NATIONAL LABOR RELATIONS BOARD

Region 18 HOT DISH

VOLUME V, ISSUE 2 DECEMBER 2011

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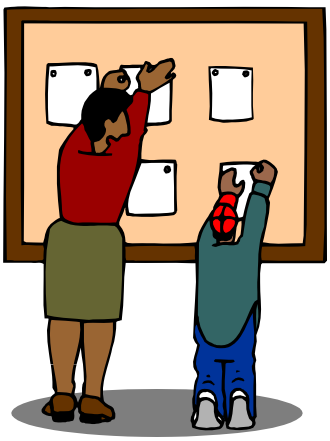
HOT DISH EDITOR:

PAMELA SCOTT, DEPUTY REGIONAL ATTORNEY

Employee Rights Poster

The National Labor Relations Board has postponed the implementation date for its new notice-posting rule by more than two months in order to allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses. The new effective date of the rule is Jan. 31, 2012. The decision to extend the rollout period followed queries from businesses and trade organizations indicating uncertainty about which businesses fall under the Board's jurisdiction, and was made in the interest of ensuring broad voluntary compliance. No other changes in the rule, or in the form or content of the notice, will be made.

Most private sector employers will be required to post the 11-by-17-inch notice, which is available at no cost from the NLRB through its website, either by downloading and printing or ordering a print by mail.



Posting is required as of January 31, 2012.

For further information about jurisdiction and posting requirements, please see our Frequently Asked Questions, which will be updated frequently as new questions arise. For questions that do not appear on the list, or to arrange for an NLRB presentation on the rule, please contact the agency at: questions@nlrb.gov or 866-667-NLRB.

The posting requirement applies to all private-sector employers within the Board's jurisdiction. This includes most private-sector employers, including labor unions, but excludes agricultural, railroad and airline employers, as well as very small employers that conduct an insufficient volume of business to have more than a slight effect on interstate commerce.

The easiest way to obtain the Notice is to download it from www.nlrb.gov/poster and print it on a single 11-by-17 paper or two 8-by-11 papers taped together. Free copies of the Notice are available on request from any NLRB regional office. Finally, employers can satisfy the rule by purchasing and posting a set of workplace posters from a commercial supplier.

BANNERING, INFLATABLE RATS AND STREET THEATER

By James L. Fox,
Deputy Regional Director

…"the union contended that a primary employer was breaking down "area standards" by paying wages or benefits that undercut those negotiated by the union."

Introduction

The rules in the labor context concerning the legality of picketing and handbilling have been fairly well settled for a number of years. The Board and the courts regard picketing as "speech plus" because of its tendency to induce work stoppages irrespective of the message conveyed by the picketers. Picketing is also regarded as "coercive" in the context of secondary boycott law. See e.g., *NLRB v. Retail Store Employees Union L.1001 (Safeco),* 447 U.S. 607 (1980). On the other hand, the United States Supreme Court has concluded that handbilling is more like traditional forms of speech that enjoy First Amendment protection. See e.g., *Edward J. DeBartolo Corp., v. Florida Gulf Coast Bldg and Constr. Trades Council*, 485 U.S. 568 (1988). The Court also concluded that handbilling is "merely persuasive" and not coercive in the context of secondary boycott law.

What, then, of other, more novel kinds of publicity? In recent years, some unions have used large banners to convey messages to the public about labor disputes. Others have used large, inflatable rats and street theater to convey such messages. Initially, the General Counsel of the National Labor Relations Board and the Board itself regarded these forms of publicity as more akin to picketing than to handbilling. The federal courts, on the other hand, gave unions much wider berth because of their concern that the Board's approach raised serious First Amendment issues. See *Carpenters L. 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (2010).

In a series of recent cases, the Board has decided to follow the lead of the federal courts. A brief summary of those decisions follows.

