NATIONAL LABOR RELATIONS BOARD
REGION 13
CHICAGO
NEWSLETTER

THE ChiRO UPDATE

VOLUME 4, ISSUE 1 SPRING 2010

INSIDE THIS ISSUE:

LERA PRESENTS: THE NLRB AT 75

WHEN: Thurs, April 29, 11:30am to 1:30pm

WHERE: John Marshall Law School, 315 S. Plymouth Ct., Chicago

FEATURED SPEAKER: John Higgins, NLRB Deputy General Counsel

See details on page 2.

NLRB Region 13 Issues Complaint Against ESPN Radio 1000

On January 25, 2010, Regional Director Joseph Barker issued a complaint against WMVP-AM/ESPN Radio 1000, alleging that the station violated Section 8(a)(5) of the National Labor Relations Act by installing cameras used for the video broadcasting of its on-air talent without negotiating with the Union which represents the employees. The Chicago Local of the American Federation of Television and Radio Artists represents all full-time and part-time announcers, newspersons, actors, singers, and other employees who broadcast for the station.

The complaint alleges that, in June 2009, ESPN Radio 1000 unilaterally installed cameras as part of its strategy to develop a simultaneous webcast of its radio programming. The Union filed a charge alleging that the move represented a change in the employees' terms and conditions of employment and had to be bargained.

(See "ESPN Radio 1000," continued on page 4)

President Obama Recess Appoints Two New Board Members

On March 27, 2010, President Barack Obama announced the recess appointments of attorneys Craig Becker and Mark Gaston Pearce to fill two vacancies on the National Labor Relations Board. The recess appointments last until the end of the U.S. Senate session in 2011. One Board member seat remains vacant. President Obama previously nominated Senate Republican aide Brian Hayes to fill this position, but did not recess appoint Hayes to the Board. The nominations for full Board member terms of Becker, Pearce, and Hayes remain at the U.S. Senate. The terms of Board Member Schaumber and General Counsel Ronald Meisburg will expire in August 2010.

NLRB Chairman Wilma Liebman, who has served on the Board for 12 years, welcomed the new members saying, "I look forward to beginning work with them, and especially to addressing cases that have been pending for a long time." Three of the Board's five seats have been vacant since January 2008. The two remaining members – Chairman Liebman and Member Peter Schaumber – have issued decisions in nearly 600 cases in

(See "Recess Appointments," continued on page 2)

Recess Appointments (cont.)

which they have been able to agree. Last week, the Supreme Court heard argument in a case challenging the Board's authority to have issued decisions with two members. (See related article on page 5.)

Becker has served as Associate General Counsel to both the Service Employees International Union and the AFL-CIO. He graduated summa cum laude from Yale College in 1978 and received his J.D. in 1981 from Yale Law School, where he was an Editor of the Yale Law Journal. After law school, he clerked for the Honorable Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit. For the past 27 years, he has practiced and taught labor law. He was a Professor of Law at the UCLA School of Law between 1989 and 1994 and has also taught at the University of Chicago and Georgetown Law Schools. He has published numerous articles on labor and employment law in scholarly journals, including the Harvard Law Review and Chicago Law Review, and has argued labor and employment cases in virtually every federal court of appeals and before the United States Supreme Court.

Pearce was a founding partner of the Buffalo, New York law firm of Creighton, Pearce, Johnsen & Giroux, where he practiced union side labor and employment law before state and federal courts and agencies. In 2008, he was appointed to the New York State Industrial Board of Appeals, an independent quasi-judicial agency responsible for review of certain rulings and compliance orders of the NY Department of Labor in matters including wage and hour law. Pearce has taught at Cornell University's School of Industrial Labor Relations Extension, and is a Fellow in the College of Labor and Employment Lawyers. Prior to 2002, Pearce practiced union side labor and employment law at Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP. From 1979 to 1994, he was an attorney and District Trial Specialist for the NLRB in Buffalo, NY. Pearce received his J.D. from State University of New York, and his B.A. from Cornell University.

The new Board members took office the week of April 7 and began a series of orientation programs about the Board, its organizational procedures and case inventory. Mr. Becker was sworn in to office on April 5 by General Counsel Ronald Meisburg. Mr. Pearce was sworn in on April 7 morning by Chairman Wilma Liebman. On April 16, the Board issued its first 3-member decision in a case in more than 2 years, with new Member Pearce joining Chairman Liebman and Member Schaumber in deciding a Section 10(k) work dispute. See *Local 71, Int'l Bhd. of Elec. Workers*, 355 N.L.R.B. No. 24 (April 16, 2010).

Mr. Pearce has named Kent Y. Hirozawa as his Chief Counsel. Mr. Hirozawa, a partner in the New York law firm of Gladstein, Reif, and Meginniss, has represented unions and workers for over twenty years and writes frequently on labor law issues. Prior to joining the firm, he served as a field attorney with Region 2 (New York, NY) and as a law clerk in the U.S. Court of Appeals for the Second Circuit. Mr. Becker has named Peter D. Winkler as his Chief Counsel. Mr. Winkler has worked at the NLRB since 1977 and served as Chief Counsel to former Members Dennis P. Walsh, Ronald Meisburg, and R. Alexander Acosta. He also was managing supervisor in the Appellate Court Branch, Division of Enforcement. Mr. Winkler's father was a career Board attorney who began his service in 1938.

