

Democracy at Work

National Labor Relations Board
Region 9

September 2016 Volume 7, Issue 1



The End of a Blazing Summer Recent Board Decisions



First Photo of Board in session, May 1955. From left, Philip Ray Rodgers, Abe Murdock, Chairman Guy Farmer, Ivar H. Peterson, and Boyd S. Leedom

Board decisions this past year culminated in a number of noteworthy rulings during the summer. Issues addressed during this time included work rules, campaign meetings, permanent replacements, “mixed guard” unions, employee status of student assistants, search-for-work expenses and bargaining obligations.

The Board issued two decisions related to employee recordings in the workplace. In *Whole Foods Market, Inc.*, 363 NLRB No. 87 (Dec. 24, 2015), the Board found that an employer violated Section 8(a)(1) by maintaining two similar rules in its General Information Guide prohibiting employee recording in the workplace without prior approval by management. The majority found that the rules, which unqualifiedly prohibit all workplace recording, are overbroad and would reasonably be construed by employees to prohibit activity protected by the Act. Member Miscimarra, dissenting, believes the rules do not unlawfully interfere with, restrain or coerce employees in the exercise of rights protected under the Act because the rules “obviously are intended to encourage all

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Recent Board Decisions

From Cover



communications, *including* communications protected by Section 7.” A similar unlawful finding by the Board was contained in *T-Mobile USA, Inc.*, 363 NLRB No. 171 (April 29, 2016). There, the Board, among other things, reversed the judge and found that an employer violated Section 8(a)(1) by promulgating and maintaining work rules that (a) required employees “to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships,” and (b) prohibited employees from making recordings in the workplace.

On January 29, 2016, the Board addressed mass campaign meetings and mail ballot elections in *Guardsmark, LLC*, 363 NLRB No. 103. There, the Employer held a mass campaign meeting on the morning that ballots were scheduled to be mailed in a mail ballot election. The Board majority overruled *Oregon Washington Telephone*, 123 NLRB 339 (1959), which held that the mass-meeting prohibition begins when the ballots are scheduled to be mailed by the Regional Office. The Board majority found that prohibiting mass, captive-audience speeches by parties within the 24-hour period prior to the mailing of the ballots would align the mail-ballot rule with the manual-ballot rule established in *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953), which prohibits such speeches within the 24-hour period prior to the start of a manual election. Member Miscimarra, dissenting, would not overrule *Oregon Washington Telephone* and found that the rule adopted by the majority creates different standards for mail-ballot and manual elections that cannot be reconciled with one another or with *Peerless Plywood*.

“permanently replacing workers to punish the strikers”

The Summer began as the Board addressed permanent replacements in *American Baptist Homes of the West, d/b/a Piedmont Gardens*, 364 NLRB No. 13 (May 31, 2016). In that case, the Board reversed the judge’s finding that the Employer did not violate Section 8(a)(1) and (3) by permanently replacing striking employees. In finding the violation, the majority applied *Hot Shoppes*, 146 NLRB 802, 805 (1964), and held that the General Counsel is not required to show that an employer was motivated by an unlawful purpose extrinsic to the strike, but only that the hiring of permanent replacements was motivated by a purpose prohibited by the Act. The majority then determined that the Employer’s stated reasons for permanently replacing workers to punish the strikers and the Union and to avoid future strikes constituted evidence of an “independent unlawful purpose.” In dissenting, Member Miscimarra argued that the Board interpreted “independent unlawful purpose” too broadly and that an independent unlawful purpose exists only if the Employer’s unlawful objective is extrinsic to the strike itself and the parties’ bargaining relationship. Two interesting decisions issued on June 9, 2016. In *The Boeing Company*, 364 NLRB No. 24, the Board set out a procedural framework for cases where an employer argues that a union no longer has a need for requested information. If an employer, based on evidence available before or during the merits hearing before the administrative law judge, wishes to argue that production should not be ordered because the union has no need for the information, it must introduce the relevant evidence during the merits hearing and argue the issue to the judge. If evidence that the union has no need for the information first becomes available after the merits

hearing has closed, an employer may raise the issue in the compliance stage of the case [or may alternatively move to reopen the record pursuant to Section 102.48 of the Board's Rules and Regulations, if applicable]. At the compliance stage, the employer must plead in its answer to the compliance specification the absence of a need for the information as the equivalent of an affirmative defense, and then introduce evidence establishing its contention. At either stage, the General Counsel and the charging party can contest the employer's claim and/or to state an ongoing need for the requested information.

