Volume 1, Issue 2

January 2009

The Gateway-River City Times

NLRB Region 14 St. Louis, MO and Subregion 33 Peoria, IL Quarterly Outreach Newsletter

- SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT (NLRA) GIVES EMPLOYEES THE RIGHT TO:
- FORM, JOIN OR ASSIST A UNION
- CHOOSE REPRESENTATIVES TO BARGAIN WITH THEIR EMPLOYER ON THEIR BEHALF
- ACT TOGETHER WITH OTHER EMPLOYEES FOR THEIR BENEFIT AND PROTECTION
- CHOOSE NOT TO ENGAGE IN ANY OF THESE PROTECTED ACTIVITIES

Inside this issue:

St. Louis

Peoria

Withdrawal of Recognition issues get attention in the 4th Circuit

The lead case concerning whether an employer may lawfully withdraw recognition from an incumbent union is *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). *Levitz* held that an employer may lawfully withdraw recognition if it can prove by **objective** evidence that an incumbent union has actually lost majority support. Two examples of objective evidence are an employer producing an untainted petition signed by a majority of employees in a bargaining unit stating that they no longer wish to be represented by that union, or a poll taken by the union steward revealing a majority of employees no longer wish to be represented. An example of what would not be considered objective evidence is the lack of contract negotiations for a four-year period. What is our responsibility if we find objective evidence of loss of support on our own? The General Counsel will not issue complaint where the Region has evidence that a union had actually lost support at the time of the withdrawal, even if the employer did not have such evidence at the time it withdrew recognition. The General Counsel's policy is not to issue a complaint to impose a bargaining representative on employees against their stated will.

In a recent case decided in the 4th Circuit, *NLRB v. B.A. Mullican Lumber & Mfg. Co.*, 535 F.3d 271 (4th Cir. 2008), the Court dealt with whether hearsay evidence would be considered objective evidence. In *Mullican Lumber*, an employee submitted a letter informing the employer that a majority of the unit employees signed slips indicating their desire to decertify the union. Neither the union nor the General Counsel presented contrary evidence nor objected to the authenticity or accuracy of the letter. Noting that the letter was hearsay, the Court ruled it was objective evidence sufficient to satisfy the *Levitz* standard. Subsequent to the 4th Circuit's *Mullican* decision, General Counsel Memorandum 09-04 was issued to provide guidance to Board personnel and practitioners in processing charges alleging an unlawful withdrawal of recognition.

Deferral Policy Changes will Expedite Casehandling

Deferring unfair labor practice charges to grievance and arbitration procedures negotiated by employers and unions is an important step in fostering labor-management relations and managing the NLRB's workload. In 2002, the General Counsel initiated a program to reduce the number of cases pending deferral for extended periods of time. As such, Regions have seen a dramatic decrease in overall inventory. With service to our public in mind, Regions have begun surveying all deferral cases pending for more than 12 months and will send letters to the parties asking them to report on the status. It is important that our parties timely respond to any letter they receive from Agency personnel, because non-responsiveness may result in a dismissal of the case. Depending on the response to these letters, the Regions will determine the appropriateness of continued deferral. Where continued deferral is inappropriate, Regions will revoke deferral and resume case processing or dismiss cases. We hope these measures encourage parties to timely complete the grievance process, and thus expedite the processing of unfair labor practice cases.

Undocumented Workers Retain Status as Employees Under the Act

In 1984, the Supreme Court ruled in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) that undocumented workers are employees under the National Labor Relations Act. While undocumented workers are employees under the Act, the Supreme Court ruled in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) that they are not entitled to back pay awards if they are unlawfully discharged.

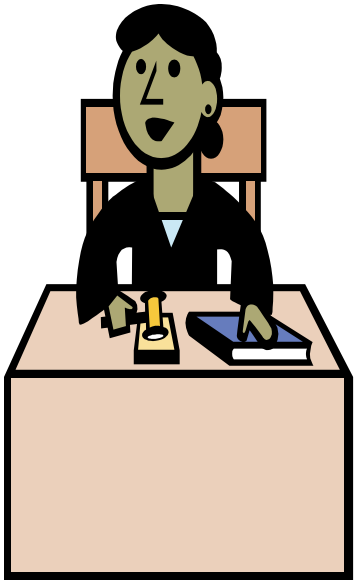
The employment status of undocumented workers was recently challenged by employer Agri Processor Co. The case arose from Agri's refusal to bargain for a first contract covering employees at a Brooklyn, New York warehouse, based on its claim that most of the voters in the union election were undocumented. The case was taken to the D.C. Circuit Court, where in a 2-1 panel decision, the Circuit Court rejected the Employer's argument asking the Court to overrule or modify *Sure-Tan, Inc.* Click here to read the D.C. Circuit's decision. Agri appealed to the Supreme Court. On November 17, 2008, the Supreme Court denied the Employer's petition for *certiorari*, thus letting stand the D.C. Circuit's decision.