Come Celebrate the NLRB's 75th Anniversary!

On April 29, 2010, from 11:30am to 1:30pm, the Chicago Chapter of the Labor and Employment Relations Association presents a program entitled "The NLRB at 75" in honor of the 75th anniversary of the passage of the Wagner Act in 1935.

The featured speaker at this event is John Higgins, currently the NLRB Deputy General Counsel and a former Board Member and Acting General Counsel. With decades of NLRB experience, Mr. Higgins is the resident NLRB historian. Mr. Higgins will discuss the founding and history of the Board, its objectives, and its continuing relevance in administering and adjudicating federal labor law.

Please register online at http://www.richblackwell.com/LERA/ by 5:00pm on April 27. The fee for the program is $20 for non-LERA members and $15 for LERA members. Lunch is included. The event will be held at the John Marshall Law School, 315 S. Plymouth Court, Room 1200A in Chicago.

CAT SCRATCH FEVER: The "Cat's Paw" Theory and the NLRA

By Joseph A. Barker, Regional Director
National Labor Relations Board, Region 13

Under the category of you learn something new every day, while serving as a panelist with distinguished employment law experts U.S. District Judge Rebecca Pallmeyer and Regional Attorney John Hendrickson of the Equal Employment Opportunity Commission, the term "cat's paw" became a central theme of their presentations in discussing recent discrimination cases. The panel, titled "Labor & Employment Law Update 2009: A Year in Review," was organized by the Young Lawyers Section of the Chicago Bar Association.

Admittedly, discrimination cases under the National Labor Relations Act, dealing mostly with union activity and protected concerted activity, are rather narrowly focused and constitute only a small segment of the types of discrimination that may be unlawful under federal and state statutes. However, there is oftentimes considerable cross-pollination between the various fields of employment cases in analyzing whether a protected class of employees has been discriminated against.

I professed ignorance of the "cat's paw" theory during the panel discussion, but vowed to do a Westlaw search of the term in Board cases upon my return to the office. Turns out there is good reason why I'm not familiar with the term. Despite the prevalence of the "cat's paw" theory in other employment discrimination contexts, only one reported case has applied the theory under the NLRA, and that occurred before I joined the Agency more than 30 years ago.

For those labor and employment practitioners whose focus is as narrow as mine at the NLRB, a definition of the "cat's paw" theory and a little history about its origination are in order. In a nutshell, in proving that discriminatory animus caused an adverse employment action, the "cat's paw" theory can be invoked where causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation of another person who is not a decisionmaker without independent investigation of the employee's asserted misconduct. In these circumstances, the recommender of the adverse employment action, although not the decisionmaker, is using the decisionmaker as a mere conduit, or "cat's paw," to give effect to the recommender's discriminatory motive. E.g., *Hyundai Motor Manufacturing Alabama LLC*, 187 LRRM 3452 (11th Circuit 2010).

Now for a little history. The Seventh Circuit in *Staub v. Proctor Hospital*, 560 F.3d 657 (2009), did as good of a job as anyone in explaining it:

> One would guess that the chances are pretty slim that the work of a 17th century French poet would find its way into a Chicago courtroom in 2009. But that's the situation in this case as we try to make sense out of what has been dubbed the "cat's paw" theory. The term derives from the fable "The Monkey and the Cat" penned by Jean de La Fontaine (1621-1695). In the tale, a clever-and rather unscrupulous-monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one. As understood today, a cat's paw is a "tool" or "one used by another to accomplish his purposes." Webster's Third New International Dictionary (1976).

(See "Cat's Paw," continued on page 4)

Cat's Paw (cont.)

In the only reported case arising under the NLRA discussing the "cat's paw" theory, *Zarda Bros. Diary, Inc.*, 234 NLRB 93 (1978), the Board reversed the administrative law judge's reliance on the "cat's paw" theory to find that the immediate supervisor, who made the decision to discharge a union activist and had no knowledge of the employee's union activities, was being used by the plant manager, who had knowledge of the employee's union activities, as a cat's paw to seize upon a fortuitous opportunity to discharge the union activist. While the Board expressed no concern with the ALJ's use of the "cat's paw" theory, it found the ALJ's rationale in applying the theory was unsupported by the record and internally inconsistent.

Although the Board in this one particular case relegated the "cat's paw" theory to the litter box, it's curious why it has not resurfaced. The answer may lie in how the Board analyzes discrimination cases under the NLRA. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. If the General Counsel satisfies the burden, the burden shifts to the employer to show that they would have taken the same employment action even absent the union activity.

However, even if union animus or knowledge of union activities can not be directly attributed to a decisionmaker, the Board can attribute unlawful motivation for an adverse employment action to an employer without resort to a "cat's paw" theory. For instance, the Board has found adverse employment actions unlawfully motivated where union animus cannot be traced directly to the decisionmaker, but can be attributed to either a subordinate supervisor or superintending manager who has no involvement in the adverse action. I suppose this could be referred to as the "stray cat" theory. A stray anti-union remark by a supervisor might be enough to attribute a discriminatory motive for an adverse employment action.