In *Loomis Armored US, Inc.*, 364 NLRB No. 23, the Board concluded that where an employer of a unit of security guards voluntarily recognizes a "mixed-guard" union (a union that has both guard and non-guard members) as the unit's bargaining representative, the employer may not later, after the parties' collective-bargaining agreement has expired, withdraw recognition without demonstrating that the union has lost its majority support. The Board overruled *Wells Fargo Corp.*, 270 NLRB 787 (1984) in which the Board interpreted Section 9(b)(3), which bars a mixed-guard union from being "certified" by the Board as the representative of a guards unit, to permit an employer to withdraw its voluntary recognition in the absence of a collective-bargaining agreement. The Board found that requiring an employer of guards, like other employers, to show loss of majority support before withdrawing the recognition it had previously chosen to give to a mixed-guard union is more in keeping with the Act's goals of promoting stable bargaining relationships and protecting employees' right to their choice of representation. Member Miscimarra defended the holding of *Wells Fargo* as the better interpretation of Sec. 9(b)(3).

The Board reviewed bargaining relationship issues in two decisions issued in July. In the first, *Miller & Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016), the Board returned to the holdings of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000) regarding collective-bargaining units that combine jointly employed and solely employed employees of a single user employer. The Board concluded that employer consent is not necessary for these units and that it would apply the traditional community of interest factors to decide if such units are appropriate. The Board thereby overruled *Oakwood Care Center*, 343 NLRB 659 (2004), and reasoned that *Sturgis* is consistent with Section 9(b) of the Act and effectuates fundamental policies of the Act that *Oakwood* frustrates. As outlined in *Sturgis*, a user employer will be required to bargain regarding all terms and conditions of employment for unit employees it solely employs. However, it will only be obligated to bargain over the jointly-employed workers' terms and conditions which it possesses the authority to control. Member Miscimarra dissented based on his view that the Act renders inappropriate a bargaining unit where one employer-participant has no "employer" relationship with some or most unit employees and believes that the Act and sound policy considerations preclude the Board from certifying such combined units absent employer consent.

On July 22, 2016, the Board issued its decision in *Colorado Fire Sprinkler, Inc.*, 364 NLRB No. 55 finding unlawful various post-expiration unilateral changes. In addressing the 9(a) relationship, the Board relied strongly on its decision in *King's Fire Protection, Inc.*, 362 NLRB No. 129 (2015), which involved identical contract language, and declined again to revisit its decision in *Central Illinois Construction (Staunton Fuel)*, 335 NLRB 717 (2001). *Central Illinois* held that clear and unequivocal contract language can establish a 9(a) relationship in the construction industry. The Board found it unnecessary to address the applicability of *Casale Industries*, 311 NLRB 951 (1993), which extended to the construction industry the rule that claims that a union lacked majority status at the time of recognition are time barred after 6 months following recognition. Member Miscimarra dissented, essentially on the same grounds as he had in *King's Fire*, that Board law requires the Union to present additional extrinsic evidence of majority support to prove 9(a) status, even where clear and unequivocal contract language establishes a 9(a) relationship

In August, five long awaited decisions, some following earlier invites by the Board

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Recent Board Decisions

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to file briefs. On August 23, 2016, the Board issued its decision in *The Trustees of Columbia University in the City of New York*, 364 NLRB No. 90, that student teaching and research assistants are employees under the Act if they meet the Act's broad definition of an employee, which encompasses individuals who meet the common law test for employment. The Board reversed the Board's 2004 decision in *Brown University*, which categorically excluded student teaching and research assistants from the Act's coverage, and found no policy reasons for excluding student assistants. Applying the common-law test, the Board found that Columbia's student assistants were employees, as they performed services under the direction of their university in exchange for compensation. Dissenting, Member Miscimarra urged that *Brown University* should be upheld and that in view of the substantial financial investment of students in postsecondary education and the long-term importance of their university education, collective bargaining rights, with prospects of strikes or other labor conflict, pose too great a risk to student assistants. He observed that the Act provides to unions and traditional educational relationship

