case number (found on the top right of the charge or petition form). Then simply follow the prompts. At the end, you will receive a confirmation number and an e-mail notification that the documents were successfully filed.

If you have questions or need help, please contact the agent handling your case.
Thank you.

.....