The Board also relies upon other theories, such as the "small plant doctrine" to infer that management of a small firm is likely to know about union activities taking place at its facility. Other factors, such as shifting defenses or pretextual reasons for an adverse action, can be enough to establish discriminatory motive if the three elements of a prima facie case are present.

Member Schaumber's suggestion for adding an independent fourth element to the *Wright Line* test, the necessity for there to be a causal nexus between the union animus and the adverse employment action, sounds similar to a cat's paw requirement. See, e.g., *Camelot Terrace Inc.*, 354 NLRB No. 24, slip op. at pg. 1, fn. 5 (2009).

But, there may be good reason why the Board does not regularly use the "cat's paw" theory. We deal frequently enough with inflatable rats in the context of labor disputes. Adding a cat's paw to the mix would certainty create volatility.

ESPN Radio 1000 (cont.)

The complaint also alleges that the station unlawfully bypassed the Union and bargained directly with on-air personalities regarding compensation and the assignment of new duties related to its renovated website.

The contract covering station employees expired in late 2007, and negotiations to reach a new agreement have not yet been successful.

Regional Director Barker said that although the station had occasionally videotaped radio broadcasts from remote locations in the past, "the installation of cameras in the studio was a whole new ball game in terms of the station's obligation to negotiate with the Union."

A hearing in the case (13-CA-45553) currently is set for April 28, 2010, before an NLRB administrative law judge at the Chicago offices of Region 13.

U.S. SUPREME COURT HEARS ORAL ARGUMENT IN *NEW PROCESS STEEL*

By Charles Muhl, Field Attorney

On March 23, 2010, the U.S. Supreme Court heard arguments in *New Process Steel, LLC v. NLRB*, Case No. 08-1457. As previously reported in *The ChiRO Update*, that case came out of the 7th Circuit Court of Appeals with the court ruling that the NLRA permits the Board to operate with only two members. 564 F.3d 840 (7th Cir. 2009). The Supreme Court agreed to take up the issue after four other Circuit Courts of Appeals agreed with the Seventh Circuit's view, but the D.C. Circuit concluded that the Board could not issue decisions with only two members.

At the oral argument, the Justices focused on the meaning of the statutory language contained in Section 3(b) of the NLRA. That Section states in relevant part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise….A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

29 U.S.C. § 153(b). The meaning of the phrase "except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof" [permitting the Board to delegate all its powers to three members] garnered the most debate. Sheldon Richie, counsel for New Process Steel, repeatedly argued that the language required three actual members to exist, without any "phantom" members. Department of Justice Deputy Solicitor General Neal Katyal, who represented the Agency, countered that the exception clause permitted the Board to function with two members, as long as three actual members existed when the authority was delegated. Katyal focused on the past tense of the word "designated" in the exception sentence to support the government's argument that a prior, proper delegation remained valid, even after the expiration of the term of one of the three members in the quorum.

The Justices also expressed concern over the practical impact of their decision on the Board's operation, with Justice Scalia questioning Richie about whether Regional Offices could operate at all if the Employer's argument was accepted. (Government shutdown, anyone?)

Near the end of the oral argument, Chief Justice Roberts bluntly asked Katyal "And the recess appointment power doesn't work why?" after Katyal described the status of the three nominations to the Board then pending in Congress. Katyal acknowledged that the vacancies could be filled with that power, but that President Obama had, at that point, not chosen to exercise the authority. Just four days later, the President recess appointed Craig Becker and Mark Pearce to fill two of the three vacancies on the Board until the end of 2011. On April 16, the Supreme Court requested supplemental briefing from the parties on whether the recess appointments had any effect in this case.

Levitz Revisited
(Do I risk riding this beast of burden of proof?)

By Arly W. Eggertsen, Regional Attorney

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001), the Board held that an employer may lawfully withdraw recognition from an incumbent union only if it can prove that the union is no longer supported by a majority of employees in the bargaining unit. While *Levitz* set a more stringent, bright line standard based on objective evidence for employers' lawful withdrawal of recognition from incumbent unions than the previous "good faith doubt" standard set forth in *Celanese Corp.*, 95 NLRB 664 (1951), subsequent cases show that issues remain regarding the types and quantum of proof necessary to establish the union's loss of majority status. An employer contemplating a withdrawal of recognition from an incumbent union needs to not only understand the legal principles set forth in *Levitz* applicable to this conduct, but also the potential consequences of its choice of actions. In light of developments in case law since the *Levitz* decision, the General Counsel issued *GC Memorandum 09-04*, which updated the guidelines contained in *GC Memorandum 02-01* for handling cases raising withdrawal of recognition issues.