The next day, the Board reasonable search-for-work and King Soopers, Inc., 364 NLRB No. the Board treated discriminatees' employment expenses as an offset will now be compensated for such are nonexistent or less than those modifying its treatment of search-expenses will bring these payments similar expenses incurred by

explained that awarding search-for-work and interim employment expenses separately from taxable net backpay, with interest, will avoid potential tax complications caused by the Board's traditional approach. Member Miscimarra dissented and believes the majority's revised remedial approach will produce a windfall in certain cases and creates a substantial risk of protracted litigation.

On August 26, 2016, the Board issued *Total Security Management Illinois I, LLC*, 364 NLRB No. 106 reexamining *Alan Ritchey, Inc.*, 359 NLRB 396 (2012) which was invalidated on procedural grounds by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). The majority held that discretionary discipline is a mandatory subject of bargaining, like other terms and conditions of employment, and that, consistent with precedents regarding other mandatory subjects of bargaining, employers may not impose certain types of discipline unilaterally. Based on the nature of discipline and the practical needs of employers, the Board majority imposed a more limited bargaining obligation than that which applies to other terms and conditions of employment. The majority applied its holding prospectively and explained how its standard remedies, which include backpay and reinstatement, would be applied in subsequent cases. Member Miscimarra dissenting in part and concurring in part, disagreed with the conclusion that decisions to impose discipline are changes subject to bargaining under existing Board precedent; rather, he found the majority's bargaining obligation irreconcilable with various existing legal principles and precluded by certain express provisions of the Act. Further, he argued that the bargaining obligation would create great uncertainty and spur extensive litigation.

***“student teaching
and research
assistants are
employees under the
Act”***

to warrant extending such rights to various protections and procedures employees would be at odds with the between students and universities.

revised how the Agency will treat interim employment expenses in 93 (August 24, 2016). Previously, search-for-work and interim against interim earnings. Employees expenses even when interim earnings expenses. The majority found that for-work and interim employment in line with the Board's treatment of discriminatees. The majority

Finally, in a case in which the Board invited briefs, the appropriate standard for evaluating orders approving and incorporating settlement terms proposed by a respondent, over the objections of the General Counsel and the charging party was clarified in *United States Postal Service*, 364 NLRB No. 116 (August 27, 2016). The Board concluded that the appropriate standard is “whether the order provides a full remedy for all of the violations alleged in the complaint.” The majority observed that the judge’s order contained a clause that limited the availability of the enforcement procedure to the 6 months following case closure. Finding that this limitation differed from the remedy that would have been ordered had the case been successfully litigated to conclusion, the majority concluded that the order did not provide a full remedy for the violations alleged in the complaint. Dissenting, Member Miscimarra would apply the Board’s former “reasonableness” standard to evaluate all “consent settlement agreements,” including those opposed by the General Counsel and charging party. Applying that standard, he would approve the judge’s order on the basis that the terms of the proposed settlement were reasonable.



Photo of ballot counting in Winston-Salem Region

ANNOUNCEMENTS

Save the date! On December 8, 2016, the Ohio State Bar Association, together with the Region and Region 8, will present a Joint Labor Seminar. The seminar will be held at 1700 Lake Shore Drive, Columbus, Ohio 43204, from 8:30 am until 4:45 pm, including a Continental Breakfast and a Reception at the conclusion. There will be many guest speakers, including the Chairman of the National Labor Relations Board Mark G. Pearce and the General Counsel of the National Labor Relations Board Richard F. Griffin. For more information, contact Lynda Morris, CLE Program Coordinator, Ohio State Bar Association at Office Direct: (614) 487-4408 | lmorris@ohioabar.org

