NLRB Region 7

Stephen M. Glasser
Regional Director

www.nlrb.gov

Outreach

February 2009
No. 5

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DETROIT REGION CONDUCTS BERNARD GOTTFRIED LABOR LAW SYMPOSIUM

Board Chairman Wilma Liebman and Detroit Regional Director Stephen Glasser joined academics and practitioners who spoke at the 16th annual Bernard Gottfried Memorial Labor Law Symposium held at Wayne State University Law School in Detroit on October 16, 2008. The Symposium, conducted by the Detroit Region and Wayne State Law School in sponsorship with the State Bar of Michigan Labor and Employment Section, is held each year in memory of Bernard Gottfried, who served as Regional Director of the Detroit Region from 1973 until his passing in 1992. Director Gottfried also taught labor law at Wayne State University Law School as an adjunct professor. *(Continued on Page 2)*

Speakers at the Symposium: [standing] Sarah Karpinen, Joseph Canfield, Jay Greenhill, Thomas Good, Stanley Moore, Regional Director Stephen Glasser, Scott Brooks, and William Altman, [seated] Michael Fayette, Board Chairman Wilma Liebman, and Maureen Rouse-Ayoub.

Gottfried Seminar *(Continued)*

Regional Director Glasser and Law School Dean Robert Ackerman each made opening remarks to welcome an audience that included attorney practitioners from management and labor, academics, Regional personnel and students**.** The first listed topic for discussion was ***Dana Corporation and Voluntary Recognition, Protection or Peril***. Senior Field Examiner Thomas Good provided an overview to the audience of the Board's ***Dana Corporation*** decision. A practitioner from the labor and management side each provided views on the Board's decision on voluntary recognition and its impact. Field Attorney Joseph Canfield, who is also an adjunct professor at Wayne State University Law School, then moderated a discussion between panels of labor and management practitioners regarding the Board's ***Register Guard*** case and employee use of e-mail and the boundaries of the law. There was also a broader discussion of union access to employees in the workplace.

Regional Director Stephen M. Glasser addresses the symposium

Board Chairman Liebman in a luncheon address discussed working with Board Member Schaumber as part of a two-person Board. She also discussed recent Board cases and gave her views on challenges facing the Agency in the upcoming years. Following the address, the Region conducted two special sessions. Field Attorney Sarah Karpinen discussed the Board cases ***Toering Electric*** and ***Oil Capitol*** and their impact on salting. Field Examiner Jay Greenhill discussed the Board law dealing with Section 7 of the Act and what constituted protected and what constituted concerted activity.

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The Region 7 Detroit office is located on the third floor of the Patrick V. McNamara Federal Building located at the corner of Michigan Ave. and Cass Ave. in downtown Detroit.

Visitors to the McNamara Building must enter the building from the Michigan Avenue entrance.

The Detroit office is open from 8:15 a.m. to 4:45 p.m. Monday through Friday.
Telephone (313) 226-3200
Fax (313) 226-2090

The Grand Rapids Resident Office handles cases on the west side of the lower peninsula of Michigan.

The Resident Office is located on the third floor of the building located at 82 Ionia, the corner of Ionia St. and Fountain St. in downtown Grand Rapids.

It is open from 8:15 a.m. to 4:45 p.m. Monday through Friday.
Telephone (616) 456-2679
Fax (616) 456-2596

The Resident Officer is Chester H. Byerly, Jr..

Section 10(b) of the National Labor Relations Act allows a charging party six months to file a timely charge with the NLRB. If you intend to file a charge with the NLRB, your charge must be filed and served on the charged party within six months of the date of the alleged unfair labor practice.

WILMA LIEBMAN DESIGNATED NLRB CHAIRMAN

On January 20, 2009, President Obama designated Wilma B. Liebman, a member of the National Labor Relations Board, as Chairman.

Chairman Liebman has served on the Board since November, 1997. She is now serving her third term, which will expire in August 2011. Prior to her designation she served on a two-person Board with Board Member Peter Schaumber. Board Member Schaumber had served as Chairman based on his designation by President Bush on March 18, 2008.