Practitioners should take heed of three points in the updated guidelines. First, it is the burden of the employer to show by a preponderance of *objective evidence* that the Union has *numerically* lost its majority status in the bargaining unit at the time it withdrew recognition. The employer's evidence may be rebutted by showing that the union retained its numerical majority status or that the employer's evidence is unreliable. Second, if the Region has objective evidence that the union has lost its numerical majority status, a complaint will not issue on a withdrawal of recognition charge regardless of whether the employer had knowledge of this evidence. Third, a number of issues, mostly regarding what constitutes objective evidence to show a union's loss of majority status and the sufficiency of the objective evidence, are to be submitted to the Division of Advice for the development of a consistent approach on *Levitz* issues.

With regard to the first point, the *Levitz* case drastically changed the nature of the evidence the employer must show to defend its withdrawal of recognition. The updated memorandum points out that in every post *Levitz* case in which the employer' s withdrawal of recognition was found to be lawful, the employer established a numerical majority of unit employees no longer supported the union. When the employer has not shown by specific evidence that the union's support has fallen below a numerical majority, its withdrawal of recognition has been found unlawful. Thus, circumstantial evidence, such as lack of union membership or activities in support of the union, inactivity of the union, and employee grumblings showing dissatisfaction with the union that would have been sufficient to establish the employer's good faith doubt concerning the union's majority standing under *Celanese* will not suffice under the *Levitz* standard since it does not specifically show a loss of a numerical majority. See *Port Printing Ad & Specialties*, 344 NLRB 354 (2005),discussed in the updated memorandum.

The updated memorandum gives examples of the type of objective evidence that will satisfy the employer's burden of proof under *Levitz*. Foremost is a petition, untainted by unfair labor practices, signed by a majority of unit employees stating they no longer wish to be represented by the incumbent union. However, even with petitions signed by a majority of unit employees, issues can arise whether the language of the petition sufficiently indicates that the signers no longer support the union. A petition entitled "showing of interest for decertification" was found to be insufficient to establish actual loss of majority support while a petition "for a vote to remove the Union" was found to be sufficient in the absence of any countervailing evidence. Compare *Regional Medical Center*, 347 NLRB 1404, 1406 (2006) with *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817 (2007). (Caution may be in order regarding the latter case as similar language which raises an ambiguity as to the signer's intent regarding authorizing union representation would prevent the designation from being used to demonstrate

(See "Levitz Revisited," continued on page 7)

Levitz Revisited (cont.)

the union's majority status. *Nissan Research & Development,* 296 NLRB 598, 599 (1989).) If an employer's withdrawal of recognition is based on employee petitions with equivocal language regarding employees' support of the union, the case is to be submitted to the Division of Advice to develop a uniform approach.

Aside from employee petitions, the updated *Levitz* memorandum gives other examples of evidence that is sufficient to meet the employer's burden of demonstrating that the incumbent union has numerically lost majority support. Particularly noted in the updated memorandum is the Fourth Circuit's decision in *NLRB v. B.A. Mullican Lumber & Mfg. Co.,* 535 F. 3d 271 (4th Cir. 2008). In that case, the Court found that the employer met its burden under *Levitz* based on a hearsay letter from the decertification petitioner that 114 out of 220 unit employees no longer wanted the union. The updated memorandum cautions against reading this decision too broadly. First, the hearsay letter went into evidence without objection and could, therefore, under the rules of evidence be considered substantive evidence. Second, no evidence contrary to the letter was introduced into the record. Third, the letter set forth an uncontradicted numerical loss of majority support for the incumbent union. In the view of the General Counsel, the *Mullican Lumber* decision is consistent with the *Levitz* standards; however, any case in which a broader interpretation of *Mullican Lumber* is urged is to be submitted to the Division of Advice. Similarly, any case in which the numerical loss of majority is based on hearsay evidence is to be submitted to the Division of Advice.

With regard to the second point concerning not issuing complaints when the General Counsel has objective evidence the incumbent union has lost majority status, the updated memorandum discusses an Advice case in which the employer did not have objective evidence of the union's actual loss of majority support, but the General Counsel did have such evidence. The General Counsel possessed a report from a union steward that he had polled the unit employees and a majority did not want the union. The report was confirmed by the testimony of five employees. Based on this evidence, the General Counsel found the employer's withdrawal of recognition was lawful and the unfair labor practice charge was without merit. Pursuant to the instructions in the updated memorandum, when Regional offices have direct evidence of an incumbent union's numerical loss of majority support, they are to confirm that the showing of disaffection comes from at least 50% of the unit employees, that petitions are authentic and demonstrate the signers no longer support the union, that any allegations that the showing of disaffection is tainted by employer conduct are investigated, and that any counter evidence of majority support for the incumbent union is investigated. Cases in which the evidence of numerical majority is inconclusive are to be submitted to Advice. However, Regions do not have to submit to Advice cases in which evidence of loss of majority status would not even have met the pre-*Levitz* good faith doubt standard.