GENERAL COUNSEL INITIATIVES

by Daniel Goode

Several initiatives during the previous year were announced by the Office of the General Counsel. On October 15, 2015, Associate General Counsel Anne Purcell issued [Memorandum OM 16-02](#) reaffirming the Board's longstanding alternative dispute resolution (ADR) program. Since December 2005, the Board has administered its ADR program in an effort to facilitate the settlement of cases pending before the Board. It has experienced success when utilized with 60% of cases reaching settlement. Many attractive features of the program include, but are not limited to: the ability to stay proceedings before the Board while the parties participate in mediation; settlement conferences can be conducted both in person or via telephone or videoconference if the parties desire, although face-to-face mediation is preferred; the mediator has no authority to impose a settlement; and all discussions between the mediator and the participants are confidential and are not disclosed to the Board. Despite the successes, OM 16-02 notes that many excellent cases ripe for entry into the program are simply not brought. Given the advantages of participating in the Board's ADR program, parties are encouraged to make use of the program for appropriate cases pending before the Board.

AGC Purcell also issued [Memorandum OM 16-23](#) on July 1, 2016 related to the collecting data in connection with the Fair Play and Safe Workplaces Executive (FPSWE) Order issued by President Obama on July 31, 2014. The FPSWE Order was signed to promote the use by the federal government of responsible contractors who comply with labor laws. To achieve that end, the FPSWE established a new Labor Compliance Advisor

within each federal agency, who is tasked with assisting contracting officers in assessing whether contractors have committed violations of labor law which are serious, repeated, willful, or pervasive. To further realize the objectives of the FPSWE, the NLRB has begun collecting data from employers who have been found to have violated the Act, including employer "CAGE," "DUNS," "DUNS+4", and tax identification numbers. Upon a complaint being issued, the Board will request that the Charged Party provide this data. That information will then be shared with the newly created Labor Compliance Advisors which will be necessary for their assessments.

In [Memorandum GC 16-03](#), issued on May 9, 2016, General Counsel Richard F. Griffin set forth a new procedure that the Regional Offices should follow in withdrawal of recognition cases. Currently, employers are permitted to withdraw recognition from an incumbent union based on objective evidence that the union has

an actual loss of majority support. See *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). Determining what constitutes objective evidence of actual loss of majority has proven difficult, and has been a perilous undertaking for many employers. It has further caused years of litigation and in certain cases has delayed employees' ultimate representation choice. Consequently, General Counsel Griffin has instructed the Regional Offices, when arguing *Levitz* cases to the Board, to request that the Board adopt a rule that, absent an agreement between the parties, an employer may lawfully withdraw recognition from a Section 9(a) representative based only on the results of an RM or RD election. The goal being that this shift in extant Board law will establish a bright-line rule which will provide clarification for employers, employees, and unions in handling withdrawal of recognition cases.

“employers are permitted to withdraw recognition from an incumbent union”

Procedures & Tech Tips



by Jodi Suber

New Phone Systems: The Agency continues its march to the 21st century, switching from an analog telephone system to NLRB Skype for Business. The Agency replaced its old phone system with Polycom VVX500 Business Media Phones. With Skype for Business, calls are made directly from Agent's computer. Agents will have the ability to take affidavits or participate in video conference calls using Skype. In addition, if Agents are working away from the Regional Office they can connect to the internet and use Skype to make and receive calls from their laptops. Fortunately, our Region was able to maintain existing phone numbers unlike most Regional Offices in the country.

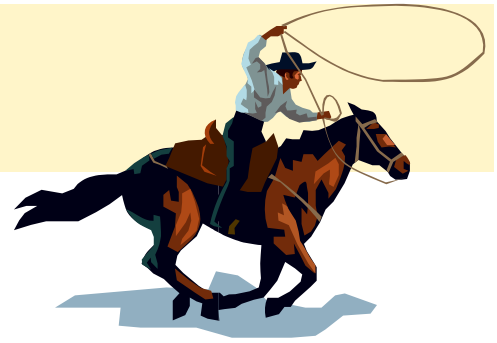
Electronic Signatures and Showing of Interests: On October 26, 2015, General Counsel Richard F. Griffin, Jr., issued Memorandum GC 15-08 providing guidance for the submission of electronic signatures supporting a showing of interest. As part of the modified rules regarding the processing of representation cases, the Board determined that its regulations were sufficient to permit the use of electronic signatures. Pursuant to the Memorandum, the General Counsel has determined that the evidentiary standards that the Board has traditionally applied to handwritten signatures will apply to electronic signatures and that such electronic signatures will be accepted if the Board's traditional evidentiary standards are satisfied. These electronic signatures can include various forms of electronic identification, including email exchanges or internet/intranet sign-up methods. The electronic signatures must demonstrate (1) that an employee has electronically signed a document purporting to state the employee's views regarding union representation and (2) that the petitioner has accurately transmitted that document to the Region. As is the law now with respect to handwritten signatures, the documents submitted by the parties are presumed to be valid. See [Memorandum GC 15-08](#) for specific requirements regarding acceptance of electronic signatures and how to submit the signatures to the Agency.

