



Spring 2010

Volume 2, Issue 1

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Director's Notes

Since the issuance of our initial newsletter both the Board and the Region have undergone changes in their managerial make-up.

Board Managerial Changes

The Board, after issuing over 500 decisions with only two members now has a complement of four members following President Obama's two recent recess appointments. The two recess appointments are Democrats Craig Becker and Mark Pearce who will serve with Democratic chairman Wilma Liebman and Republican member Peter Schuamber. This leaves a Republican vacancy on the five-member board. The two recess appointments, unless confirmed by the Senate, will expire at the end of 2011. Chairman Liebman's term expires in August 2011 while member Schuamber's term expires in August 2010. General Counsel Ronald Meisburg's term also expires in August 2010.

The Board's authority to issue decisions with only two sitting members is under court challenge and is being reviewed by the United States Supreme Court. The substance of the challenge to the Board's authority to issue decisions with two members is discussed on page 2.

Regional Managerial Changes

In July 2009 the Region said good-bye to Regional Attorney Dorothy (Dottie) Wilson. Dottie transferred to the Division of Operations Management in Washington, D.C. where she is serving as a Deputy Assistant General Counsel. The Region had a going away fish fry for Dottie where she received a handsome computer carrying bag as a going away gift.

The direct supervision of the legal work in the Region is now in the very capable hands of Deputy Regional Attorney Rosalind Eddins. Rosalind is a 1989 graduate of the University of Memphis' Cecil B Humphreys School of Law. Rosalind has over 19 years of litigation experience with the Board and has held the position of Deputy Regional Attorney since 2006. She recently served as an instructor at the agency's one week Trial Advocacy Institute for new attorneys in San Diego. Please feel free to contact Rosalind with regard to any questions or concerns you have regarding litigation matters.

In January 2010 the Region said good-bye to Deputy Regional Director Thomas (Tom) H. Smith who retired after 35 years of service with the Board. The region celebrated Tom's retirement with a wonderful luncheon at the Majestic Grille in downtown Memphis where Tom, who is an avid golfer and University of Mississippi (Ole Miss) sports fan, was presented with a state of the art golf laser range finder as a retirement gift. We wish Tom and his wife Patsy many wonderful years of retirement.

Fortunately, the Region had a number of excellent applicants applying to fill Tom's position. Ultimately former Supervisory Examiner William R. (Bill) Yarbrough was chosen and now serves as the Region's new Deputy Regional Director. Bill has been with the Board for over 30 years and began his career as a Field Examiner in 1979. In 1992 Bill was promoted to Compliance Officer where his expertise in this area became known throughout the agency. Bill served as compliance officer until he was promoted to supervisory field examiner in 2000. Bill has oversight responsibility for the processing of all representation cases and the assignment

Our Service Standards

- We will treat you courteously.
- We will attempt to answer your questions about the case, consistent with the confidentiality rights of other persons and the Privacy Act.
- If necessary we will provide bilingual services if we are given sufficient notice of that need.
- We will provide the same treatment to all persons regardless of race, sex, religion, national origin, age, political affiliation, sexual orientation or disability.
- Our facilities are accessible to persons with disabilities. Please let us know if you will need an accommodation.
- If you wish, you may be represented by an attorney or other representative of your own choice.

NLRB Releases Videos on Website

In its continuing effort to enhance the public's ability to transact business with the Agency, the NLRB now features the following videos on our site at www.nlr.gov:

"Introduction to the NLRB Public Website, which provides viewers with a guided tour of the Agency's website; **How to Use CiteNet**, which explains how to use the Agency's electronic legal research database of Board and court decisions dating from 1002; and the **"Representation Case"** video, which is designed to inform the public about the role of the Agency in conducting elections.

MID-SOUTH NOTES

Director's Notes

monitoring of unfair labor practice investigations. Please feel free to call Bill on any questions you may have in these areas.

Challenge To Board's Authority to Issue Decisions with Two Members

On December 20, 2007 the then current four Board members, Liebman, Schaumber, Peter Kirsanow and Dennis Walsh, in anticipation of pending term expirations of two members, delegated all the powers of the Board to a three member panel of Liebman, Schaumber and Kirsanow. Subsequent to the expiration of member Kirsanow's term the Board continued to issue decisions on the premise that members Liebman and Schaumber constituted a statutory quorum of the previously designated three member panel. The two-member Board issued approximately 586 decisions. Most parties have complied with those decisions. However about 80 of those decisions have been challenged in federal appeals courts.