The bottom line for any practitioner or employer dealing with the question of whether to withdraw recognition from an incumbent union is that it is still a perilous choice even under the more stringent *Levitz* standard and the updated guidelines. The scope of the facts upon which an employer can lawfully withdraw recognition has narrowed. The employer must have definite reliable evidence that the union has numerically lost majority support. If the employer chooses to withdraw recognition, it does so at its own peril as the legality of its action is only determined after the fact, and it may be shown later that the union, in fact, had not lost majority support when recognition was withdrawn. The after the fact determination of the legality of the employer's withdrawal of recognition may take considerable time winding its way through an investigation, Advice determination, trial, and Board determination. While awaiting a determination of the legality of its withdrawal of recognition, the Employer continues to act at its own peril as it may be required to remedy any changes it makes in the employees' conditions of employment if it is ultimately found that its withdrawal of recognition was unlawful.

In *Levitz,* the Board offered employers an alternative to the foregoing perils – the filing of a RM petition for a Board election to determine whether the incumbent union remains the representative of the unit employees. To encourage the use of election petitions rather than unilateral withdrawals of recognition, the Board in *Levitz*

(See "Levitz Revisited," continued on page 8)

LEVITZ REVISITED (*CONT.*)

lowered the standard for employers to file a petition for a RM election, requiring only that the employer demonstrate a "good-faith reasonable uncertainty" as to the union's majority status. The Board further encouraged the filing of election petitions by declaring that the filing of a petition for an election would insulate an employer from any Section 8(a)(2) findings even in situations where the incumbent union had lost its majority status and the employer was continuing to recognize a minority union while the question of representation remained outstanding.

Given the perils inherent in an employer's unilateral withdrawal of recognition from an incumbent union, there is a logical question as to why an employer would be reluctant to instead take the election route offered in *Levitz*. One answer that has been offered is that the RM petition road can, in some instances, be a long and difficult one due to blocking charges and post-election objections and challenges, as noted by the dissent in *Levitz*. However, as pointed out above, the road to vindicating a unilateral withdrawal of recognition in a ULP proceeding can also be a long and difficult road to travel. Thus, the real difference in choosing to unilaterally withdraw recognition rather than following the election route is that the employer immediately relieves itself from its bargaining obligations. The downside is that if the employer's action is subsequently proven wrong, there may be heavy liabilities in restoring the status quo to any changes made in employment conditions after the withdrawal of recognition. The employer's choice comes down to balancing the strength of its evidence on the union's loss of majority status against the potential liabilities if the wrong choice is made and deciding whether there are any benefits that make it worth taking that calculated risk of unilaterally withdrawing recognition, rather than taking the much less risky Board election route. The only risk inherent in the Board election route is that the employees may retain the union as their representative.

In light of the enhanced status that employers have found in Board elections during the debate on the Employee Free Choice Act, perhaps it is time for employers, unions, and the Board to consider removing the employer's risks in withdrawing recognition and at the same time insure that employees are not unlawfully deprived of their bargaining representative by setting a bright line rule that withdrawals of recognition must be based on Board conducted elections. In *Levitz*, the General Counsel urged the Board to adopt such a rule. While the Board acknowledged the logic of the General Counsel's position, it declined to adopt a rule requiring withdrawals of recognition be based on Board elections "at this time." Perhaps now is a good time for employers, unions, and the Board to reconsider whether adopting such a rule will minimize litigation, more fully serve the policies of the Act, and benefit everyone involved in Board proceedings.

REGION 13 STATISTICS

Region 13 Case Intake	Fiscal Year 2010 (10/1/09 to 3/31/10)	Same Period in Fiscal Year 2009	Percentage Change
ULP Charges ("C Cases")	537	400	+34.3%
Representation Petitions ("R Cases")	71	66	+7.6%
Complaints Issued	47	28	+67.9%
Trials Pending	32	18	+77.8%

Coming Soon to Region 13: Social Media and Street Advertising

By Gail R. Moran, Assistant to the Regional Director

The NLRB recently established its own national Facebook page at http://www.facebook.com/pages/Washington-DC/National-Labor-Relations-Board/123035371176. The Agency invites you to check it out and become a friend and/or a fan. In the near future, Region 13 will be establishing its own, unique Facebook page with local news you can use as well. We envision posting various publicly available documents on interesting cases, press releases, and perhaps responding to information officer inquiries through this now widely-used form of social media. If your firm or labor organization already uses Facebook, please provide our coordinators (Charles Muhl and Gail Moran) with your Facebook identities so we can reach out to you when we are up and running.

As noted in a prior issue of *The ChiRO Update*, the NLRB already has a twitter page that can be accessed at http://twitter.com/NLRB.

And who are those people handing out fliers at the farmers markets and festivals? Are those Board agents from Region 13? Yes they are! What better way to reach the public than street advertising? While we don't intend to wear any of those awful costumes, don't be surprised if you see some us walking around well populated areas of the Chicago Loop wearing sandwich boards with the NLRB logo on it and handing out fliers about the NLRB to members of the public.

Why, you ask, would the Region want to be on Facebook or doing street advertising? It's one more avenue to advertise the Agency's mission and inform the public about their rights under the National Labor Relations Act. So, see you soon with these effective outside-the-box options for outreach!

