Special points of interest:

- 10(j) Injunction New
- Social Media Cases
- Domsey Update
- Outreach Program
- Hurricane Sandy

In this issue:

February 2013 | Volume 1, Issue 7

NLRB CONNECTIONS

Region 29's Significant Litigation Successes!

Target Corporation, JD(NY)-16-12 (May 18, 2012)

In December of 2011, the NLRB, Region 29 issued a Complaint against Target alleging that it promulgated and maintained certain unlawful rules that infringed on employees' rights under Section 7 of the National Labor Relations Act (NLRA). These included rules regarding employees' non-work time communication, no solicitation/no distribution policies and dress code (prohibiting employees from wearing insignia in support of the Union). The Complaint further alleged that Target made numerous threats to employees during the union organizing campaign, including threatening discharges and closure of the store if employees supported or voted for the Union. It was further alleged that Target engaged in unlawfully interrogations of employees about their Union activity.

Currently, none of Target's 1,755 stores have been successfully organized by a union. In May 2011, United Food and Commercial Workers Local 1500 filed a representation petition in Region 29 of the NLRB, seeking to represent a bargaining unit of Target's full-time and part-time employees employed at its Valley Stream, New York store. A campaign for and against union representation by the Union and by Target ensued. An election was held among Target's employees on June 17, 2011. The Union lost the election and, thereafter, filed objections to conduct affecting the outcome of the election, arguing, essentially, that Target's unlawful conduct precluded an election that was free from intimidation. The Regional Director decided a hearing be held on the Union's objections, and be consolidated with the unfair labor practice litigation.

On May 18, 2012, the ALJ issued his Decision finding that Target violated the NLRA and ordered that Target rescind its unlawful rules and post a Notice to Employees, advising its employees of their rights and assuring its employees that Target will not violate those rights. Furthermore, the Judge sustained the objections to the election, and directed the Regional Director to conduct a second election. Target has appealed, and the case is now pending before the Board.

(Continued on page 6)

10(j) Injunction News

In ***833 Central Owners Corp***, Case No. 29-CA-70910, a Union charged that the Employer unlawfully disciplined and discharged the discriminatee on specious claims after his refusal to testify falsely at an arbitration hearing on the Employer's behalf in support of the Employer's discharge of another employee who supported the Union. After the Region issued a Complaint, the matter was litigated before an Administrative Law Judge (ALJ) in May 2012. The ALJ concluded in September 2012 that the Employer unlawfully discharged the employee, and ordered reinstatement and back pay for the employee.

The Employer did not reinstate the employee, and instead filed Exceptions with the Board challenging the ALJ's conclusion. Meanwhile, the Employer and Union had continued negotiating for a successor collective bargaining agreement.

The Region obtained authorization from the Acting General Counsel and the Board to seek injunctive relief under Section 10(j) of the Act, ordering the Employer to immediately reinstate the employee and to cease committing any similar unfair labor practices.

(Continued on page 5)

Region 29 and Hurricane Sandy

Located in the heart of downtown Brooklyn, Region 29 has staff that lives in several of the areas that were hit hardest by Hurricane Sandy such as: Staten Island, parts of New Jersey, and the Rockaways. Several of our staff were evacuated from their homes and were unable to return, and others went without heat and water for weeks. The office continued to operate, however, and even housed a few board agents from Region 2-Manhattan while they were out of power. The office also rallied together to raise funds and collect goods for its members that were hit the hardest, and donated annual leave so that those that needed time off to deal with the storm's aftermath did not have to take unpaid days off.