Are you ready for the Digital TV Transition?

Several federal agencies, including the NLRB, have partnered with the Federal Communications Commission (FCC) to get the word out about the upcoming transition from analog to digital television broadcasts. If you are one of the many who still use "rabbit ears" to get your television signal, you will be left in the dark if you do not take action to convert to a digital TV format by February 17, 2009. Please go to the FCC's website, www.dtv.gov to learn how you can be ready for the DTV transition.

Tips for Best Practices from Administrative Law Judges (ALJs)

Have you even wondered what an ALJ is thinking as s/he sits on the bench to hear your case? Would you like to know ways to bolster the credibility of your witnesses? If the answer to these questions is "yes", then this is your lucky day! On September 19, 2008, Chief Administrative Law Judge Robert Giannasi and Associate Chief Administrative Law Judges William Cates, Joel Biblowitz, and Mary Cracraft addressed questions from NLRB Field and Headquarters attorneys on issues related to subpoenas, credibility, briefs, oral arguments, settlements, and trial conduct. This panel discussion was videotaped so that it could be made available to Board agents in the Regional Offices and to practitioners. Operations Memorandum 09-09 lists some useful reminders from the session. The videotaped session may be accessed through the Agency's website, www.nlrb.gov under "What's New", or by clicking here.



WE WANT TO HEAR FROM YOU!

We would like to know if this Newsletter is helpful and informative. We would also like to know if there are certain topics, issues, Board decisions, or Regional practices that you would like to see addressed or discussed in future editions. If so, please contact Region 14 Outreach Coordinators Lynette Zuch or Cindy Flynn at (314) 539-7770 or Subregion 33 Outreach Coordinator Melissa Olivero at (309) 671-7080 and let us know. Your feedback will be greatly appreciated and carefully considered. You may also contact the Outreach Coordinators if you would like to be added or deleted from our mailing list or if you would like to have a speaker speak to your group.

Region 14 Wrap-up

This section will highlight topics related to Region 14.

Board Rejects Respondent's Supervisor Argument, issues Bargaining Order

In *ADB Utility Contractors, Inc.*, 353 NLRB No. 21 (September 30, 2008), the Board adopted the administrative law judge's findings that the Respondent committed multiple violations under Section 8(a)(1) and (3) following the Union's efforts to organize employees in early 2003. The Board also adopted the judge's finding that a *Gissel* bargaining order was necessary in light of the Employer's egregious and pervasive unlawful activity. In its decision, the Board rejected the Respondent's argument that some of the discharged employees, the crew leaders, were statutory supervisors. The supervisory issue had been remanded to an administrative law judge to consider the criteria set forth in *Oakwood Healthcare, Inc.*, 348 NLRB 646 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). The Board affirmed the judge's conclusion that the crew leaders were not supervisors. The judge noted that the Respondent's evidence of supervisory status was conclusionary and lacking in specificity. The crew leaders did not posses the supervisory authority to assign and direct work based on several factors, including that they did not discipline or evaluate the performance of the crew; overtime and lunch hour decisions were made jointly by the entire crew; crew leaders could not approve time off; and crew leaders were not held accountable for the performance mistakes of the rest of the crew.

Unit Clarification Petitions Dismissed in Kenneth Hall

In April 2008, amid reports of financial difficulties of the Kenneth Hall Regional Hospital in East St. Louis, IL, the Illinois Health Facilities Planning Board voted 3-1 to allow the owners of Kenneth Hall Regional Hospital in East St. Louis to move services to Touchette Regional Hospital in Centreville, IL. The Service Employees International Union, Local 2000 represents employees at Kenneth Hall, and the employees at Touchette are currently unrepresented. The Union filed two unit clarification petitions involving a professional and non-professional unit seeking to include employees at both Kenneth Hall and Touchette. The Region issued a decision in Cases 14-UC-204 and 14-UC-205 on December 10, 2008, concluding that the merger between Kenneth Hall and Touchett had not progressed enough to determine what the appropriate unit should be and both unit clarification petitions were dismissed.

Union Representation of Vatterott Instructors Remains Unknown

In Case 14-RC-12738, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local Union No. 562, filed a petition to represent instructors at Vatterott Educational Centers, Inc. The Employer contended Local 562 could not represent this group of employees because the Union, which has an apprenticeship program, is its business rival causing a conflict of interest for the Union to represent the Employer's instructors.

The Region issued a Decision on October 31, 2008, concluding there was not a sufficient conflict of interest to warrant dismissing the petition. The Employer filed exceptions to the decision, which are pending. An election was held on November 25, 2008 and the ballots were impounded.