On March 23, 2010 the United States Supreme Court heard oral argument in *New Process Steel, L.P. v. NLRB*, U.S. No 08 – 1457, to resolve the question of whether Section 3(b) of the National Labor Relations Act's (NLRA) delegation, quorum, and vacancy clauses permit the two-member Board quorum of chairman Liebman and member Schaumber to issue decisions. The circuit courts have split, 5-1, in favor of the Board's authority, with the only adverse decision coming from the District of Columbia Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). The Board's basic position is that the "plain meaning" of Section 3(b), as held by the 7th circuit in *New Process Steel*, permits the Board to operate with only two sitting members if the Board, at a time when it had at least three members, previously delegated the Board's full authority to a three-member group that includes the two remaining members. Additionally, the Board argues that the legislative history of the NLRA supports its position and that in any event the Board's position should be accorded deference if the Court views the language in Section 3(b) susceptible to more than one construction. In contrast, the Petitioner in *New Process Steel*, relying heavily on the *Laurel Baye* decision, argued that the "plain meaning" of Section 3(b) requires the Board to have three sitting members at all times in order to act. The Court's decision is expected to issue by the end of its current term in June.

Ronald K. Hooks, Regional Director

Agency Celebrates 75th Anniversary



On July 5, 2010 the Agency will celebrate 75 years of bringing democracy and fairness to the American workplace. Prior to 1935, American workers had the right to become trade union members and to withhold their labor during industrial disputes, but employers also had the right to fire workers because they enrolled in unions or had taken part in strikes. When Congress enacted the National Labor Relations Act on July 5, 1935, it was hailed as the Magna Carta of American labor. Although the workplace has changed significantly since the Act's passage, one thing that has remained stable is the Agency's commitment to uphold its responsibility of assuring that employees are able to work in an atmosphere free of coercion and intimidation, so that their choice regarding unionization is always a free one.

Region 26 Trivia Quiz

1. Name the current and former regional directors for Region 26.
2. Who was the first regional director for Region 26?
3. In what year was Memphis established as a subregional office?
4. Tennessee was originally under the jurisdiction of which two Regions?

The first person to email Outreach Coordinator Rosalind Eddins with the correct answers wins a commemorative 75th anniversary keychain and pin. The winner and the answers will be posted in the next newsletter.



FROM THE R-CASE DESK

In our last edition, we discussed the Board’s 2007 decision in *Dana Corp.*, 351 NLRB No. 28, (September 2007) in which the recognition-bar doctrine was modified. Since *Dana* issued, Region 26 has processed 23 Voluntary Recognition petitions. In all of those cases except two, the employers’ grants of voluntary recognition went unchallenged by any party. In the first exception, a second union filed a representation petition during the 45 day posting period required by *Dana*. However, prior to reaching an election agreement, the petitioning union withdrew its petition leaving the voluntarily recognized union as the employees’ representative. In the second case, during the 45 day posting period a decertification petition was filed which resulted in an election. In that election, the voluntarily recognized union prevailed by a 7 to 6 margin and received Board certification as the bargaining representative.

While there is a possibility of change in representation case processing in the event some version of the Employee Free Choice Act becomes law, at the present time there is little in the way of new case developments to report. So rather than discuss long-settled case law, following are some frequently asked questions that demonstrate representation case procedures and Region 26 statistics.

When a union files a representation petition, must it provide some proof that employees actually want to proceed to an election?

Yes. The Board requires that a petitioner, filing either a representation petition or a decertification petition, provide a dated list (known as the showing of interest) of employee signatures from at least 30% of the eligible voters in the proposed bargaining unit indicating that they want to be represented by a union (RC petition) or that they do not want to be represented by a union (RD petition). The showing of interest, which may be on individual cards or sheets containing multiple signatures, should normally be filed along with the petition. If a petition is filed either without a showing of interest or if the showing of interest is inadequate because it contains signatures from less than 30% of employees in the proposed unit or because signatures are not dated, the petitioner has 48 hours to submit a proper showing of interest. The petition is subject to dismissal if all showing of interest deficiencies are not resolved by that time. The employee signatures are considered strictly confidential by the Board. Neither the identity nor number of signatures is revealed to any other parties.