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NLRB HELPING FCC PREPARE THE PUBLIC FOR TRANSITION TO DIGITAL TELEVISION

In an effort to aid the Federal Communications Commission (FCC) to educate the public regarding the conversion to digital television, the NLRB has agreed to display posters in its reception areas and place in reception areas information materials to the public regarding the national transition to digital television that is scheduled to take place on June 12, 2009.

On June 12, 2009, all full-power broadcast television stations in the United States will stop broadcasting on analog airwaves and begin broadcasting only in digital. Digital broadcasting will allow stations to offer improved picture and sound quality and additional channels. Find out more about whether or not you will be impacted by the digital (DTV) transition by visiting the DTV Website of the Federal Communications Commission at http://www.dtv.gov/.

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WE WANT TO HEAR FROM YOU!

The Region would like to know if this newsletter is helpful and informative. We would also like to know if there are certain topics, issues, Board decisions, or Regional practices that you would like to see addressed or discussed in future editions. If so, please contact Group Supervisor Patrick Labadie at (313) 226-3213 or by e-mail at patrick.labadie@nlrb.gov and let him know. Your feedback will be greatly appreciated and carefully considered.

ST. GEORGE WAREHOUSE

In September 2007, just before the end of its fiscal year, the Board issued 61 decisions. While it is debatable which decision had the greatest impact, ***St. George Warehouse***, 351 NLRB 961, a compliance case, certainly deserves consideration.

Generally in the litigation of a compliance specification, the General Counsel bears the burden of proving the amount of gross backpay due the discriminatee. Upon meeting this burden, the respondent may raise affirmative defenses seeking to reduce the gross backpay due. Prior to ***St. George Warehouse***, the respondent bore the entire burden of production and persuasion with respect to the affirmative defense of failure to mitigate backpay.

In ***St. George Warehouse***, the Board, in a 3-2 decision, held that once a respondent produces evidence of substantially equivalent jobs for a discriminatee, the burden shifts to the General Counsel to produce evidence concerning the discriminatee's efforts to find interim employment. In essence, the Board split the burden of production into two elements: (1) there were substantially equivalent jobs within the relevant geographic area; and (2) the discriminatee unreasonably failed to apply for jobs. The Board reaffirmed that the first element remained the respondent's burden but changed existing law to hold that the General Counsel bears the burden of the second element. The Board also reaffirmed that the ultimate burden of persuasion still rests on the respondent.

The practical effect of this change means an increased likelihood that in compliance proceedings, the General Counsel will have to litigate whether the discriminatee's conduct demonstrates a reasonable search for work. Now, during litigation, the General Counsel will attempt to rebut the adequacy of the respondent's evidence asserting that substantially equivalent jobs were available.

The General Counsel will also produce evidence demonstrating the discriminatee's reasonable search for interim employment and assert that the respondent failed to meet its ultimate burden of persuasion.

The evidence produced by the General Counsel to meet its new production burden will be evaluated on the totality of the discriminatee's job-seeking efforts. In other words, the discriminatee's efforts will not need to show that he or she sought the particular job raised by the respondent but rather that the discriminatee's efforts reflected those of a reasonable person in like circumstances. Several indications of a reasonable search might include: checking newspapers and/or the internet, registering with state unemployment agencies, applying for work, visiting employers, and seeking employment leads from other people.

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SPEAKERS AVAILABLE

Members of the Region's staff are available to make presentations before any employer or union group, classroom group, legal services clinic or service agency, and labor relations association, to describe the Act's protections, how the Region investigates and resolves unfair labor practice charges, processes representation petitions, or any NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please do not hesitate to telephone Regional Outreach Coordinator Patrick Labadie at (313) 226-3213.

ST. GEORGE WAREHOUSE *(CONTINUED)*

In order to aid in this effort, the Region, during the investigation, will continue to advise the discriminatee regarding his or her responsibility to seek interim employment. Moreover, the Region will emphasize the need for the discriminatee to maintain careful notes and records regarding his or her search for interim employment. ***NLRB Casehandling Manual, Part 3, Compliance Proceedings (Casehandling Manual)*** §§ 10508.8 and 10558, sets forth Regions' duties to maintain contact with a discriminatee and gather the requisite information to draft a compliance specification including mitigation.