Bannering Cases

Stated generally, Congress enacted § 8(b)(4)(i)(ii)(B) of the NLRA, the so-called secondary boycott section, in order to shield an unoffending employer from becoming embroiled in a labor dispute that a union has with another employer. See, e.g., *NLRB. v. Denver Bldg & Constr. Trades Council*, 341 U.S. 675, 692 (1951). In a series of three cases in 2010 and 2011, all involving Carpenters local unions, the Board addressed the question whether "bannering" was "coercive" under § 8(b)(4)(ii)(B). *Carpenters L. 1827 (UPS)*, 357 NLRB No. 44 (2011); *Carpenters L. 1506 (Marriott Warner Center Woodland Hills),* 355 NLRB No. 219 (2010); and *Carpenters L. 1506 (Eliason & Knuth of Arizona, Inc.),* 355 NLRB No. 159 (2010).

In each case, the union contended that a primary employer was breaking down "area standards" by paying wages or benefits that undercut those negotiated by the union. In each case, the union displayed a large, stationary banner that publicized the labor dispute that the union had with the "primary" construction industry employer and its connection to the "secondary" (or "neutral") employer. The point was to "shame" or otherwise cast aspersions on the secondary employer who was utilizing the services of the primary employer. Handbills accompanying the bannering explained in more detail the nature of the labor dispute and the objectives of the union's protest activities: to persuade consumers not to patronize the secondary employer and/or to persuade the secondary employer to cease its business relationship with the primary. In each of the three cases, the Board concluded that the bannering and accompanying handbilling were not coercive and, thus, not unlawful under the secondary boycott section of the NLRA.

Several common themes run through the Board's decisions in these cases. First, the Board noted that neither the literal language of § 8(b)(4) nor the legislative history clearly indicates that Congress sought to prohibit bannering publicity. Second, the Board noted its obligation under Supreme Court precedent to avoid, where possible, construing the NLRA in a way that raised serious First Amendment issues. And third, the Board reasoned that the display of a stationary banner, without more, is more like handbilling and other non-picketing publicity, which are merely persuasive, than it is like picketing, which is confrontational and coercive.

Although the Board concluded that bannering, without more, is not coercive under the secondary boycott laws, it clearly signaled that there are limits to this conclusion. Thus, if the bannering is accompanied by patrolling, blocking of ingress or egress to the secondary's premises, violence or

Continued on page 5….

Sonotone Elections and Professional Employees

By Jennifer Hadsall, Resident Officer

Recently the Region has had situations arise where unions and employers have not understood either the rights of professional employees to have a self-determination election, and/or the difference between professional and non-professional employees. A self-determination election, more commonly referred to as a *Sonotone* election, is required when a union seeks to represent a mixed unit of professional and non-professional employees.

In such a mixed unit, the Act requires that professional employees be asked two questions when they vote. They are first asked whether they wish to be in a combined unit with non-professionals. Second, they are asked if they wish to be represented by the union involved. If a majority do not vote to be combined with non-professional employees, then the ballots of professional employees regarding whether they wish union representation are counted separately from the ballots of non-professional employees.

What you may not realize is that in a decertification election, if professional employees in a mixed unit have never voted on whether they wished to be in a unit with non-professional employees, then a *Sonotone* election must be held instead of a standard election. To give an example, if a mixed professional/non-professional unit exists by voluntary recognition or because the employer and union combined them by agreement, but the professionals were not given the opportunity to vote for inclusion with non-professionals, a *Sonotone* election will be held at the time of the decertification election. Thus, in any decertification election involving professional and non-professional employees, you should be prepared to discuss the question whether professional employees have ever had the opportunity to vote in a *Sonotone* election with the Board agent assigned to your case.

A second issue is whether an employee is a professional employee. If you are unsure whether classifications in a petitioned for unit are professional or non-professional, I encourage you to look up the definition, which can be found at Section 2(12) of the Act. You can also find good explanations regarding when a classification would be classified as professional in the NLRB manual entitled, "Outline of Law and Procedure in Representation Cases," at Sections 18-110 and 18-120. In addition, for healthcare professionals, Appendix D of the NLRB's "Hearing Officer's Guide" provides a list of several classifications that have been found to be professional along with the case cites for those findings. The Act and the NLRB manuals listed here can be found on our website at www.nlrb.gov.