How many representation case petitions does Region 26 process annually?

Region 26’s geographical area covers all but one county in Arkansas, the northern half of Mississippi, the western two-thirds of Tennessee, 40 counties in southeast Kentucky and four counties in the boot-heel of Missouri. This rather large geographical area is the responsibility of the Memphis Regional Office and the Nashville and Little Rock Resident Offices. The number of RC, RD and RM petitions filed in Region 26 in each of the last three and one-half fiscal years is as follows. Of course, not every petition filed results in an election as some are withdrawn or administratively closed by dismissal.

<u>Fiscal Year</u>	<u>RC</u>	<u>RD</u>	<u>RM</u>
10/1/2009 to 3/31/2010 (six months of current year)	12	3	2
10/1/2008 to 9/30/2009	21	10	1
10/1/2007 to 9/30/2008	38	14	4
10/1/2006 to 9/30/2007	26	8	0

From the R Case Desk

In Region 26 representation cases in which elections were conducted during the last three fiscal years, who won?

Once a Board-conducted election is final, one of two certifications will issue to the parties. If the union received a majority of the valid votes counted, a *Certification of Representative* will issue. If the union did not receive a majority of the valid votes counted, a *Certification of Results* will issue. Results of elections conducted during the last three and one-half fiscal years is reflected by the certifications that issued as set forth below. These numbers do not include elections in which no final result has been obtained because of pending objections to the election or where the election has not yet occurred.

<u>Fiscal Year</u>	<u>Cert. of Representative</u>	<u>Cert. of Results</u>
10/1/2009 to 3/31/2010 (six months)		
RC Cases	2	5
RD Cases	0	1
10/1/2008 – 9/30/2009		
RC Cases	7	6
RD Cases	3	4
10/1/2007 – 9/30/2008		
RC Cases	9	8
RD Cases	4	3
10/1/2006 – 9/30/2007		
RC Cases	5	7
RD Cases	3	3
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Totals	33	37

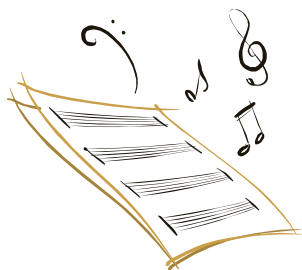
If a union loses an election, how long must it or any other union wait to try again?

Section 9(c)(3) prohibits the holding of an election in any bargaining unit or subdivision in which a valid election was held during the preceding 12-month period.

What is an employer's responsibility if a union receives a majority of the valid votes cast in an election?

At that point, an employer must abstain from making unilateral changes to bargaining unit employees' terms and conditions of employment. The Board has held that, absent exceptional circumstances, an employer "acts at its peril" by making changes in wages, hours or other terms and conditions of employment during the period that objections to an election are pending where the final determination about certification of the labor organization has not yet been made. If the union is ultimately certified, an employer would be liable for any unilateral changes it made after the date of the election.

More information concerning representation case procedures can be found at www.nlr.gov. The web site also includes a video using narrators and actors demonstrating the petition filing and election process, [http://www.nlr.gov/Workplace Rights/Conducting an Election.aspx](http://www.nlr.gov/Workplace%20Rights/Conducting%20an%20Election.aspx)



Bill Yarbrough, Deputy Regional Director



Compliance Corner

Immediate Work Search Essential

On September 11, 2007, the Board issued its decision in *Grosvenor Orlando Associates, LTD., d/b/a The Grosvenor Resort, and its general partners Grosvenor Properties, Ltd., Donald E. Werby and Robert K. Werbe*, 350 NLRB No. 86. In this decision, the Board found “that reasonably diligent discriminatees should at least have begun searching for interim work at some time within the initial 2-week period. . .” Thus, a discriminatee will lose backpay if there is more than a 2 week period after his/her termination, layoff or a refusal hire in which s/he does not engage in a search for work. However, even if the discriminatee fails to search for work during this 2 week period, the backpay period does not stop. If a discriminatee unreasonably delays an initial search, the Board will toll backpay until such time as a reasonably diligent search begins. As a result of this decision, it is important to remember that if backpay and/or other reimbursement is due as part of the remedy for the unfair labor practice, for instance, an unlawful discharge or refusal to hire, the Board requires discriminatees to mitigate (offset) the backpay by beginning to look for another job in the same or similar line of work promptly. If a discriminatee is unable to establish that s/he actively sought to mitigate damages, s/he may face the risk of having whatever money is owed reduced. Accordingly, discriminatees are urged to keep careful records of when and where they sought employment.