Modification of Social Security Administration Reporting: On March 11, 2016, the Board issued its decision in *AdvoServ of New Jersey*, 363 NLRB No. 143 modifying the judge's recommended tax compensation and Social Security Administration reporting remedies under *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Board's modifications require an employer, within 21 days of the date the amount of backpay is fixed, to file a report allocating backpay to the appropriate calendar years with the Regional Director, rather than with the Social Security Administration.

Region 9 Roundup

by Daniel Goode , Michael Riggall & Jodi Suber

Board Decisions & Administrative Law Judge Decisions



The Region enjoyed another successful year in our litigation before the Board and Administrative Law Judges.

In *Cobalt Coal Ltd., Westchester Coal, L.P., and Cobalt Coal Corp. Mining Inc., a Single Employer*, 363 NLRB No. 64 (December 14, 2015), the Board granted the General Counsel's motion for default judgment based on the Respondent's failure to file an answer to the compliance specification. The Board ordered the Respondent to make the employees whole by paying them the amounts specified in the compliance specification, plus additional backpay that may accrue in the event mining operations resume at the facility, plus interest. Similarly, in *McClay Energy, Inc.*, 364 NLRB No. 83 (August 19, 2016), the Board granted the General Counsel's motion for default judgment based on the Respondent's failure to file an answer to the complaint. The Board found that the Respondent violated Section 8(a)(5) and (1) by failing to bargain collectively and in good faith with the Union regarding the effects of its decision to cease operations at its Hensley, West Virginia facility, and by failing to provide the Union with relevant requested information.

“violated the Act by calling the Police to escort the employee from the post office facility”

On February 17, 2016, the Board issued two decisions involving Voith Industrial Services, Inc. In 363 NLRB No. 116 (Voith I), a successorship case, the Board found, among other things, that the Respondent Employer engaged in the following unlawful conduct: (1) implementing a plan to avoid hiring former employees of the predecessor, and

discriminating against or refusing to hire those former employees to avoid a successorship obligation to recognize and bargain with the Teamsters Local 89; (2) refusing, as a successor, to recognize and bargain with the Teamsters; (3) setting initial terms and conditions of employment; and, (4) rendering assistance and support and recognizing and bargaining with the Respondent Union (UAW). The majority concluded in addition to those previously employed by the predecessor, reinstatement and backpay remedies should be awarded to any Teamsters Local 89-affiliated individuals who did not previously work for the predecessor but who filed individual applications with the Respondent Employer. In 363 NLRB No. 109 (Voith II), the Board agreed that the Respondent Employer violated the Act when it disciplined and discharged two, Teamsters-affiliated employees. The Board also found that Respondent Employer unlawfully implemented changes to its attendance policy and adopted a new requirement that employees load rail cars during non-daylight hours.

The Board reversed an Administrative Law Judges' dismissal of a complaint in *IMI South, LLC, d/b/a Irving Materials*, 364 NLRB No. 97 (August 26, 2016). A Board panel majority found that the Respondent violated Section 8(a)(1) and (5) by unilaterally transferring a portion of bargaining unit work from union-represented mechanics at the Respondent's facility in Louisville, Kentucky to unrepresented employees at its facility in New Albany, Indiana. The majority found that neither the language of the collective-bargaining agreement nor extrinsic evidence, established that the Union clearly and unmistakably waived its right to bargain over the relocation of work. The majority also reversed the judge and found that the Respondent violated Section 8(a)(1) and (3) by failing to reinstate mechanics who engaged in an economic strike. Member Miscimarra

dissented and found that the Respondent had no obligation to bargain over its decision and that the Union waived its right to bargain over the effects of the decision by failing to request bargaining. He also dissented from the finding that the Respondent unlawfully failed to reinstate striking mechanics.