Please take the time to look closely at the classifications in the petitioned-for units and let us know if you believe some of them are professional employees. However, make sure you consider what employees' actual duties and responsibilities are, and not just their qualifications or degrees. For example, a registered nurse who performs the duties of a nursing assistant while employed by a nursing home, is not a professional employee.

Most importantly, you, the other party, and the Board agent assigned the case should fully explore this issue prior to stipulating to a *Sonotone* election.

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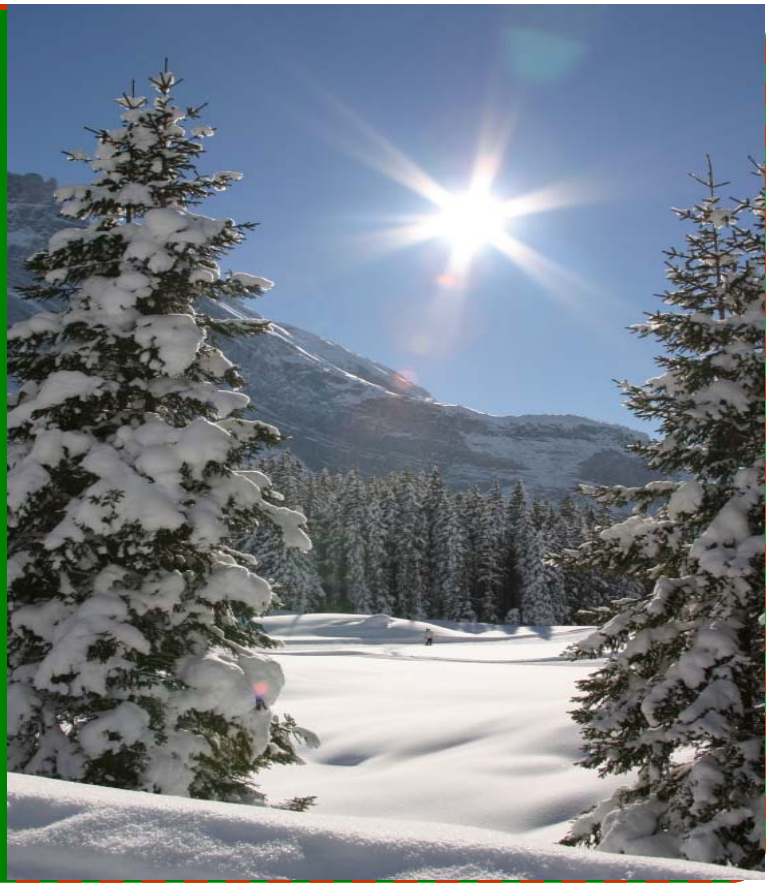


Four+ states: where are charges filed?

Region 18's geographical area — one of the nation's largest — covers the states of Minnesota, North Dakota, South Dakota, most of Iowa and part of Wisconsin (actual geographical area can be found at www.nlrb.gov). The Region has a Regional Office in Minneapolis, MN and a Resident Office in Des Moines, IA.

Taking a look at the charges filed in Fiscal year 2011 (October 2010 – October 2011) or Calendar year 2011 to date shows the following for percentage of cases (charges and petitions) being filed for each state based on dispute location listed:

Minnesota = 66%
Iowa = 23%
North Dakota = 3%
South Dakota = 3%
Wisconsin = 5%

Happy Holidays!

threats of it, or if the bannering otherwise interferes with the secondary's operations, the Board will likely hold that such conduct is sufficiently confrontational in nature to be coercive.

It is important to note that none of the three cases decided by the Board involved the question whether the bannering was unlawful under § 8(b)(4)(i)(B) because it constituted an "inducement" to engage in a work stoppage. However, the Board intimated (and flatly stated in dicta in the inflatable rat case discussed below), that it would not find bannering directed at the general public, as opposed to the employees of a secondary employer, to constitute unlawful inducement under § 8(b)(4)(i)(B).

