Region 29's Quarterly Newsletter Volume 1, Issue 4

NLRB CONNECTIONS

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Monday to Friday,

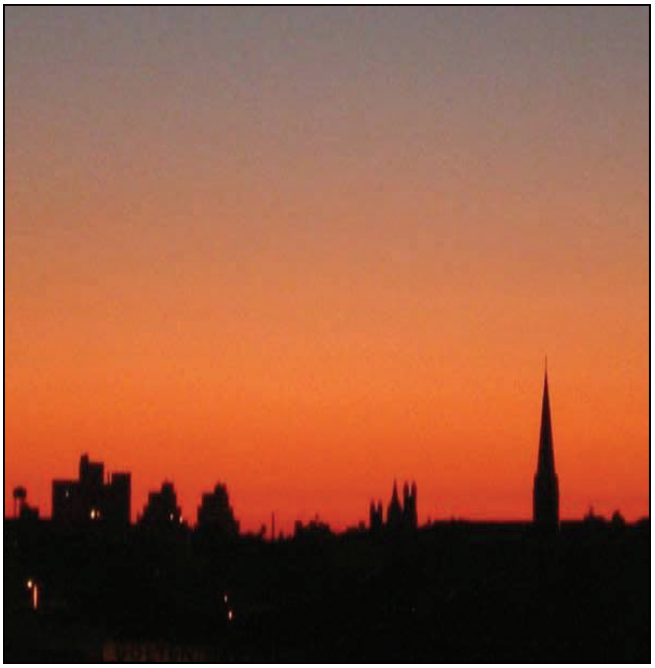
"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . ."

Section 7, National Labor Relations Act

29 U.S.C. 157

CHANGE HAS COME TO AMERICA ... — The NLRB Looks Forward To 2010 —

Change has come to America. And it's not just about *this* president, and *his* policies and *this* Congress. Change will occur *whenever* we have new leaders. Like everyone, we look forward to change, and we dread change. But whatever change occurs – and change is a constant, we've been through it before. Some changes were momentous, such as the passage of the Taft Hartley Act, which, among other things, protected the public from unfair labor practices committed by unions, and the healthcare amendments of the 1970s, which placed most healthcare institutions under the Board's jurisdiction. Other changes were relatively minor, such as the Board's standards for determining when an 8(f) relationship becomes a 9(a) relationship (What's that?). Some areas of law, such as what constitutes a supervisor, have been in flux for longer than most of us have been alive. And to a certain extent, that is a good thing, for as long as the pendulum is swinging, the clock is working. But one thing will never change. Our mission, to prevent and resolve labor disputes which disrupt the economy and, more importantly, disrupt lives, will remain the same no matter who is in office.



Sun rising over Brooklyn, New York.

NLRB PRODUCES NEW REPRESENTATION CASE VIDEO

To enhance the public's understanding of how the agency handles representation cases, the Board has produced a video presentation in Spanish and English. The video, featuring a narrator and some fine actors, takes the viewer on a journey through the different stages of the Board's representation procedures from the filing of a petition to the running of an election. It also contains information on the agency's information officer program, pre-election hearings and post election procedures. The video will be made available for streaming on the agency's website at www.nlrb.gov.

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Region 29 representatives are available to speak to your group. Contact Outreach Coordinator, Peter Margolies, at (718) 330-7721 for more information.

UNFAIR LABOR PRACTICE LITIGATION

In some recent Region 29 cases, the Board found employers had violated the Act. Some of these involved discrimination against employees for engaging in protected concerted activity, some involved interference with union activity, and some concerned the failure on the part of some companies to furnish unions with information the unions needed to represent unit employees. Another involved a somewhat novel issue.

Turning first to the cases involving protected concerted activity, while it is common knowledge that the Act protects an employee's right to engage in union activity (or refrain from engaging in union activity) many non-labor practitioners do not know that the Act also protects an employee's right to engage in certain types of concerted activity. As a general rule, an employee engages in concerted activity when he or she acts *in concert* with other employees. The employee acts in concert with other employees when he or she acts *with* or *on behalf of* others. Meyers Industries, 268 NLRB 493 (1984). If the focus of those activities is improving wages, hours or working conditions, those activities are usually *protected.* (i.e. it is unlawful to retaliate against the employee for engaging in such activities.)