On August 26, 2016, the Board issued *E.I DuPont de Nemours-Louisville Works*, 364 NLRB No. 113, following a remand from the United States Court of Appeals for the District of Columbia Circuit, affirming its prior findings that Respondent violated Section 8(a)(1) and (5) by unilaterally changing employees' benefit plans after expiration of a collective-bargaining agreement. In so concluding, the Board, following precedent, ruled that unilateral, post expiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause. Here, Respondent's right to exercise broad discretion in unilaterally changing the benefit plans existed solely because the Union agreed that the Respondent could make changes during the term of the parties' collective-bargaining agreement pursuant to the reservation of rights clause in the plan documents. The Board, overruling cases to the contrary, concluded that this provision did not survive the expiration of the collective-bargaining agreements and neither did the employer's contractual right to make unilateral changes permitted by it. In dissenting, Member Miscimarra believes that the Board's rulings contradict the Supreme Court's decision in *Katz* that bargaining is not required before taking actions that are not a change and actions constitute a change if they materially differ from what has occurred in the past. Miscimarra would find that the Employer's changes were lawful under *Katz* since they were consistent with its past practice.

The Region obtained several favorable decisions from ALJs since the last Newsletter. In *United States Postal Service*, JD-56-15 (September 23, 2015), the judge found that the Employer violated the Act by calling the Police to escort an employee from the post office facility in retaliation for the employee's protected activities. The judge did not find a violation with respect to the

employee's suspension, allegations that the employee was required to talk to supervision and not other employees when investigating potential violations of the collective bargaining agreement, threats of unspecified reprisals directed towards the employee, and increased supervision of the employee in order to engage in surveillance of the employee's union activities. In *Data Monitoring Systems, Inc.*, JD(NY)-3-16 (January 19, 2016), the judge found that the Employer violate section 8(a)(1) and (5) of the Act by failing to provide requested information to the Union. The judge also concluded that the Employer was not a perfectly clear successor and did not violate Section 8 (a)(1) and (5) of the Act by its refusal to use seniority in determining whom to employ. Julius Emetu was lead counsel in both matters an assisted by Erik Brinker in *Data Monitoring*. Erik Brinker also successfully litigated an information request case in

Jack Cooper Holdings, d/b/a Jack Cooper Transport Co., JD-07-16 (January 27, 2016).

“ordered that employees be made whole for all losses”

There, the judge ordered the Employer to provide the Union with information related to alleged diversion of work.

On April 6, 2016, in *Burns Machinery Moving & Installation, Inc. and Nationwide Services LLC*, JD-25-16, a judge agreed with the Region that two entities constituted an alter ego and were jointly and severally liable for the failure to adhere to the terms of a collective-bargaining agreement. The case was tried by Jonathan Duffey and also included an order that the employees be made whole for all losses of earnings and benefits and that the alter ego provide the Union with requested information.

An unlawful rule requiring employees, as condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, was found by the judge in *The Scherzinger Corporation*, JD-52-16 (June 17, 2016). The judge agreed with Counsel for the General Counsel Daniel Goode that, as part of the remedy, the Employer was to notify the United States District Court for the Southern

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Democracy at Work

Region 9 Roundup

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District of Ohio that it has rescinded or revised the rule upon which it based a defense and motion to dismiss a plaintiff in the collective action filed under the FLSA and state wage and hour laws. The Employer was directed to inform the court that it no longer opposes that action on the basis of the rule.

Zuzana Murarova obtained a successful decision in *Advance Pierre Foods, Inc.*, JD-58-16 (June 27, 2016). This organizing case was tried over several days and the judge found that the Employer, among other things, unlawfully interrogated employees, engaged in surveillance of employees' union activities and solicited grievances and impliedly promised employees increased benefits and improved terms and condition of employment in order to discourage employees from supporting a union. The judge further found that the Employer disciplined an employee and suspended an employee indefinitely for her failure to comply with an unlawfully motivated demand that she document her identity. Another successful decision involving the discipline of an employee issued in *Airgas USA, LLC*, JD-61-16 (July 7, 2016). The matter was litigated by Erik Brinker and the judge found that he met the initial burden of persuasion under *Wright Line* of showing that the Employer's motivation for the written warning was motivated by its disdain for the employee's repeated charge filings with the Board. The judge further concluded that the Employer failed to meet its burden that it would have disciplined the employee in the absence of his protected activity and ordered that the discipline be removed from its files and not be used against the employee in any way.