Region 29 didn't just recognize and try to address the struggles of its own staff; it undertook efforts on behalf of the larger community. Several board agents and staff members volunteered their time with relief groups such as Occupy Sandy. This work included the preparation and delivery of food and supplies to devastated areas, checking in on residents in buildings without power, and help in filling out forms for state and federal assistance to those who needed it. Region 29's local union also threw its annual holiday party, and this year fundraiser for Sandy relief efforts. Proceeded went to Occupy Sandy■

Social Media and The NLRB

In ***Costco Wholesale Corp***, 358 NLRB No. 106 (Sept. 7, 2012) the Board considered whether *Costco* violated the Act by maintaining a rule that prohibited employees from electronically posting statements that "damage the company…defame or damage any person's reputation."

The Board ruled on the lawfulness of numerous workplace rules, finding violations of Section 8(a)(1) for the maintenance of these rules in its nationwide employee agreement. The Board analyzed the rules under the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which considers whether the rule explicitly chills Section 7 rights. Under this analysis, if the rule in question does not explicitly chill Section 7 activity, finding a violation is dependent on a showing of one of the following: employees reasonably could construe the language to prohibit Section 7 activity; the rule was promulgated in response to Section 7 activity; or the rule has been applied to restrict the exercise of Section 7 rights.

The Board rejected the Employer's argument that the rule was designed to ensure a civil and decent workplace. Instead, the Board found that the rule reasonably chills employees' Section 7 rights, as the rule clearly encompassed concerted communications protesting the employer's treatment of its employees. The Board noted that there was no language in the employer's rule excluded Section 7 activity from its application.

(Continued on page 6)

Expediting Cultural Enrichment!

Promoting Diversity

The Region's Special Emphasis Program (SEP) aims to ensure that minorities, women, people with disabilities, and people with various sexual orientations are provided an equal opportunity. The SEP improves the workplace environment by promoting diversity and educating employees about our social and cultural similarities and differences so that we all can have a greater appreciation and understanding of one another.

This year we held a program highlighting Martin L. King Day as a "Day of Service". The event featured a short film about Dr. King's legacy and commitment to service. It challenged everyone to not treat this day as a day off but rather as an opportunity to volunteer and serve.

Representation Case Roundup

Staffco of Brooklyn, LLC, Case Nos. 29-AC-072193 et al.

Staffco of Brooklyn filed seven petitions to amend certifications which had been issued to Long Island College Hospital (LICH) covering seven different units represented by five different labor organizations, including 1199 SEIU, United Healthcare Workers East, United Federation of Teachers, New York State United Teachers, American Federation of Teachers, AFL-CIO, Special and Superior Officers Benevolent Association, Locals 30 and 30 A-B-C-D, International Union of Operating Engineers, and New York State Nurses Association.

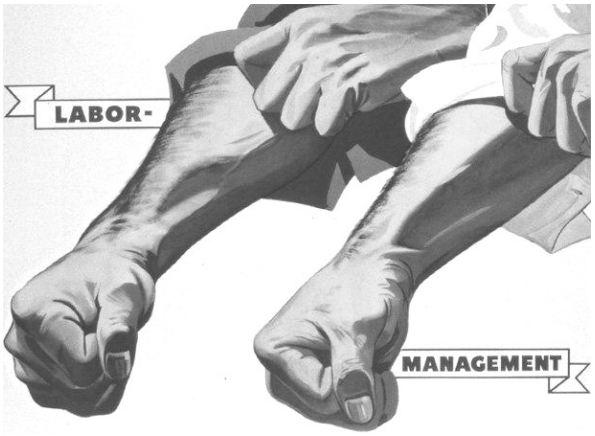
On May 28, 2011, SUNY Downstate Medical Center began operating the hospital, pursuant to an asset purchase agreement. Prior to purchasing LICH, Downstate sought to engage a company to supply a workforce for the hospital. Specifically, Downstate wanted to find a company which would employ the employees and lease those employees to the hospital. Downstate was concerned that if the employees became Downstate employees, and thus public employees, it would impact their benefits, such as retirement plans. Ultimately, the Health Science Center at Brooklyn Foundation, a private foundation that supports Downstate, decided to create Staffco in order to provide that service to Downstate. Accordingly, in January 2011, the Foundation created Staffco as a limited liability professional employer organization to be the employer of all non-physician employees at LICH. Staffco hired virtually all the non-physician employees formerly employed by LICH and began leasing them to Downstate. Employees were hired in their same LICH positions at their same rates of pay.