A complete copy of ***St. George Warehouse***, 351 NLRB 961, and ***Guideline Memorandum Concerning St. George Warehouse***, Memorandum GC 09-01 are available on the NLRB's website at www.nlrb.gov.

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GENERAL COUNSEL ISSUES GUIDELINE MEMO ON *LEVITZ*

On November 26, 2008, the Office of the General Counsel released GC Memo 09-04 ***(Guideline Memo Concerning Withdrawal of Recognition Based on Loss of Majority Support)***. This memo updates GC Memo 02-01 concerning ***Levitz***, dated October 22, 2001. Both GC memos are available on the Board's website at www.nlrb.gov.

In ***Levitz Furniture Co. of the Pacific***, 333 NLRB 717 (2001) the Board overruled almost 50 years of precedent when it held that an employer may lawfully withdraw recognition from an incumbent union *only* if it can prove that the union has actually lost majority support. Prior to ***Levitz*** the Board utilized a reasonable good faith doubt standard to evaluate an employer's withdrawal of recognition from an incumbent union.

To establish "actual loss" of majority support an employer may rely only on "objective evidence." As is the norm in Board cases, a determination of this objective evidence is fact specific. An antiunion petition signed by a majority of the employees that is not tainted by prior unremedied unfair labor practices is adequate objective evidence of actual loss of majority status; unsolicited employee statements, and lawful employee polls regarding support for the union can also be relied upon. The post ***Levitz*** cases indicate that objective evidence sufficient to demonstrate actual loss must be sufficiently specific to show that a numerical majority of the unit no longer supports the union. The investigation into an alleged unlawful withdrawal of recognition examines whether at least 50% of the bargaining unit indicated their

(Continued on Page 6)

Helpful Hints When Filing a Charge:

- Remember to sign the charge.
- Section 10(b) of the Act provides for a six month statute of limitations. To be timely, a charge must be filed with a Board office and served on the charged party within six months of the date of the alleged violation.
- In the body of the charge, you should identify only those employees whom you allege have been discriminated against and may be entitled to a reinstatement or back pay remedy. That is, employees who allegedly were unlawfully discharged, suspended or denied a pay increase should be named, but not employees who allegedly were threatened, interrogated, or surveilled.
- Witnesses who are not alleged discriminatees should not be identified in the charge.
- Documents should not be attached to the charge.
- There is no need to file a separate charge for each alleged violation. Multiple related allegations should be contained on the same charge form.
- If possible, confine the charge allegations to the space provided in Part 2 of the form.

Remember, assistance is only a telephone call away. Call (313) 226-3200 or (616) 456-2679 and ask to speak with an information officer. Assistance is available Monday through Friday, 8:15 a.m.. to 4:45 p.m.

LEVITZ (CONTINUED)

disaffection with the union at the time recognition was withdrawn, whether the signatures are authentic, the poll is reliable, and whether, in fact, statements were made. [Note that this inquiry is not unlike the standard for establishing the propriety of a ***Gissel*** bargaining order.] In addition, any allegations of taint relative to employees' disaffection, or a countervailing petition or evidence in support of union majority, must be investigated. Strictly circumstantial evidence of loss of majority support, and circumstantial evidence that would not have satisfied the previous good faith doubt standard, is insufficient under ***Levitz.***