In three cases, Dickens *(JD (NY)-21-09)* East Buffet Restaurant (352 NLRB No. 116), and Approved Electric Corp.(JD(NY)-22-09), the Region successfully litigated allegations that the employers had discriminated against employees for engaging in protected concerted activities. In Dickens, the ALJ also found that the employer had laid off an employee for engaging in the concerted activity of requesting a larger bonus, and laid off another employee because of testimony she gave the Board in an earlier unfair labor practice proceeding, which is a violation of a different section of the Act, i.e. Section 8(a)(4). In East Buffet Restaurant, the Board found the employer terminated an employee for engaging in concerted activities, engaged in various other forms of retaliation, and refused to reinstate 8 employees who went on strike to protest the employer's unfair labor practices. In Approved Electric, an ALJ found that the employer discharged two employees for concertedly complaining that they were not being paid on time and were not being compensated for overtime work in accordance with prevailing wage laws.

In two other cases, Walgreen Co., 352 NLRB No. 137, and First Student, Inc., JD (NY)-33-09, the Region successfully litigated allegations that the employers involved had interfered with the attempts of union agents or other individuals to converse with employees outside their facilities regarding their working conditions. .

In two other cases, Aramark Services, Inc., JD(NY)-32-09 and Courtesy Bus Company, Inc., JD(NY)-23-09 the Region successfully litigated allegations that the employers involved failed to furnish the unions representing their employees with certain information. The obligation on the part of an employer or union to bargain entails the obligation to furnish the other party with relevant information. The Board and the courts have found that most information concerning the wages, hours and working conditions of bargaining unit employees is *presumptively* relevant. The party requesting that information is entitled to it and is under no obligation to demonstrate its relevance. Ohio Power Co., 216 NLRB 987, 991 (1975). Information that does not concern bargaining unit employees is not presumptively relevant, and the party requesting the information must both establish its relevance and explain it to the party from whom the information is being requested. If the information is related to a grievance, a broad discovery-type standard is utilized to determine its relevance. NLRB v. Acme Industrial Co., 385 US 432, 437 (1067). In Aramark, the union was requesting certain financial information that it needed to investigate a grievance concerning a reduction in hours suffered by bargaining unit employees. While the information was not presumptively relevant, the ALJ found that the Union had met its burden of establishing how it could be useful in its investigation of the grievance. In Courtesy Bus, the union requested data showing the names, hours worked and wages paid to bargaining unit employees over a one year period. The Employer refused to produce it, contending that there was no grievance pending, and that producing it would be unduly burdensome. The ALJ found that the information was presumptively relevant, and that the Employer had not met its burden of showing that producing it would be unduly burdensome.

The Region also successfully litigated a case with a somewhat novel legal issue regarding the discharge of a supervisor. Supervisors are generally excluded from the Act's protection. However, there are some situations in which a supervisor's termination will be found unlawful.

An employer may not terminate a supervisor for refusing to commit unfair labor practices or for giving testimony at an NLRB or arbitration hearing. Parker-Robb Chevrolet, Inc., 262 NLRB No. 58 (1982). An employer also violates the Act if it discharges an unpopular supervisor in order to persuade employees to reject a union. In such a situation, the discharge is considered a conferral of a benefit. Burlington Times, Inc., 328 NLRB 750, 750-751 (1999). In The Inn at Fox Hollow, 352 NLRB No. 127, the Board upheld the Region's allegation that the Employer had terminated a supervisor to dissuade employees from selecting a union that was attempting to organize them. It also found the Employer unlawfully discharged another employee for engaging in protected concerted activities.

# # #

ON THE REPRESENTATION FRONT ...

Many of the representation cases the Region recently handled concerned post election matters. In our last newsletter, we briefly discussed pre-election procedures. Thus, as a segue into our description of some of the decisions the Region recently issued, it seems appropriate to briefly describe the agency's post election procedures.