Two public labor organizations, Public Employees Federation, AFL-CIO and United University Professions, intervened claiming that the petitioned-for employees had become employees of Downstate, and were therefore public employees not subject to the Board's jurisdiction.

The Region found that the certifications should be amended to list the name of the Employer as Staffco of Brooklyn, LLC instead of LICH. In so finding, the Region found that an AC petition could be used to substitute the name of a successor employer. The Region found that Staffco was a private employer subject to the jurisdiction of the Act. This analysis involved questions of whether Staffco was a political subdivision, which would not be subject to the Act. The Region also determined that Staffco was a successor to LICH, so it would be appropriate to amend the certifications to change the name of the Employer to Staffco of Brooklyn, LLC. The Region also considered whether Staffco was an alter ego of or a single employer with SUNY Downstate. The Regional Director determined that Staffco did not meet the alter ego or single employer standards.■

Compliance Corner

On January 30, 2013, in *Estate of Arthur Salm v. NLRB and NLRB v. Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International Sales Corporation, a Single Employer* ("Domsey"), Case Nos. 12-378;12-1131;12-1190, the United States Court of Appeals for the Second Circuit enforced, in part, the Board's Decision and Order permitting the Board to pierce the corporate veil and impose personal liability on a Domsey owner, now deceased, for Domsey's backpay obligations. Under Board law, the corporate veil may be pierced if it meets the two prong test set forth in *White Oak Coal Co.*, 318 *NLRB*, 732, 734-35, enforced, 81 F.3d 150 (4th Cir. 1996). Thus, personal liability can be found if "(1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, *and* (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *White Oak Coal*, 318 NLRB at 735. Under the first prong there are nine factors although it has long been held that not all factors need be present. Unlike prior cases, however, Domsey satisfied only one factor in the first prong, specifically that one of its owners, in one major transaction, commingled Domsey's assets with his own thereby rendering Domsey judgment proof. This was sufficient for the Court to find that the corporate form was abused and that the first prong was met. The Court also found that the second prong was met, and therefore found that Domsey's owner was personally liable■



Promotions and Departures

Kathy-Drew-King, promoted to Supervisory Attorney in July 2012, received her J.D. from the Howard University School of Law. She began working in the Regional Office in 1992. Prior to coming to the NLRB, she worked at the U.S. Department of Labor, Benefits Review Board, the U.S. Merit Systems Protection Board and the Interstate Commerce Commission.

Nancy Reibstein, also promoted to Supervisory Attorney in July 2012, received her J.D. from Northeastern University School of Law. She began working for the NLRB in Region 2 in 1990 and has been at Region 29 since 1998.

Tara O'Rourke, also promoted to Supervisory Attorney, started at Region 29 in 2000 after graduating from Hofstra Law School. Recently, she worked on a case that reached the federal courts, affirming the constitutionality of the President's appointment of NLRB Board members, resulting in an injunction reinstating 70 locked out workers. Tara also recently prevailed before an ALJ in a national case involving a utility company's unfair labor practices affecting 3,500 employees working in 15 states.

Nancy Lipin was promoted to Supervisory Attorney in October 2012. She graduated from the University of Michigan Law School. Nancy worked for several years in private practice before joining the Board in 2000.

Departures

Former Deputy Regional Attorneys **April Wexler** and **Elias Feuer** and former Field Attorney **James Kearns** became Administrative Law Judges for the Social Security Administration. This past fall, former Board Attorney **Michael Berger**, joined The Directors' Guild of America as an assistant executive director.