The summer closed out with success as judges issued their decisions in *Paragon Systems, Inc.*, JD-65-16 (July 8, 2016) and *Marathon Petroleum Co., d/b/a Catlettsburg Refining LLC*, JD-84-16 (September 1, 2016), litigated, respectively, by Daniel Goode and Jonathan Duffey. In *Paragon*, the judge found that the Employer unilaterally implemented new health insurance and 401(k) benefit plans and failed to provide the Union with

information about the plans. On August 19, 2016, the Board adopted the judge's findings and recommendations in the absence of exceptions. In *Marathon Petroleum*, the judge rejected the Employer's assertion that its summary satisfied its obligation to provide the Union with requested information. The judge ordered the Employer to provide the Union with the specific information it had requested.

Injunctions & Subpoena Enforcement

The Board authorized the Region to institute Section 10(j) injunctive relief proceedings in *AP Green Industries, Inc.*, Cases 09-CA-151564 and 09-CA-154799. That matter involved allegations that the AP Green Industries offered regressive bargaining proposals with the intent of frustrating the parties' bargaining, which converted its initially lawful lockout to an unlawful lockout. Following the investigation of these charges, the Region issued a Consolidated Complaint and Notice of Hearing on January 19, 2016. Thereafter, the Board authorized the Region to institute Section 10(j) proceedings in the United States District Court for the Southern District of Ohio. On February 22, 2016, the Region filed a petition seeking 10(j) relief in the District Court (Civil Action No. 2:16-mc-00026). Prior to the commencement of the 10(j) hearing, the parties reached agreement on and ratified a new collective-bargaining agreement, agreed on backpay amounts for locked out employees and ended the lockout. Thereafter, the Region approved the Union's withdrawal request conditioned on compliance with the parties' agreement.

The Region has also been involved in a lengthy investigative subpoena enforcement proceeding that has made its way to the United States Court of Appeal for the Sixth Circuit. On June 22, 2015, an unfair labor practice charge was filed in Case 09-CA-154644 alleging that Canon Solutions America, Inc. (Employer) discharged the Charging

Party for complaining about the Employer's use of performance metrics. Following the Charging Party's representation that he communicated with other co-workers to voice his concerns about the Employer's use of performance metrics, the Region requested that the Employer voluntarily disclose contact information for certain employees. The Employer refused to voluntarily provide the information and instead filed a Petition to Revoke the Subpoena. On October 28, 2015, the Board denied the Employer's Petition to Revoke concluding that, following the Region's narrowing of the timeframe for the responsive documents, the subpoena sought information relevant to the matters under investigation and described with sufficient particularity the evidence sought. On November 25, 2015, the Region filed for enforcement of the subpoena in the United States District Court for the Southern District of Ohio (Civil Action No. 3:15-mc-00012). A show cause hearing was held in front of Chief Magistrate Judge Sharon L. Ovington, and on February 23, 2016, Magistrate Judge Ovington issued a report and recommendation that the Board's subpoena enforcement application be granted and an order issue by the District Court requiring the Employer to produce the subpoenaed information.

The Employer filed an objection to Magistrate Judge Ovington's recommendation with the District Court. Following a significant exchange of briefs, on May 2, 2016, the District Court adopted Magistrate Judge Ovington's report and recommendation over the Employer's objection, and ordered the Employer to furnish the subpoenaed information. Instead of furnishing the information, the Employer filed a motion to stay the District Court's ruling and filed a motion for an expedited hearing. Specifically, the Employer requested that the District Court stay its May 2 order pending a ruling on its appeal of the Court's Order to the United States Court of Appeals for the Sixth Circuit, which it filed on May 31. Thus, the Employer filed an appeal of the Court's Order to the Sixth Circuit and also filed with the Sixth Circuit a motion to stay the Court's Order until such time as the Sixth Circuit has ruled on its appeal. On August 25, 2016, the Sixth Circuit denied the Employer's motion to stay the Court's

Order, effectively ordering the Employer to turn over the subpoenaed documents, even though its appeal of the Court's Order remains active.