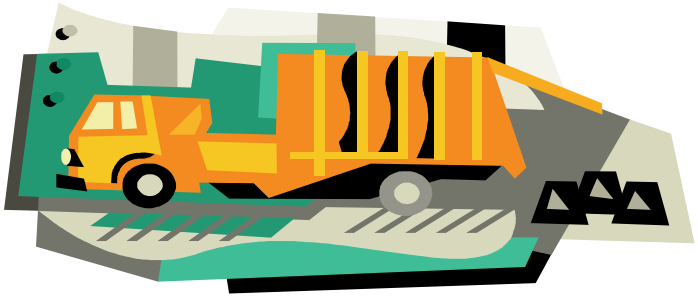
National Labor Relations Board,
Region 14
1222 Spruce Street
Room 8.302
St. Louis, MO 63103
Phone:
(314) 539-7770
Fax:
(314) 539-7794

Hours:
Monday through Friday
8:00 a.m. to
4:30 p.m.

Additional Grounds to Challenge Ballots Can be Raised at Hearing

The setting is Anchor-Harvey Components. One hundred and six ballots were cast in an election, all of which were challenged. Some challenges were made by the Employer, some by the Union, and the rest were made by the Board Agent. This case is complex, so we will focus on one part—what happened at the post-election hearing. During the hearing, the Employer and the Union raised additional grounds on which to challenge voters. The Employer's additional ground to challenge former strikers was that the voters had been permanently replaced and the Union's additional ground to challenge voters was that they were not in the bargaining unit. The Hearing Officer found the Employer's additional ground to challenge was made timely and the found the Union's ground was made untimely. The Union filed exceptions. In *Anchor-Harvey Components, LLC,* 352 NLRB 1219 (2008), the Board majority of Chairman Schaumber and Member Liebman affirmed the Hearing Officer's finding regarding the Employer's additional challenge and reversed the Hearing Officer's finding regarding the Union's additional ground. Citing *Coca-Cola Bottling of Miami,* 237 NLRB 936 (1978), the Board noted that a party may raise and litigate an alternative ground for a properly challenged ballot during a hearing, even if that alternative ground had not been raised prior to the hearing. Ultimately, the Board ordered the Director to count certain ballots, but did not rule on the merits of remaining challenges. A count of the ballots revealed that the Union did not prevail. Remaining challenges were not determinative, so a Certification of Results issued on September 19, 2008.

Employee Unlawfully Discharged After Testifying in a Representation Hearing



In *Rochelle Waste Disposal,* 353 NLRB No. 38 (October 20, 2008), the two-member Board, consisting of Chairman Schaumber and Member Liebman, affirmed the administrative law judge's finding that the Respondent violated Sections 8(a)(1), (3), and (4) of the Act by discharging an employee. This case occurred in the context of an organizing campaign at Respondent's landfill facility. The administrative law judge found that the employee at issue had testified "prominently and adversely to respondent's position" at a representation case hearing five months prior to his discharge; his employment was terminated eight days before the representation election. Citing *Success Village Apartments,* 348 NLRB 579, 599-600 (2006), the judge noted that when a Respondent's motives for its actions are found to be false, the circumstances warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The judge further noted that testimony indicating the Respondent discharged the employee for business reasons was "suspect" and "incredible" and found that the Respondent's true reason for discharging the employee was his protected, concerted activity.

How did it Play in Peoria?

In a "play" on words of the city's motto dating back to Vaudevillian days, this section will highlight topics related to Subregion 33.

National Labor Relations Board,
Subregion 33
300 Hamilton Blvd., Suite 200
Peoria, IL 61602
Phone: (309) 671-7080
Fax: (309) 671-7095
Hours:
Monday through Friday
8:30 a.m. to 5:00 p.m.

NLRB

Region 14 St. Louis, MO and

Subregion 33 Peoria, IL

Quarterly Outreach Newsletter

www.NLRB.gov

The **National Labor Relations Board** is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, the primary law governing relations between unions and employers in the private sector. The statute guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activity with or without a union, or to refrain from all such activity.

The Basics

The National Labor Relations Board (NLRB), charged with enforcing the NLRA, has two principal functions: 1) to determine through secret ballot elections whether employees wish to be represented by a union in dealing with their employers, called representation cases, and 2) to prevent and remedy unlawful acts by either employers or unions, called unfair labor practice cases. The Agency does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections that are filed with the NLRB in one of its 51 Regional, Subregional, or Resident Offices. Region 14 covers the geographical area of Eastern Missouri and Southern Illinois. Subregion 33 covers the Northern Half of Illinois (except for the Chicago area) and some of Iowa. If you have questions about a workplace problem, please call an NLRB Information Officer in the Office that covers the area where your employer is located. Information Officers are available by phone or by walking into Regional Offices during business hours. Our website is extensive and user-friendly, and it can give you additional information about filing charges and petitions with the NLRB and other workplace questions.