Salting Backpay Periods in Compliance

By Elizabeth Cortez, Field Attorney

Region 13 currently is prosecuting a Compliance Specification against Respondent Jerry Ryce Builders, Inc. which involves determining the appropriate backpay period for "salts" who were unlawfully terminated by the Employer pursuant to the new Board standards announced in *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007).

Back in March 2007, Illinois District Council No. 1 of the International Union of Bricklayers and Allied Craftworkers filed charges with the Region against Jerry Ryce Builders alleging discrimination against union organizers planning an organizing campaign. In February and early March 2007, two Union organizers obtained employment at the company without revealing their Union affiliation as part of the Union's salting campaign. On March 9, 2007, another Union organizer and two Union members applied for work at one of the Employer's sites wearing Union hats and logos. They were told there was no work currently available at that site or any other, despite evidence that the Employer was seeking and hiring employees at different sites at the time. On March 22, 2007, the two "salts" who had been working for the Employer handed the Employer a letter requesting area standards pay and announcing their intent to initiate a Union organizing campaign among the Employer's employees. The Employer asked them to leave the site.

In the meantime, the Employer hired two other Union members who concealed their affiliation with the Union and repeatedly interrogated them about their Union affiliation. The Employer also told employees not to talk to Union organizers, that a Union organizer had recently been fired for his Union affiliation, and that if employees saw that Union organizer near a jobsite they were to report him to the Employer. The two Union members eventually revealed their Union affiliation and announced their intent to organize the Employer, but never began discussing unionization with other employees. That same day, they commenced a strike against the Employer, accompanied by a few Union organizers. They never returned to the Employer after that day. The Region issued a complaint alleging that the Employer violated Section 8(a)(3) by refusing to hire Union supporters and discharging Union organizers, and violated Section 8(a)(l) by various coercive statements to employees.

A hearing on the Region's complaint was held before an Administrative Law Judge on July 30 and 31, 2007. On November 19, 2007, the Judge agreed with the Region and held that Jerry Ryce Builders violated Section 8(a)(3) of the Act by refusing to hire, or consider for hire, employees it believed were affiliated with the Union and by discharging or constructively discharging the union organizers. On August 29, 2008, the Board affirmed the ALJ's rulings, findings, and conclusions and adopted the his recommend Order.

On November 5, 2009, the U.S. Court of Appeals for the Seventh Circuit entered its Consent Judgment enforcing in full the provisions of the Board's Order, which directed Respondent to take certain affirmative actions, including offering full reinstatement to the discharged union organizers; offering employment to the union supporters it

("Jerry Ryce Builders," continued on page 11)

Jerry Ryce Builders (cont.)

denied employment in the jobs for which they applied; and making all discriminatees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

On January 29, 2010, after disagreements arose over the Respondent's obligations to extend offers of reinstatement to the discriminatees and its continuing liability for backpay under the terms of the Board Order as enforced, the Regional Director issued a Compliance Specification and Notice of Hearing. In the instant case, the ALJ, in fashioning the remedy, concluded, "[a]s they are all union salts, the duration of the backpay period shall be determined in accordance with the evidentiary requirement set forth in *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007)." Under *Oil Capitol*, the Board announced a rule altering the presumption of continued employment in the construction industry for traditional discriminatees by requiring the General Counsel to produce affirmative evidence that a salt-discriminatee would have worked for a respondent during the claimed backpay period. *Oil Capitol* requires an investigation of a respondent's claims that events subsequent to the discriminatory action have relieved the respondent of its obligation to reinstate the discriminatee. "An evaluation of the respondent's practice of transferring employees from jobsite to jobsite is not itself sufficient to establish that the salt would have continued to work for the respondent. The General Counsel must present evidence that the discriminatee would have accepted the transfer." OM 08-29 (CH), February 15, 2008 at p. 5.

Oil Capitol specifies five factors to consider to prove the length of a salt's backpay period: (1) Personal Circumstance; (2) Union Policies and Practices; (3) Specific Union Plans for the Targeted Employer; (4) Salt Instructions/Agreements; and (5) Historical Data. In a recent matter involving a single salt, another Region evaluated the backpay period under *Oil Capitol* and concluded that a union business agent was entitled to receive an offer of instatement, but not to receive backpay. Based on the union's information and the employer's practice of transferring employees from job to job, it was determined that the salt sought open-ended employment and thus was entitled to instatement after a fifty-seven (57) month backpay period. However, because of deficiencies in the search for work, he was not entitled to any backpay.

In so concluding, the Region relied upon the following factors: (1) there were no personal circumstances which hindered the individual's ability to work; (2) the witnesses testified to an unwritten union policy to continue to salt until the employer was organized and a contract was negotiated; (3) after losing a Board election, the union planned to continue its efforts because the employer was a major competitor of union shops and, although there were no particular plans for the targeted employer, the union offered to post a bond to guarantee the salt's term of employment; (4) the union's general instructions to organizers were to "attempt to remain as long as possible."; and (5) historically, salts were rarely hired and, when hired, seldom worked more than three days before being terminated. In addition, the employer's payroll showed that core employees were transferred from job to job, two of whom had worked for several years.