Region 29 Welcomes Our New Staff

From left to right Rudylexis Saliev, Shao Chen, Erin Schaefer, Dan Notargiacomo, Nancy Reibstein, Kareema Alston, Tim Koch, Sarah Hurley, William Newsome, Nancy Lipin, Kimberly Walters, Jaime Cosloy, Kathy-Drew-King and Colleen Breslin

Noor Iman Alam, Field Attorney (FA), has a JD from Brooklyn Law School and a master's degree from the CUNY Graduate Center. She interned at Region 2 in Manhattan.

Jaime Cosloy, FA, has a J.D. from University of Baltimore School of Law and was awarded an ABA Bloomberg BNA Award for Excellence in the Study of Labor Law. She also worked with the NFL in the Player Development and Officiating department.

Tim Koch, FA, PhD, and published author, joins us after finishing his J.D. at Arizona State University, and interning at Region 28 in Phoenix. Prior to his career with the Board, he had taught religion, history & culture in Charlotte, NC, and Berkeley, CA.

Erin Schaefer, FA, a graduate of the University of Pittsburgh school of law, interned both in Region 29 and in the Judge's Division in Manhattan before joining our staff as a board attorney.

Kimberly Walters, FA, received her J.D. from Columbia Law School as a Harlan Fiske Stone Scholar. She was a member of the Honor's Moot Court and Vice President of Outlaws, an LGBT student association.

Field Attorney **RyAnn McKay Hooper**, FA,, previously worked on Board Member Craig Becker's staff in Region 22 (Newark), before, transferring here.

NLRB veteran **Colleen Breslin**, FA, spent several years as a field attorney in Region 27 (Denver) and Region 2 before teaching at Villanova Law School. When she returned she hit the ground running, immediately handling a seven-day representation case hearing.

Our latest Field Examiner, **Sarah Hurley**, has a master's degree in human resources and employment relations from Penn State. She also worked in Region 6 (Pittsburgh).

Anisha Singh, Legal Intern, came to us from the University of Virginia law school, on a one-year fellowship. Originally from Miami, she is adjusting to the cold Northeast weather!

Kareema Alston, Field Examiner, has a master's degree in employment and labor relations from Indiana University. She relocated from her hometown of Philadelphia to join us here.

Shao Chen, Field Examiner, has a bachelor's degree from Cornell in industrial and labor relations, and interned in Region 2 in 2011.

Rudylexis Saliev, our new language clerk, speaks Spanish and Russian; she also worked with the Peace Corps in Ukraine. Rudy is pursuing a Master's degree in Public Administration/International Relations.

William (Will) Newsome, Group Secretary, is the latest support-staff hire. Originally from Virginia, he traveled extensively before landing in New York. We welcome Will and his *joie de vivre* to the City.

Dan Notargiacomo, Intern, is currently enrolled in the CUNY, School of Professional Studies' undergraduate business degree program.

We Remember Joyce Walters

We are grieved to announce the passing of **Joyce Walters**, who died of lung cancer in June 2012. Joyce joined Region 29 and worked for many years as a team secretary. She will be deeply missed by her friends, family and colleagues.

Noteworthy Board Decisions

In ***Alan Ritchey, Inc.***, 359 NLRB No. 40 (Dec. 14, 2012), the Board unanimously decided that where there is no collectively bargained grievance-arbitration mechanism in place, employers must provide its employees' bargaining representative with notice and opportunity to bargain in good faith before imposing certain types of discipline on unit employees. The Board held that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining. The Board further reasoned that as with other terms and conditions of employment, such as wages, once employees choose to be represented by a union, an employer may not continue to act unilaterally with respect to terms and conditions of employment. (Members Pearce, Griffin and Block. Member Hayes was recused from participating in this case).

In ***Latino Express, Inc.***, 359 NLRB No. 44, Dec. 18, 2012), the Board held that respondents are required to reimburse employees for extra income taxes that they had to pay as a result of receiving back pay in a lump sum payment. The Board will also require a respondent that has been ordered to pay backpay to file a report with the Social Security Administration.