Following an election, if one party receives a majority of the ballots cast, and no party cries foul, the agency certifies the results of the election. If a union wins, we issue a Certification of Representative. If the employees vote against representation, we issue a Certification of Results. Sometimes, however, the results are not determinative or a party alleges that the election was not freely and fairly conducted. Here is where the agency's post election procedures come in to play. These procedures are designed to resolve voter *eligibility* issues, and issues involving the *fairness* of the election. We'll first discuss how the Board handles eligibility issues, and then look at its procedures for resolving questions regarding the fairness of the election.

The agency resolves voter eligibility issues through the challenged ballot procedure. If a party does not believe a voter is eligible to vote, that party may challenge the voter's ballot at the election. When the voter arrives at the polling place, he or she is allowed to cast a ballot. However, the voter's ballot is segregated from the ballots of unchallenged voters by being placed in an envelope. At the conclusion of the election, the agent conducting the election attempts to secure an agreement from the parties concerning the eligibility of the challenged voters. If the parties agree that a voter whose ballot has been challenged is in fact eligible, the ballot is taken out of the envelope, mixed with the other ballots and counted. If they agree that the voter is ineligible, the ballot is considered void. Unfortunately, sometimes the parties are unable to agree on the eligibility of certain challenged voters. When that occurs, the envelopes containing the ballots of the challenged voters are set aside, and the agent counts the remaining unchallenged ballots. At the conclusion of the count, the agent provides the parties with a Tally of Ballots, setting forth the results of the count. If the challenged ballots are sufficient in number to determine which party reigns victorious, the envelopes containing the challenged ballots are placed in a larger envelope. This larger envelope is then sealed and secured in front of the parties and subsequently transported to the Regional office, where it is placed under lock and key.

Thereafter, the Region investigates the eligibility of the challenged voters. At the conclusion of that investigation, it issues a report in which it either sets forth its recommendations regarding the challenges, or forwards the issue to hearing.

The agency resolves issues of fairness through the investigation of objections. If a party contends that an election was not fairly and freely conducted, it may file objections. Objections are due at the Regional office 7 days from the date of the election. As is the case with challenged ballots, the Region conducts an administrative investigation of the objections and then issues a report which either makes a recommendation concerning their disposition or forwards them to hearing. With objections, it is important to note that it is the obligation of the party filing them to promptly submit evidence in their support within 7 days of their filing. Craftmatic Comfort Mfg. Corp., 299 NLRB 514 (1990). A party's failure to promptly submit evidence in support of the objections will result in its objections being overruled.

In most cases, post election issues are not put to rest with the Region's report. If the election was conducted pursuant to a Stipulated Election Agreement or a Decision and Direction of Election, the Region's recommendations concerning post election matters can be appealed to the Board. Parties seeking a more expeditious resolution to post election matters may enter into a Consent Election Agreement which provides that the Regional Director's disposition of post election matters is final and binding. The Region strongly encourages parties to enter into Consent Election Agreements. Let us now turn to some of the Region's most recent post election decisions involving large units. (Continued on Page 4).

The March of Technology

Some of us remember the days when cutting and pasting involved the use of scissors and tape, when support staff fought over who would use electric typewriters, and when whiteout frequently splattered the desk tops of various board agents. Those days are rapidly receding into the annals of ancient history. The agency is now in the process of converting its records and case management system to an electronic format. This will ultimately make more casehandling information accessible to the general public and result in greater transparency. The agency has dubbed its new case management system "NxGen."

Alas, the days when parties had to dash to the post office to timely file documents are also becoming a distant memory. As part of the transition to the NxGen case management system, the Board is encouraging the filing of documents through the agency's web site. Information concerning what documents may be electronically filed, and instructions for filing documents through the internet can be found on the agency's website by clicking the E-Gov tab. It is important to note that charges, petitions and petitions for advisory opinions must still be filed the old fashioned way, on paper. It is also important to note that parties that file documents electronically will be required to serve these documents by email upon the other parties, where possible. It will come as a relief to some that documents that are filed electronically will be due at 11:59 p.m. local time at the receiving office, rather than by the close of business at the receiving office, as remains the case for paper documents. While parties may be able to use technology to their advantage, there will be limits to the blame that can be placed upon technology if things do not work out as planned. While technical failures of the e-filing system will excuse the late filing of documents, user end problems, such as malfunctioning phone lines, will not.