Although the employer has the litigation burden to establish actual loss of majority status, it has been the General Counsel's longstanding policy *not* to issue complaint in §8(a)(5) withdrawal of recognition cases when he possesses sufficient objective evidence that the union has lost majority status, even if the employer is not aware of same. The Fourth Circuit's recent decision in ***NLRB v. B.A. Mullican Lumber & Mfg. Co.,*** 535 F.3d 271 (4th Cir. 2008) is consistent with this policy. The ***Mullican*** court defined objective evidence as evidence "external to the employer's own (subjective) impressions." It determined that the employer's hearsay evidence was sufficiently objective and probative to satisfy its burden under ***Levitz***. The employer's objective evidence of actual loss of majority consisted of a letter from the decertification petitioner informing the employer that 114 out of 220 unit employees signed decertification slips stating that they no longer wanted to be represented by the union and some unsolicited employee statements that the union had lost majority support. In denying enforcement, the Fourth Circuit observed that it would be improper for the General Counsel to seek a bargaining order. The Court also noted that neither the General Counsel nor the union presented contrary evidence or objected to the hearsay nature of the evidence before the administrative law judge. ***Mullican*** should not be viewed as a reversion to the pre-***Levitz*** standard, however, in light of the Fourth Circuit's repeated positive references to the Board's decision in ***Levitz***.

The question of what probative value to assign to hearsay evidence remains open. If the alleged loss of majority status is based on an ambiguously worded petition, disputed unit composition, possibly stale evidence of disaffection, or hearsay evidence, such as employee sentiments or polling, the matter will be submitted to the Division of Advice to ensure a consistent national policy regarding the sufficiency of "objective evidence" under ***Levitz.***

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Learn More:

The NLRB website, www.nlrb.gov, contains a great deal of information about the provisions of the Act, Board policies and procedures, and how to contact the nearest Regional Office.

Contact the Region:

There is always an information officer available at an NLRB office or by telephone to answer general inquiries or to discuss a specific workplace problem or question. The information officer can provide information about the Act and discuss whether it appears to be appropriate to file an unfair labor practice charge. However, the information officer may not offer legal advice and the decision as to whether to file a charge rests with the individual. If filing a charge appears to be appropriate, the information officer can assist in completing the charge form.

The information officer at Region 7 may be reached by telephone at: 313.226.3200

NLRB General Counsel Issues Report on FY2008 Operations

On October 29, 2008, General Counsel Ronald Meisburg issued a report giving an overview of the operations of the field and headquarters offices under his supervision for fiscal year 2008. In the report, GC Meisburg discussed the achievements in the case handling and administrative functions of the field and headquarters offices.

Of special note, the GC cited the following:

- 95.1 % of all initial elections were conducted within 56 days of filing of the petition;
- Initial elections in union representation petitions were conducted in a median of 38 days from filing of the petition;
- Regional offices achieved a settlement rate of 96.87% of meritorious unfair labor practice cases;
- The Regional offices won 90.8% of Board and Administrative Law Judge unfair labor practice decisions in whole or in part in fiscal year 2008;
- A total of $70,001,594 was obtained for employees as backpay or reimbursement of fees, dues, or fines, with 1, 564 employees offered reinstatement;
- Agency representatives participated in over 525 outreach events in fiscal year 2008;
- The GC also noted that in fiscal year 2008, the Agency representation case intake increased by 2.3%, Agency unfair labor practice charge intake increased by 1.6% and overall case intake was up by 1.7%.

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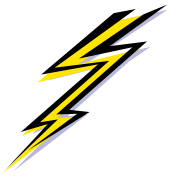
Board Amends Rules on Service to Parties



On January 30, 2009, the Board amended its Rules and Regulations to require that when a document is filed electronically with the Board, Division of Judges or a Regional Office through the Agency's website, and is required to be served on another party, that the party shall be served by electronic mail (e-mail), if possible. If the other party does not have the ability to receive electronic service, the other party shall be notified by telephone of the substance of the transmitted document and a copy of the document shall be served by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.

The change was designed to place the Board's Rules and Regulations for E-filing more closely with the E-filing practice followed by the Federal courts.

Did You Know?

Next year, 2010, will mark the 75th anniversary of the National Labor Relations Board and the law that established it. The Wagner Act was signed into law by President Franklin D. Roosevelt on July 5, 1935. The Wagner Act established the NLRB and set forth the rights of employees to engage in protected concerted and union activity. The Wagner Act was challenged in court and found constitutional by the United States Supreme Court in April 1937 in the **Jones and Laughlin** case.

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