In ***American Baptist Homes of the West, d/b/a Piedmont Gardens***, 359 NLRB No. 46 (Dec. 15, 2012), the Board overruled the long-standing rule in *Anheuser-Busch Inc.*, 237 N.L.R.B. 982, 99 LRRM 1174 (1978) under which union representatives were denied access to witness statements obtained by employers. The Board held that witness statements are "fundamentally the same" as other information that an employer is required to furnish to its employees' bargaining representative and should be analyzed under the same test, namely balancing an employer's interest in not disclosing information and a union's need for relevant information in its role as bargaining representative. (Board Members Pearce, Griffin Block, Member Hayes dissenting)■

10(j) Injunction News Continued

(Continued from page 1)

The Region sought 10(j) relief because the employee's discharge made the remaining employees reluctant to support the Union or participate in the bargaining process for fear of retaliation, and the employees absence was causing the Union to lose support and created an imbalance in bargaining power. Furthermore, the Union had credibly argued that the Employer was engaging in a pattern of conduct to rid itself of the Union,

The matter was heard by the Honorable Jack B. Weinstein in the U.S. District Court for the Eastern District of New York, who considered affidavits from the witnesses and the evidentiary record developed by the ALJ in determining whether there was reasonable cause to believe that the Act had been violated. Judge Weinstein heard testimony from the discharged employee and the Union President demonstrating why the employee's reinstatement was necessary to preserve the integrity of the collective bargaining process. In this regard, the Region argued that the passage of time was likely to cause the employees to abandon support for the Union and eventually help accomplish the Employer's stated intention to rid itself of the Union. The Employer presented witnesses who argued that the negotiation process was working because the Employer had offered concessions, and that the discharged employee's attendance at negotiation sessions showed that his absence from the workplace posed no harm to the bargaining process.

On December 7, 2012, Judge Weinstein issued an Order granting the Region's request for injunctive relief. The employee returned to work approximately 10 days later.

The Decision and Order can be found at: http://law.justia.com/cases/federal/district-courts/new-york/nyedce/1:2012cv05502/336053/15■

The Agency Goes Paperless

Reducing waste one case at a time.

The NLRB's new electronic case filing system, called NxGen, has helped eliminate many antiquated systems and improved quality and efficiency of casehandling by providing uniform templates throughout the Agency. In connection with NxGen, the Agency has implemented an "e-filing" system that enables parties to file documents electronically through the Agency's website. Both new systems have reduced waste and expatiated casehandaling. **We strongly encourage all parties to file all documents with Region 29, ALJ and the Board, through the e-filing system.**

Noteworthy Changes From The General Counsel

On January 9, 2013, Acting General Counsel Lafe Solomon modified the Agency's policy to permit Agency settlements to include "front pay," which is a monetary payment to an employee in lieu of reinstatement. Unfair labor practice Case Handling Manual Section 10592.8 will be revised to reflect that front pay can now be part of the settlement agreement, and no longer needs to be in a side letter, in Non-Board agreement among the parties separate from the settlement agreement.

Region 29's Significant Litigation Successes!

(Continued from page 1)

GVS Properties, LLC JD(NY)-39-12 presented a novel and important issue regarding whether an employer who is statutorily mandated to hire its predecessor's employees for at least 90 days under New York City's Displaced Building Service Workers Protection Act (DBSWPA) is obligated to bargain with the recognized exclusive bargaining representative of its predecessor's employees, and when that bargaining obligation attaches.

DBSWPA requires a successor employer to retain for a 90-day transition employment period those building service employees of the former employer. After the 90-day period, the successor employer is required to perform a written performance evaluation of each employee and offer continued employment to all employees whose performance was satisfactory.

On February 17, 2012, GVS Properties, owner of real estate properties throughout New York City, purchased seven buildings from their previous owner and assumed the management of the buildings from Vantage Building Services. When GVS purchased and took over the management of the buildings, it hired seven of the eight Unit employees that were employed by Vantage and were represented by the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447.