\$12 Million Resolution of Fluor Daniel, Inc. Litigation

Following years of litigation by the Board and in the U.S. Court of Appeals, Fluor Daniel and several unions reached agreement, with approval of the Board, on back pay due employees in cases arising in Region 26 (Memphis), Region 15 (New Orleans) and Region 28 (Phoenix). The agreement provided a total of \$12,000,000 for about 170 individuals, who Fluor Daniel had unlawfully refused to hire at jobsites in Kentucky, Louisiana, and Arizona because of their union membership. The unions involved in the Region 26 case were: Boilermakers Local 40 (Elizabethtown, KY); Ironworkers Local 103 (Evansville, IN); Pipefitters Local 633 (Owensboro, KY); and the Laborers Union.

The Region 26 case began in 1990 when non-union Fluor Daniel, Inc. entered into a three year contract to perform service and maintenance work at power generating facilities in northern Kentucky. Boilermaker, Ironworker, Laborer and Pipefitter Local Unions initiated a campaign to organize the company by encouraging their members to apply for employment with Fluor Daniel. Fluor refused to hire the union applicants, and the Boilermakers Union filed an unfair labor practice charge alleging Fluor’s refusal as unlawful discrimination because of the applicant’s membership and activities on behalf of the Boilermakers and the other unions.

Following an investigation, the Region concluded there was merit to the Union’s charge and issued a *Complaint* alleging that 54 applicants from the four unions were not hired because of their union membership and that one employee was unlawfully discharged for refusing to cross a picket line. The initial hearing in the case was conducted over 12 days in May and June 1991 before an Administrative Law Judge in Owensboro, Kentucky. The Judge issued his decision in November of that year finding that Fluor Daniel had violated the Act as alleged by the Unions. The Board adopted the ALJ’s decision in 1993 and ordered Fluor to offer employment to the applicants, reinstate the discharged employee and provide backpay to the individuals for loss of earnings resulting from the 1991 failure to hire/discharge. pay

Unfortunately, the Board’s 1993 decision turned out to be only the beginning of litigation that included Fluor’s appeal of the decision to the Sixth Circuit Court of Appeals, remands by the court and the Board for additional litigation regarding the qualifications of the applicants to fill positions for which they applied, and additional hearings to resolve other compliance issues. Portions of the case were still pending at the Circuit Court, and an additional hearing to resolve the amount of backpay due had been scheduled for late 2009, when a global agreement to resolve all pending litigation in the Region 26, Region 15, and Region 28 Fluor Daniel cases was reached by the parties. Based on that agreement, in late 2009 a total of \$2,000,000 was distributed to the discriminatees in the Region 26 case.

The Region 15 and Region 28 cases arose in 1994 when Fluor Daniel refused to hire about 120 union applicants at maintenance projects at an Exxon facility in Louisiana and the Palo Verde nuclear plant in Arizona. These cases also resulted in extensive litigation including enforcement of the Board’s Order by the Sixth Circuit Court of Appeals and a compliance hearing that began in 2007 to determine the amount of backpay due the discriminatees. The compliance hearing was still in progress when the global agreement was obtained in 2009 resulting in distribution of \$10,000,000 to the discriminatees in those cases.

How to File an ULP Charge

Anyone may file an unfair labor practice charge with the NLRB. Here are some helpful tips:

- Completed charge forms identify the parties, give a brief basis for the charge and are signed by the charging party.
- Forms are available for download from the NLRB website or can be obtained from any NLRB office. The Information Officer can help in drafting charges.
- Section 10(b) of the Act requires that the charge be filed and served on the charged party within 6 months of the alleged unfair labor practice.

Remedies

The Act does not impose fines or other direct penalties. It requires remedial action to correct the violation and its effects.