Representation Front (cont. from p. 3)

Elmhurst Care Center

In Elmhurst Care Center, Case No. 29-RC-9431, after an election involving approximately 150 service and maintenance employees, the Region recommended overruling the Employer's objections and certifying Local 1199, Service Employees International Union, United Healthcare Workers East (1199).

The case had a long history involving 1199, the Employer, and Local 300S, Production, Service and Sales District Council, United Food and Commercial Workers (Local 300S). In February 1999, the Employer began hiring employees to prepare for the operation of its new nursing facility. A month later, before the Employer had commenced regular operations, it recognized Local 300S as the representative of certain employees working there. 1199 filed charges against both the Employer and Local 300S, alleging that the recognition was unlawful. The petition in Case No. 29-RC-9431 was filed on February 8, 2000. The Board has a policy of suspending or "blocking" the processing of petitions when there are unfair labor practice allegations pending which, if proven, would preclude a free and fair election.

1199's petition was blocked over the next 8 years while the unfair labor practice case was litigated. In 2005, the Board issued a decision (345 NLRB No. 98) finding the Employer's recognition of Local 300S unlawful, ordering the Employer and Local 300S to terminate their bargaining relationship, and ordering them to jointly reimburse their employees for the dues and initiation fees that they had been required to pay in order to work. They refused to do so. On November 10, 2008, the Court of Appeals for the District of Columbia enforced the Board's Order. Local 300S and the Employer nonetheless refused to remedy the portion of the Board's order requiring them to reimburse employees for the dues that had been deducted, and requested that their liability be determined at a backpay hearing.

Although the unfair labor practices had not been fully remedied, 1199 requested that the case be "unblocked," and the election was finally conducted on January 8, 2009. Local 300S was not allowed to appear on the ballot. The Tally of Ballots at the election's conclusion showed that 1199 received 102 of the 134 ballots cast. The Employer filed 8 objections, one of which alleged that Local 300S should have been allowed on the ballot. The others set forth a variety of allegations, including claims that 1199 tainted the election through the use of racial slurs and other acts of intimidation, and that the election was conducted in the face of unlawful picketing. The Region recommended overruling all these objections. On May 18, 2009, the Board adopted the Region's recommendations and certified 1199.

Alle Processing Corp.

This was another election in a large unit, consisting of over 400 production, warehouse and hourly research and development employees at the Employer's Maspeth, New York facility. After Local 342, United Food and Commercial Workers, the Petitioner, did not prevail, it filed numerous objections, some of which were sent to hearing. On June 17, 2009, an Administrative Law Judge issued a Decision on Objections in which he found that the Employer had interfered with the election by photographing employees as they spoke to union agents on the day before the election, and threatening to close the facility if it was unionized. The threats were made by the Employer's President during the course of meetings with employees and were repeated in several leaflets and posters the Employer produced. In some cases, when the agency sets aside an election and directs that a new election be conducted, it places language in the Notice of Election that the employer is required to post explaining why the election is being rerun. It states, in general terms, that the initial election was set aside because one of the parties, in this case the Employer, engaged in conduct that prevented employees from voting in an atmosphere free of coercion. *The Lufkin Rule*, 147 NLRB 341 (1964). The ALJ, in directing a new election, determined that the Employer's conduct in this case warranted the inclusion of such language in the election notices. The ALJ declined to make a determination on the merits of other objections filed by the Petitioner, finding it was unnecessary to do so, inasmuch as he was ordering that the election be set aside. The Petitioner subsequently withdrew its petition.

Affiliated Computer Services

This case also involved a unit of nearly 300 employees. The Employer administers the Port Authority's EZ Pass program, and Communication Workers of America filed a petition seeking to represent various of the Employer's employees working at the Employer's Staten Island location. Because the parties had been unable to reach an election agreement, the case went to hearing and the Region issued a Decision and Direction of Election. The Employer filed a Request for Review, and because the Board had not ruled upon the Employer's Request prior to the election, the ballots were impounded at the conclusion of the election. After the Board denied Review, the ballots were opened and counted at the Region's office, and the Union prevailed.