On March 7, 2012, after GVS purchased the buildings but before the expiration of the 90-day period, the Union requested that GVS recognize and bargain with the Union. GVS refused. At the end of the 90-day period, GVS terminated three employees of the seven employees and replaced them by hiring four new employees.

GVS contended that because it was required to hire a majority of the predecessor's Unit employees under the requirements of DBSWPA, it was not a successor under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and therefore, was not obligated to recognize and bargain with the Union, arguing that a *Burns* successorship results only from the voluntary decision of a new employer to hire a majority of the predecessor's workforce. GVS argued that the determination of a successorship obligation should be based on circumstances as they exist after the DBSWPA 90-day probationary period ends.

Rejecting GVS's argument, the ALJ found that GVS was a *Burns* successor and that the bargaining obligation attached on March 7, 2012, when the Union made its demand for recognition. The ALJ found that the NYC statute was intended to ensure stability and job security during a time of economic uncertainty in the New York real estate industry and was not intended to circumvent the collective bargaining rights of employees, and does not alter the application of the successorship doctrine.

The Region petitioned for injective relief pursuant to Section 10(j) of the NLRA. The Honorable Brain Cogan of the United States District Court for the Eastern District of New York denied injunctive relief, finding that the Employer was not a *Burns* successor because it hired its predecessor's employer as required by DBSWPA, concluding that the Employer, therefore, did not act voluntarily.

American Water Works Company Inc., 29-CA-30676 (October 26, 2011)

In *American Water Works Company Inc.*, 29-CA-30676 (October 26, 2011), the Region prevailed before an ALJ in this case that impacts 3,500 employees nationwide. An ALJ determined that the Respondent employer violated Section 8(a)(1) and (5) of the Act when it failed to notify the FMCS and any of the state mediation agencies of the bargaining dispute before implementing its last offer, which altered employees medical benefits, disability benefits and retiree medical benefits. As noted by the ALJ, the Respondent employer (on behalf of itself and its subsidiaries) and the Utility Workers Union of America, AFL-CIO, (on behalf of itself and a consortium of other local and national labor unions representing about 3,500 employees working in 65 bargaining units in 15 states across the country) have historically negotiated health and welfare benefits on a national level. The ALJ concluded that since the Respondent employer was the party that sought to modify the contract, it had the burden of notifying the mediation agencies pursuant to Section 8(d)(3) of the Act. According to the ALJ, while Respondent notified the FMCS, it failed to also notify any of the state mediation agencies of the dispute prior to its implementation of its last offer. Thus, the ALJ concluded that Respondent's implementation of its last offer was unlawful and ordered that Respondent cease and desist from unilaterally changing the terms and conditions of employees benefits, and further ordered that Respondent make all employees whole for any losses suffered as a result of this unlawful conduct. At the present time, the Charging Party estimates that the cost of reimbursing all 3,500 employees for the unlawful increases in the cost of their benefits to be several million dollars.■

Social Media Continued

(Continued from page 2)

Karl Knauz Motors d/b/a Knauz BMW, 358 NLRB No. 164 (Sept. 28, 2012)

In a provision in the employee handbook articulating the employer's expectation that employees be courteous, polite and friendly to customers, vendors and suppliers, the employer further wrote, "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." The Board adopted the ALJ's decision, finding this language violated Section 8(a)(1) of the Act.

The Board concluded the rule's construction would encompass Section 7 activity. Citing its *Costco* decision, the Board also noted there was no language that would reasonably suggest to employees that employee communications under Section 7 of the Act were excluded from the rule's broad reach■

National Labor Relations Board
Region 29
Two MetroTech Center, Suite 5100

Tel: 718 330 7713
Fax: 718 330 7579
E-mail: region29@nlrb.gov

Know your workplace rights under the National Labor Relations Act!
www.nlrb.gov