Region 18 has had a fairly large number of bannering cases. Pursuant to outstanding instructions, we submitted our bannering cases to the Division of Advice. Most of those cases were remanded with instructions to hold the case in abeyance until the Board decided the cases pending before it. However, two Region 18 cases were remanded with instructions to issue complaint, absent settlement, because they raised issues that could be resolved under extant law. The Advice cases are consistent with the rationale of the Board cases described above and illustrate the limits that might be imposed on bannering. In one case, Advice concluded that a union's bannering was the functional equivalent of picketing because it involved patrolling directly in front of the entrance to the employer's facility. Consequently, Advice concluded that the bannering was coercive and violated § 8(b)(4)(ii)(B). In another case, Advice concluded that a union's bannering at a construction site during prime construction hours was clearly intended to (and apparently did) induce work stoppages by secondary employees. Consequently, Advice concluded that the bannering constituted inducement to engage in a work stoppage and violated § 8(b)(4)(i)(B) and, derivatively, § 8(b)(4)(ii)(B). (These Advice memos have not yet been released to the public.)

Inflatable Rats

According to the Oxford English Dictionary, a "rat" is "a workman who refuses to strike along with others, or takes a striker's place; also, one who works for lower wages than the ordinary (or trade union) rate." The O.E.D. traces this usage to the late 1800s. A company that employs a "rat" is, in the lexicon of labor relations, a "rat employer."

At least since 2003, the General Counsel of the Board has taken the position that under the secondary boycott laws a union's stationary display of an inflated rat at the situs of a labor dispute constituted a "signal" equivalent to picketing that both induces a work stoppage and is coercive. The Board recently rejected that position. *Sheet Metal Workers L.15 (Brandon Medical Center),* 356 NLRB No. 162 (2011). Consistent with its analysis in the bannering cases described above, the Board concluded that the display of an inflatable rat, without more, did not constitute picketing and was not otherwise coercive because it was not confrontational in nature. The Board also concluded that the display did not induce a work stoppage because it was directed to the general public and not to employees of secondary employers. As with the bannering cases, it is apparent from the Board's inflatable rat decision that different facts may lead to a different conclusion.

Street Theater

Unions have also turned to "street theater" to publicize labor disputes to the public. For example, in a Region 13 (Chicago) case a union used "Keystone Kops" chasing a putative offender dressed in prison garb in and around an office building to protest the building manager's use of a non-union security firm. The Regional Director concluded that this conduct was coercive and violated § 8(b)(4)(ii)(B) because it involved trespass. In a Region 12 (Tampa) case that reached the Board, a Sheet Metal local union used a mock funeral procession, complete with a union representative dressed in an oversized "Grim Reaper" costume and a prop coffin, as well as handbilling and an inflatable rat, to protest a hospital's use of a non-union sheet metal contractor to perform work at the hospital. The Board concluded that the mock funeral procession was the functional equivalent of picketing and violated § 8(b)(4)(ii)(B). The Board declined to decide whether the union's contemporaneous display of an inflatable rat violated the same section on the ground that any such finding would be cumulative. The union appealed the Board's decision to the United States Court of Appeals for the District of Columbia. Applying Supreme Court law developed in the context of non-labor protests, the Court of Appeals concluded that the mock funeral procession could not in any realistic sense be deemed coercive and, hence, the union did not violate § 8(b)(4)(ii)(B) by conducting it. *Sheet Metal Workers International Union, L. 15, AFL-CIO*, 491 F.3d 429 (D.C. Cir. 2007). The Court of Appeals remanded the case to the Board so that it could decide the inflatable rat issue. The Board's decision on remand has already been described above.