In its Compliance Specification for *Jerry Ryce Builders*, the Region alleges, based upon evidence obtained during subsequent investigation, that the backpay period began in March 2007 and continued for each discriminatee unless or until 1) the discriminatee is offered instatement or reinstatement by the Employer; 2) the discriminatee removes himself from eligibility (e.g. retirement); or 3) Respondent demonstrates changed circumstances.

A hearing for the presentation of *Oil Capitol* evidence on the Compliance Specification was scheduled for May 27, 2010. However, Respondent failed to file an answer, with its previous counsel instead submitting a request to withdraw from the case. Respondent was given extra time by the Regional Director to answer the Compliance Specification, but failed to do so. Therefore, on March 24, 2009, the Regional Director filed a Motion for Default Judgment with the Board and requested the Board to issue a Decision and Order without further proceedings herein.

Thus, it appears that the Region's and a respondent's first presentation of evidence on the five *Oil Capitol* factors will have to wait for another case.

Chicago Labor History: African-Americans in the Chicago Labor Movement

On April 7, 2010, as part of the Region's African-American History Month celebration, Professor Jeff Helgeson visited Region 13 to give a presentation on the history of black workers and the labor movement in Chicago. Helgeson recently received his Ph.D. in U.S. history at the University of Illinois at Chicago. He is currently teaching in the Labor and Employment Relations program of the University of Illinois at Urbana-Champaign (out of the Chicago office). Helgeson's presentation covered the World War I and Great Migration era, the 1930's and New Deal era, the World War II and Postwar Economic Boom era, and concluded with the 1970's era. The following is a summary, edited by Field Examiner Jay Greenhill, of Helgeson's much-appreciated presentation to the Region.

Black Chicago's population grew from a series of migrations beginning in the late 19th century. From a total of just over 6,000 in 1880, the city's African-American population increased to 30,000 at the turn of the century, and to over 1 million by 1970. Initially, most migrants came from southern Illinois and the Upper South, where they had been working as trades people, service workers, and farmers. The first mass migration came during World War I, when the almost complete stop to European immigration combined with the increasing demand for industrial workers created opportunities for black workers in Chicago.

For most black migrants, the city failed to live up to their dreams. Instead, black Chicagoans found themselves living in increasingly segregated neighborhoods. Their communities lacked regularly employed and well-paid blue-collar workers. Black residents of cities like Chicago were relegated to service positions or low-skilled jobs in industry. They worked in white people's homes, restaurants, and hotels. They did the dirty, dangerous, unglamorous work that cities require.

Not only were black workers excluded from the best jobs in the early 20th century, they also were excluded from unions. As a result, black workers could not rely upon unions as allies. These workers, as much as they might have wanted more power in order to improve their lives, were not likely to align with the labor movement. In the first place, most came from the South where, if there was a labor movement at all, the movement was racially exclusionary. Moreover, when they arrived in northern cities like Chicago, black workers were met by hostile white workers who perceived them not only as economic competitors, but also as inherently hostile to the white-dominated labor movement. This is because when black workers found opportunities in industry, they generally found them as strikebreakers.

Eugene Debs and the American Railway Union, as radical as they might have been, were not going to accept black workers in their ranks. As a result, black workers helped break the 1894 Pullman strike when they crossed picket lines. In the 1894 Stockyards strike, black workers entered as strikebreakers and were attacked by white workers. White workers and union leaders used these episodes of black strike breaking as evidence that black workers were inevitably the opponents of labor progress. With racial divisions in the working class and a racially exclusionary union movement, black workers generally identified with the corporations, and felt justified in acting as strikebreakers. One can actually even argue that strikebreaking was a form of black collective action in the struggle against racial exclusion.

Between 1915 and 1918, approximately 500,000 African-Americans migrated from the South to northern cities and another 700,000 followed in their wake during the 1920s. Out of these communities would grow civil rights organizations like the National Association for the Advancement of Colored People, black nationalist organizations like Marcus Garvey's Universal Negro Improvement Association, and the first major black trade unions. Much of the black support for organized labor grew out of the struggle for an independent black trade union movement.

The most visible workers in the black metropolis before World War I were the black Pullman Porters. Working as

(See "African-Americans in Chicago Labor History," continued on page 13)

African-Americans in Chicago Labor History (cont.)

a porter for the Pullman Company allowed black men to travel across the country and earn much higher wages than their counterparts in the city. In August 1925, five Pullman Porters formed the Brotherhood of Sleeping Car Porters ("BSCP") in New York City, the first union led by African-Americans. They were inspired by what has been described as a growing movement of labor-based, black protest politics led by a "new crowd" of African-American activists unsatisfied with the existing interracial, middle-class civil rights and social work groups. With mass black support, a new legal foundation, and the potential competition from the emerging CIO in mind, the AFL granted a charter to the BSCP in 1935. The broader trend of labor and civil rights activism in the 1930s and New Deal labor laws created opportunities to break down resistance from the AFL and the Pullman Company. BSCP also took advantage of the 1934 Railway Labor Act to hold successful union elections among black porters. Two long years later, the Brotherhood finally signed its first contract with the Pullman Company, the first union contract for black workers with a major corporation.