The Employer filed objections alleging that, among other things, the Region had failed to maintain proper chain of custody procedures with regard to the impounded ballots, which largely mirror those for challenged ballots, described in our introduction, and are described in the Casehandling Manual for Representation Cases, which can be found on the agency's website. The Region overruled the Employer's objections, finding that the board agents who conducted the election, along with other Regional personnel, closely adhered to all the procedures set forth in the manual. The Employer has filed a request for review of the Region's decision with the Board which has not issued a decision at this time.

Representation Front (cont. from p. 4)

MV Public Transportation

The Region also issued numerous pre-election decisions. Among the most interesting of these, in terms of the novelty of the issues presented, was the decision in MV Public Transportation, Inc. This case concerned whether the agency could conduct a union deauthorization (UD) election in the face of pending unfair labor practice charges. In order to understand the issues involved, a brief discussion of UD petitions and union security clauses will be necessary.

Contracts in non-right to work states may contain union security clauses which, by and large, are agreement s between their employer and a labor organization to require that employees make certain lawful payments to that labor organization in order to retain their jobs. The Act provides, however, that employees may determine, through a secret ballot election, whether to allow their employer and bargaining representative to continue enforcing this clause. This is called a union-security deauthorization election and can be brought about by the filing of a petition signed by 30 percent or more of the employees covered by the agreement.

The Board also has a policy, known as its blocking charge policy, of holding representation cases in abeyance when there are pending unfair labor practice cases involving the parties. The Board may apply this policy in cases where the alleged unfair labor practices, if unremedied, would prevent a fair election from being conducted. It may also apply this policy where the resolution of the unfair labor practice case would render an election unwarranted.

MV Transportation dealt with whether this policy applies to UD petitions. The Employer recognized Local 707, International Brotherhood of Teamsters in September 2008. About three months later, the Employer and Local 707 entered into a collective bargaining agreement containing a union security clause. Thereafter, several charges and petitions were filed by multiple parties. On September 30, 2009, the Region issued a Consolidated Complaint alleging that the recognition of Local 707, along with the contractual union security requirement, was unlawful, as the Employer had not hired a representative complement of its employees at the time it recognized Local 707. On October 9, 2009, an employee filed both a decertification (RD) petition and a deauthorization petition. The RD petition and a representation (RC) petition filed by Local 1181, Amalgamated Transit Union, were blocked by the unfair labor practice complaint.

The Region determined, however, that the blocking charge policy did not apply to the UD petition and directed an election. In making this determination, the Region noted that both Congress and the Board have historically emphasized the importance of providing for an "immediate" election in union deauthorization cases. For this reason, the Board's contract bar rules, which provide that elections cannot be conducted for most of the period that a contract is in effect, do not apply to UD petitions. For this same reason, the Board has held that unlawful conduct on the part of the contracting parties does not always warrant holding UD cases in abeyance until the unfair labor practices are remedied. In Andor Co., Inc., 119 NLRB 925 (1957), the union security clause itself ran afoul of Section 8(a)(3) of the Act because it required the payment of more than dues as a condition of employment. It required the payment of additional "assessments." The Board held that waiting for an appropriate charge to be filed, and freezing processing of the UD petition while the unfair labor practice case worked its way through the agency's sometimes protracted litigation process, would defeat the purpose of the Board's UD procedures. The Region found this reasoning applicable to the instant petition.

Finally, the Region found that much of the rationale underlying certain aspects the agency's blocking charge policy did not apply to the case at hand. The Board often applies this policy because the issues underlying the unfair labor practice case and representation petition are essentially the same, and resolving the unfair labor practice case would render an election unwarranted.

This was the case with regard to the unfair labor practice complaint and the blocked RC and RD petitions. The complaint alleges that the recognition of Local 707 was unlawful and the Region is seeking, in part, the disestablishment of the bargaining relationship as a remedy for this conduct. The RC and RD petitions would also resolve the question of whether Local 707 will continue to represent the Employer's employees. Clearly, an election will not be necessary or warranted if the Region prevails in its litigation of the unfair labor practice case. It also will not be warranted if the Region does not prevail and the complaint is dismissed. In that case, the contract between Local 707 and the Employer will probably constitute a bar to an election and warrant the dismissal of the petitions.