Conclusion

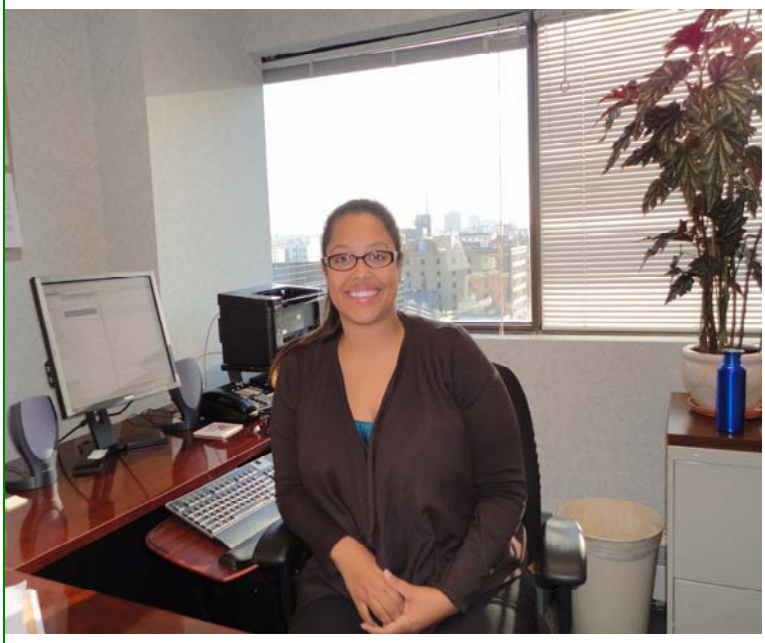
As a result of the recent bannering, inflatable rat and street theater decisions, the Board has assumed responsibility for demarking an elusive line between what is "merely persuasive" and what is "coercive." Investigating and, where necessary, litigating these cases will raise many interesting and difficult issues at the intersection of the federal labor laws and the First Amendment.

WELCOME TO OUR NEWEST ATTORNEY: **CHINYERE OHAERI**

Chinyere Ohaeri joined the Region 18 staff in August of this year. She was born in Mankato, Minnesota and moved to the east coast a few years later. She earned her undergraduate degree in Psychology with a minor in Labor Studies at Rutgers, The State University of New Jersey, formerly Rutgers College, in New Brunswick, New Jersey. She then worked for the national nonprofit organization Learning Ally, formerly Recording for the Blind & Dyslexic, as a Financial Development Specialist where she worked in corporate, foundation, and organization charitable giving.

Chinyere decided to pursue her interest in labor and employment law and moved to the District of Columbia to attend The George Washington University Law School. While in law school, she held several internships including one with the Service Employees International Union headquarters legal department and with the Equal Employment Opportunity Commission Office of Federal Operations. In addition to internships, while in law school, she served as the Secretary for the Black Law Students Association and participated in the Cohen & Cohen Mock Trial Competition.

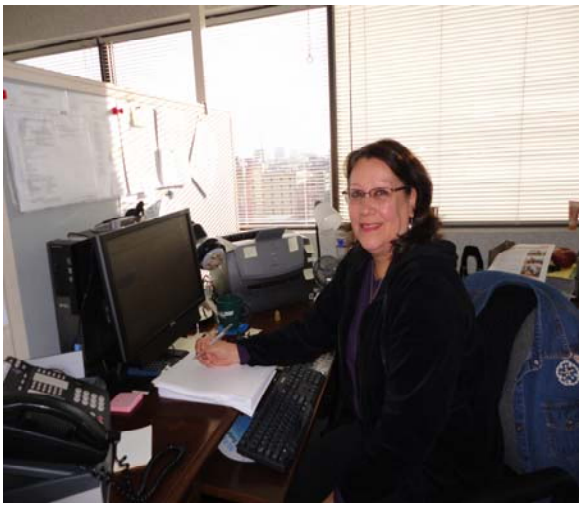
In her free time, Chinyere enjoys snowmobiling, fishing, camping, RVing and traveling. She is especially excited about returning to Minnesota and spending time with family.



In other news:

Please join us in wishing a fond farewell to Field Attorney David Biggar who is retiring at the end of the year after nearly 40 years of combined military and civilian service. He will be missed!

Welcome to Our New Office Automation Assistant: **Deb Amburn**



Deb Amburn comes to Region 18 from South Dakota, where she was previously employed with the Veterans Affairs Black Hills Health Care System, within the Human Resources Department. Deb is married to husband Terry and they have one child, who is attending the University of Minnesota, Morris.

In her leisure time, Deb enjoys reading, movies, arcade games, and spending time with family.