NLRB remedies require those who have violated the Act to cease the violation, to inform employees that they will respect their rights, to reinstate employees who have been unlawfully fired and to pay compensation for lost earnings.



Litigation Notes

The extent to which employees enjoy the protection of the National Labor Relations Act can sometimes be difficult to discern. Inherent in Section 7 of the Act is an employee's right to maintain the confidentiality of his support for a union. Thus, Section 8(a)(1) of the Act makes it unlawful for an employer to interrogate an employee concerning the employee's union activities and/or support. However, under Rule 26 of the Federal Rules of Civil Procedure, a party has the right to inquire into matters relevant to pending claims or defenses. It was the balancing of these countervailing rights that was at issue in *Chinese Daily News*, 353 NLRB No. 66 (Dec. 2008). The complaint in that case alleged, inter alia, that during depositions taken in connection with a federal class-action lawsuit, the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union support and activities. Applying the test set forth in *Guess?, Inc.*, 339 NLRB 432 (2003), the judge found no violation and dismissed the allegation. Conversely, the Board, utilizing the same test, reversed the judge and found that the Respondent violated the Act when during the deposition it asked an employee if the employee voted for the union. These conflicting findings illustrate the difficulty of discerning when an employer's discovery requests implicate Section 7 concerns, and thus violate the Act. They are also good reminders to employers and their attorneys that employee protection under the National Labor Relations Act extends beyond questioning in the workplace and can encompass situations that do not directly involve issues relating to a union.

Employees Wei, Wang and Sun were longstanding and open union supporters working at the Chinese Daily News, a publication based in Monterey Park, California, when Wang brought a class-action wage and hour lawsuit in U.S. District Court against the newspaper employer. Wei and Sun submitted declarations in support of the motion for class certification. The Employer took the position that the class action was a pretext for the plaintiffs' real motive of advancing the Union's organizing interests, and argued that the plaintiffs could not adequately represent the interests of the proposed class. The Federal district court rejected this argument and certified the class in November 2004. The court denied the Employer's motion for reconsideration of its decision, concluding that the Employer failed to establish that the class-action suit was filed to pressure the Employer to organize, and moreover, that there was no conflict between the plaintiffs' protected activity under the National Labor Relations Act, and their ability to adequately represent the class members in the lawsuit. The Employer continued to challenge the appropriateness of the class certification as litigation of the case proceeded. During discovery the Employer deposed the employees asking them a range of questions impinging on Section 7 interests. Specifically, Wei was asked whether he voted in a Board election and whether he voted for the Union. Wei, Wang and Sun alleged that the Employer's deposition questions violated Section 8(a)(1) of the Act.

The Board found that the respondent's question to Wei—" [D]id you vote for the union to win the election?" - violated Wei's Section 7 rights. Under the test set forth in *Guess?*, the Board considers whether the questioning is relevant to the lawsuit, and, if so, whether it has an illegal objective. If the questioning is relevant and there is no illegal objective, the Board considers whether the respondent's need for the information outweighs employees' Section 7 rights. In this case, the Board assumed the question at issue was relevant to litigation and did not have an illegal objective. As to the final *Guess?* prong, however, the Board, contrary to the judge, found that the employee's substantial Section 7 interest in maintaining the confidentiality of his election vote outweighed the respondent's need for the information to develop its defense to the lawsuit. The Board therefore concluded that the deposition question regarding how Wei voted in the election constituted an unlawful interrogation.



How to File a Representation Petition with the NLRB

Filing NLRB representation petitions can be simple and convenient but please keep in mind these helpful tips:

- Know which Regional office will handle your petition. Region 26 covers all of Arkansas, except Miller County, northern Mississippi, west and central Tennessee, western Kentucky, and southeast Missouri.
- Know the job titles used by the Employer and the employee shift schedules.
- Provide the Region with authorization or membership cards (or other proof of interest) signed and dated by at least 30 percent of the employees in the petitioned-for unit.
- Be prepared for a hearing by knowing the following: (1) the employer's operations; (2) the community of interests of various employee job categories; and (3) the supervisors.
- Hearings are held 10-14 days from the date of filing. Only file a petition if you are ready to proceed to hearing.
- Be prepared for an election within 42 days from the date of filing.
- Always call the assigned Board agent with questions or concerns.