These considerations did not, by and large, apply to the UD petition. The election in that case would not be determining whether Local 707 would continue to represent the Employer's employees. It would only determine whether they would continue having to pay dues to continue working. Moreover, if the Region does not prevail in its litigation of the complaint, the dismissal of the UD petition would not be warranted on contract bar grounds because the board's contract bar policies do not apply to UD petitions.

In view of these considerations, in particular the urgency the agency has historically placed on providing for immediate deauthorization elections, the Region directed an election.

Compliance Corner

We have experienced several recent successes in a group of cases in which obtaining a remedy had, or was about to become, difficult. Three of those cases involved Respondents who were no longer operating; a fourth involved a purported "inability to pay." In Ingramo Enterprises, Inc., the Board found that the Employer had unlawfully discharged an employee. The company ceased operating while its appeal was pending in the Second Circuit. Reacting to notice of the closing from the discriminatee, we filed an Emergency Motion for a Protective Restraining Order which required the Respondent to escrow over $100,000, its unliquidated backpay liability, pending resolution of the appeal. The Court granted our motion. The escrowed funds made it possible to achieve a full remedy in this case once the Court of Appeals issued a judgment that enforced the Board Order.

In Modern Towel, we discovered that a Respondent that had closed many years ago and had sold its business, was still receiving installment payments from the sale. We obtained a Writ of Garnishment pursuant to the Federal Debt Collection and Procedures Act ("FDCPA") and received the unpaid balance of $130,000. We then used these funds to fully pay the discriminatees. Likewise, in Carnival Carting, which recently ceased doing business, we discovered that Romar Sanitation, an alleged single employer with Carnival, had sold the business property. We obtained a pre-judgment Writ of Garnishment under the FDCPA and froze over $200,000 in a bank account that held Romar's sales proceeds. If we are successful and secure a favorable Board Supplemental Order and court judgment against Romar, these frozen assets will be available to fully satisfy our remedy against Carnival. Further, in Human Development Association ("HDA") a home-care provider unlawfully recognized a union and deducted dues from its employees. The Board had a liquidated judgment, inclusive of interest, that exceeded $1.6 million. HDA claimed inability to pay because its sole source of income was Medicaid reimbursement. We obtained a post-judgment Writ of Garnishment under the FDCPA that restrained HDA's Medicaid reimbursement from the State of New York and an HDA bank account. We have now collected the full amount of the Judgment and expect to soon complete reimbursing dues payments to the first half of the over 3,000 affected current and former unit employees. The Region's pending compliance litigation also includes a case in which we established personal liability by piercing the corporate veil and in which we registered a $250,000+ judgment lien against the individual's home. We are awaiting the disposition of a foreclosure action initiated by the mortgage holder whose claim has a lower priority than our lien.

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WHO WE ARE AND WHAT WE DO

*The National Labor Relations Act is the Nation's primary labor law, governing relations between unions, employees and employers in the private sector. It protects employees' rights to organize and to bargain collectively with their employers, or to refrain from doing so. The law also protects employees' rights to get together among themselves to seek improved wages and/or working conditions — so called "protected concerted activities"

*Employers are also protected under the NLRA from unlawful activities, including certain kinds of union strikes and picketing.

*The National Labor Relations Board (NLRB) administers the National Labor Relations Act. It has two primary functions: first, to prevent and remedy unfair labor practices, committed by either unions or employers interfering with the rights the Act guarantees, and; second, to establish whether groups of employees wish to be represented by a union for collective bargaining purposes, through the administration of supervised elections.

*The NLRB is organized into two major components: a five-member governing Board, which decides unfair labor practice cases and representational issues; and the Office of the General Counsel, which investigates and prosecutes unfair labor practice cases. Headquartered in Washington D.C., the NLRB maintains 51 offices across the U.S.

Protecting Workplace Democracy

National Labor Relations Board

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