Regional Director Decisions

Two Regional Director's decisions issued since the last Newsletter—one in mid-December 2015 and the other in January 2016. In the first decision, *Advance Pierre Foods, Inc.*, Case 09-RC-165455, issued on December 17, 2015, the Regional Director concluded that the Union's argument that an offsite election be conducted due to the Employer's unfair labor practices that were alleged in a complaint were not egregious or sufficiently impactful on the bargaining unit to compromise the employees' free choice if a manual election was conducted at the Employer's premises. Further, the Regional Director noted this was a first election, not a rerun election, and there has been no finding that the Employer has engaged in unlawful or objectionable conduct.

In the second decision, *Brown Foodservice, Inc.*, Case 09-RC-166927, issued on January 20, 2016, the Union petitioned to represent the Employer's "security" employees as part of an existing unit of associate employees, maintenance employees, warehouse employees, sanitation employees and truck drivers. The Regional Director found that the "security" employees performed substantial duties and responsibilities typical of a guard unit. Accordingly, the Regional Director dismissed the petition concluding that it would be inappropriate to include the "security" employees in the existing unit because they are guards as defined by Section 9(b)(3) of the Act.



USPS commemorative stamp American, 1975, recognized the lives of working people

As you know our staff is always busy; now more than ever with their new additions:

Attorney Jamie Ireland, her husband, and big sister, welcomed a bouncing baby brother.



Field Examiner Alaina Nikonow and her husband announced the arrival of their precious princess.

Field Examiner Mike Riggall, his wife, and big brother added another brother to Team Riggall.



Attorney Erik Brinker, his wife, two big brothers, and big sister became a family of six when their little brother joined them.

PROFESSIONAL EXCHANGE TO HEADQUARTERS

by Zuzana Murarova and Joseph Tansino



This spring, Region 9 Attorneys Joseph Tansino and Zuzana Murarova were selected for Professional Exchange to Agency Headquarters. The Exchange provided Joe and Zuzana with an opportunity to experience the workings of different branches of the NLRB. For four weeks this summer, Joe worked for the Division of Advice and Zuzana worked for the Division of Appeals. Joe and Zuzana also had the chance to attend briefings with the other branches and divisions in Headquarters, meeting with the heads of these offices and learning about their functions. Within the Division of Advice, attorneys are assigned work providing regional advice or assisting with injunction litigation. Attorneys providing advice to the Regions typically work on one assignment at a time, research oftentimes novel legal issues and prepare draft memoranda for agency publication. During Joe's time in the Division of Advice, he researched an assignment for the Regional Advice Branch concerning the appropriateness of seeking bargaining expenses as a remedy in a case where the charging party had alleged that an employer engaged in surface bargaining. The Division of Appeals reviews appeals of Regional Director Decisions including dismissals and approvals of settlement agreements. During Zuzana's time in the Division of Appeals, she handled numerous appeals of both dismissals and settlement agreements, helping with the Office's case log of about 2,000 cases per year. She also attended several meetings involving the Office of Appeals presenting their recommendations to reverse regional office decisions to the General Counsel.

The opportunity for Agents to learn about different offices offers a unique experience. It equips Agents with a broader understanding of how the agency functions as a whole and how their individual roles contribute to the agency's success in performing its statutory duties.

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La oficial de información discutirá su situación y le ayudará si desee
Someter una carga o petición. Información esta dispuesta a usted
mientras las horas de servicio - lunes a viernes, 8:30 a.m. to 5:00 p.m., o
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Comments or Questions?



In addition to the topics we may choose to feature, we would like to invite your comments and suggestions concerning specific items of interest, regional policies, practices, or procedures that you would like to see discussed, or whether you would prefer a Spanish version, an electronic format or to be deleted from our mailing list altogether. We can make it

happen and your comments would be greatly appreciated. Please contact Supervisory Field Examiner David Morgan at david.morgan@nlrb.gov or by phone at 513-684-3643.

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