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Speakers Available

Members of the Region's staff are committed to educating the public on the National Labor Relations Act. To that end, we encourage members of the public to contact our Regional Outreach Coordinator Rosalind Eddins at (901) 544-0026 or RO Joe Artiles (615) 736-2584 or RO Stacia Campbell (501) 324-6313 to arrange a presentation before employer or union groups, and other community and civic organizations. Speakers will be happy to discuss a broad range of subjects including a description of the Act's protections, how the Region investigates and resolves unfair labor practice charges, and processes representation petitions, or any NLRB topic of interest. We invite you to take advantage of the wealth of knowledge available in the Region concerning these topics. Below are photos from a mock election conducted by our Nashville Resident Office during a community outreach event.



The Information Officer (IO)

Each Region, Subregion or Resident office has an Information Officer (IO) who is available, during office hours, to answer questions from the public. The IO can answer general questions about the NLRA/NLRB as well as specific questions you may have regarding a possible unfair labor practice or representation issue. If you have questions about a workplace problem, please call or come into the office to speak to the IO in person. Tell us your story and we will tell you whether your situation falls under the NLRB's jurisdiction. If it doesn't we will do our best to refer you to the appropriate agency for assistance. If it does, the IO can assist you in the filing of an unfair labor practice charge or a representational petition. If you decide to file please be sure to have the contact information for the Employer and the Union.

The Agency Enters the 21st Century Electronic Age

The Agency rose to new challenges as it approached the 21st Century. Consistent with the mandate to federal agencies to establish procedures for Internet-based access to government services, the NLRB has developed an extensive and user-friendly website www.nlr.gov that can give you further information about filing charges and petitions. Although the site was first launched in 2006, in 2008-2009, new features were added to allow users to transact business with the Agency online. These include issuance and posting of Board and administrative law judge decisions, and the ability for parties to electronically file case-related documents with the Agency. In February 2009, the NLRB instituted changes to its electronic filing program that are meant to simplify and encourage electronic filing by the public. This program allows users to register, receive Board and ALJ decisions electronically, maintain their own contact information, and save searches. This project was selected as a finalist in the prestigious 2009 Excellence Government Awards Program. The award recognizes best practices in the Federal Government's management and use of information technology and those programs that have achieved exceptional results in supporting the government's mission and serving citizens.

The Agency also has begun the process of converting from paper case management to electronic case management. The Agency's pioneering "NxGen" project will support electronic processing of the case from filing of a charge or petition to resolution and closure of the case. At present, the Office of Appeals processes its cases electronically in NxGen, and eventually the entire Agency will process cases electronically. The website has a list of documents that may be filed electronically with Regional Offices, the General Counsel's Office of Appeals, the Administrative Law Judges, and the Executive Secretary of the Board. The e-filing policy and conditions, as well as instructions can be found on the Board's website. Meanwhile, we encourage you to browse the website and review the following links which are excellent resource tools:

- **Casehandling Manuals:** an excellent place to begin any research project as they contain the Board's policies and procedures for unfair labor practice, representation, and compliance cases.
- **Rules and Regulations:** provide the procedural guidelines for the Board's processes, including various deadlines and how different documents may be submitted and served on other parties, including which documents may be filed or served by fax.
- **Decisions by the Board, ALJs, and Regional Directors:** the most recent legal precedents and how they are being applied. Several options for conducting legal research.
- **General Counsel Memos:** the GC's position on novel issues and legal issues of particular interest dating back to 1973. Find insight into what the GC looks for in a quality investigation, for example, see GC 08-06 which includes checklists for investigation of different types of ULP allegations.
- **Operations Management Memos:** updates to the Agency's policies in memos dating back to 1985. See, for example, OM 08-54, a discussion of *Grosvenor Orlando Associates, LTD*, 350 NLRB 1197 (2007) which describes a discriminatee's obligation to search for work after a discharge.
- **Advice Memos:** information on the General Counsel's position on issues for which there is no clear legal precedent.

For all of you social media minded individuals, you can also follow the NLRB on twitter and facebook.. Just click on the link: <http://twitter.com/nlr> or <http://www.facebook.com/pages/Washington-DC/National-Labor-Relations-Board/123035371176>