Perhaps the most celebrated movement in Chicago has been the militant interracial unionism in the city's packinghouses in the 1930s and 1940s. Black workers on the killing floor, like the white organizers in the CIO, recognized that they were never going to improve their work and their lives if they continued to let race separate them. This realization, combined with the growing mass militancy in black Chicago and the support workers now had from the federal government in the form of the National Labor Relations Act, all combined to inspire those black workers to join the union movement. The CIO's interracial unions fostered a black working-class alignment with the labor movement and helped to form a union that became one of the most successful, persistently militant, and politically active unions in U.S. history.

Despite all the organizing and union gains in the 1930s, black Chicagoans at the end of the decade were still suffering from depression-level economic desperation. However, World War II would change that. It was a watershed moment for black Americans generally, and for black Chicagoans in particular. Between the spring of 1942 and the fall of 1944, approximately 1.5 million black laborers nationwide entered the war-production workforce. Between 1940 and 1945, sixty to seventy thousand black southerners migrated to Chicago to take advantage of the booming economy. Black employment in the Chicago area grew from 80,347 to 222,600 -- an increase from 4.9 to 11.7 percent of the total number of people working. Black men and women not only found jobs in unprecedented numbers, they also moved from the service to the industrial sector at a previously unseen rate.

Although white and black workers both lost jobs during reconversion, black workers faced disproportionate unemployment in the postwar period. For black workers, especially black women, the quality of jobs available decreased markedly. The war ended, not with the mass unemployment many had feared, but with the institutionalization of racial disparities and with uneven opportunities for black workers recreating an increasingly stratified black class structure. However, all Chicagoans, regardless of race or gender, benefited as a whole from the economic boom of the 1940s and 1950s. Unemployment declined and increasing numbers of black workers moved out of the service sector into manufacturing, trade, and clerical work.

The largest migration of black workers came from about 1942 to the mid-1970s. Between 1930 and 1970, about 500,000 black southerners came to the Chicago metropolitan region. This was an unprecedented movement of working-class people to Chicago. By the 1970s, with high wage, blue-collar jobs disappearing and federal support for labor unions beginning to wane, black Chicagoans suffered from a crisis of unemployment and underemployment. The collapse of unionized big industry and rise of the service sector left black workers without the foothold they would need in high wage, blue-collar work that might have allowed for more substantial progress toward racial equality. However, by 1980, white and black steelworkers were picketing together in support of firefighters struggling to get the antiunion Chicago Mayor Jane Byrne to recognize public unions.

There's much more to this story, but at the very least it goes to show how far we have come from the early days of strikebreaking and race riots during the late 19th and early 20th centuries.

What's New in Region 13

By Elizabeth Galliano, Field Examiner

PROMOTIONS

Over the past seven months, there have been several internal promotions among the staff. These hard-working, behind-the-scenes positions are vital to helping the office run smoothly. Rosemary Wright was promoted to Office Manager, Catherine Jones was promoted to Assistant Office Manager, Maria Gavina-Arriola was promoted to Regional Attorney Secretary, and Roberta Davis was promoted to Deputy Regional Attorney Secretary. Congratulations to all on their promotions!

NEW FACES

Once again, the Region has been fortunate enough to hire several talented interns and co-ops to assist with its workload this year. They include Ximena Molano, a co-op studying at the School of Labor and Employment Relations at the University of Illinois, who expects to graduate with her master's degree in May 2010; Christina Ortega, a legal intern studying at Northern Illinois University, who expects to receive her juris doctorate in 2010; Jungyoon "Jaz" Parks, a legal intern on a work study program through Chicago-Kent College of Law, who expects to receive her juris doctorate this year; and Nakisha Wright, an intern studying Human Resources at Triton College, who expects to receive her bachelor's degree in January 2012.

FURNITURE

Those of you who have been lucky enough to visit our office recently may have noticed the new chairs in the lobby. They are part of the new furniture the Region received, allowing us to dispose of those worn, red chairs you had come to know so well. In February 2010, Region 13 received its first shipment of furniture from the Department of Homeland Security, which was gracious enough to give us their slightly used cast offs before moving on to bigger and better furnishings. The Region is expecting its second furniture shipment in the summer of 2010. Keep your eyes peeled because rumor has it the Regional Director may give out a prestigious Golden Fly Award to the first visitor to notice our new furnishings!

PROTECTING WORKPLACE DEMOCRACY

REGION 13
CHICAGO

209 S. LaSalle Street
Suite 900
Chicago, IL 60604
Phone: 312-353-7570
Fax: 312-886-1341
Web: www.nlrb.gov

Regional Director:
Joseph A. Barker

Regional Attorney:
Arly W. Eggertsen

Assistant to the Regional Director: Gail R. Moran

Deputy Regional Attorneys:
Paul Hitterman,
Richard Kelliher-Paz

Supervisors: Walter Hoffman, Jessica Muth, Dan Nelson

Office Manager: Rosemary Wright

Assistant Office Manager:
Catherine Jones

Newsletter Editor:
Charles J. Muhl