

Region 18 Hot Dish

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THE TIME HAS COME

Fond Farewell: Marlin Osthus and Jim Fox Retire

By Nichole Burgess, Supervisory Attorney

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In this edition of the Hot Dish, we pay homage to two perennial and iconic figures in the Region - both of whom retired after long and distinguished careers at the Agency. I've had the privilege of being supervised by both Regional Director Marlin Osthus and Regional Attorney Jim Fox at various points in my career. Marlin and Jim have a combined almost 80 years of service. However, they have a lot more in common than their tenure. Both are Minnesota natives, and both attended St. Olaf College, in Northfield Minnesota. As you will see, they met at St. Olaf when Jim took on the task of tutoring Marlin in logic. They also each wrote an article about the other, featured in this edition. As you read those articles, it may also strike you that they have a similar style of writing and indeed in talking about each other - that is because they are both "golds." A gold? What is the significance of a color? Well, that requires a little backstory.

Several months after the merger of Region 18 and Region 30 in 2013, employees attended a two-day training behind the cheddar curtain (in Onalaska, Wisconsin) where, among other things, we took a personality test which assigned everyone a color: gold, green, blue or orange. The colors corresponded to certain personality traits, values and communication styles and were intended to facilitate an understanding of these differences and ensure

the smooth functioning of the now-merged Regional office.

Marlin and Jim are both golds: motivated by underlying values, which include duty, responsibility, accuracy, order, and tradition. Sounds about right, doesn't it? Golds are rule-followers and enforcers. They are efficient, driven, and focused on completing tasks.

Now, one might think that the legal work in the Region was actually the most challenging part of their jobs, but instead, it might have been dealing with the oranges (spontaneous, flexible, good negotiators who welcome new ideas and enjoy problem solving) and blues (motivated by honesty, sincerity, compassion and teamwork). Millennials (of which we have many) tend toward the orange and blue . . .



Much to his dismay, I actually think Marlin is more of a blue/orange than a gold, which is what makes him such an outstanding manager. Marlin was my first supervisor when I came to the Region. I knew he had a great sense of humor when he told me I could come to the office and pick out my office furniture, only to bring me to a windowless room where he told me to pick through the furniture the more senior employees had discarded, most of which was manufactured during the war assets era, circa 1945, and all in various shades of brown.

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An Exceptional Case by an Extraordinary Lawyer

By Jim Fox, Retired Regional Attorney

Marlin Osthus and I worked together for over 38 years. I have always thought that the most interesting case, and certainly the most challenging from an evidentiary point of view, Marlin tried was *Geo A Hormel & Co*, 287 NLRB 693 (1987). I wish to emphasize that case here as a way to pay homage to an extraordinary lawyer and colleague. But I also wish to emphasize that this case is emblematic of Marlin's entire career as a field attorney, supervisor and manager, and eventually Regional Director.

The story of the 1985-1986 strike at the Hormel plant in Austin, Minnesota, has been told many times in both film and print. The strike spawned litigation in many forums. One of the most interesting and challenging of the Board cases involved the discharge of a striker for allegedly making anonymous, terroristic threats during two telephone calls on consecutive days to two government agencies. The caller stated that Hormel products in stores in Austin and the Minneapolis-St. Paul metropolitan area had been injected with strychnine.

The calls were routinely recorded by both agencies. Austin police personnel played the audio tapes for groups of Hormel's supervisors. Three supervisors identified a particular striker as the person who made the threats. Authorities charged the striker with two felony



Marlin Osthus, center, with wife Connie and family.

counts of making terroristic threats. Hormel discharged the striker for strike-related misconduct.

Labor law practitioners are aware that the Board and the Courts generally apply a so-called *Wright Line* analysis in determining whether discrimination against an employee for engaging in conduct protected under the NLRA is unlawfully motivated. However, the facts in the *Hormel* case strongly suggested that the discharge was not unlawfully motivated. Rather, it appeared that Hormel's decision-makers had an honest, good-faith belief that the striker engaged in strike misconduct by making the terroristic threats.

But what if, in fact, the striker was innocent? In that instance, the employee would have been discharged during the course of otherwise pro-

tected conduct – striking. Discharging an employee who engages in protected conduct but who has not engaged in any form of misconduct would surely deter other employees from similarly engaging in protected conduct. Where, as in *Hormel*, the employer has a good-faith belief that an employee engaged in misconduct during the course of otherwise protected conduct and acts on that belief, the Board and courts apply a so-called *Burnup & Sims* analysis. On this analysis, the General Counsel attempts to prove the negative -- that the employee did not engage in the alleged misconduct. The employer rebuts by offering evidence that he did. The ultimate burden of persuasion remains at all times with the General Counsel.

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An Extraordinary Legal Scholar and Evidence Guru

By Marlin Osthus, Regional Director

As many of you may already know, Regional Attorney Jim Fox retired on March 31, 2016 after nearly 39 years with the Minneapolis office of Region 18. Jim held a number of positions during his tenure with Region 18, starting as a staff attorney and retiring as the regional attorney. Whether Jim was trying cases as counsel for the General Counsel, or mentoring the next generation (or two) of staff attorneys, Jim represented the epitome of a great trial attorney. His mastery of the Federal Rules of Evidence and knowledge of Board procedure, including its many idiosyncrasies, woven into his very pragmatic approach to litigation (which can be summarized as: “tell a compelling story”) resulted in a remarkably successful career.

Jim’s career includes many highlights – far more than I can describe here. Certainly one of his “biggest” cases involved *Overnite Transportation Company*, reported at 329 NLRB 990 (1999). Jim and Dave Biggar (also retired after a long career with Region 18) litigated and coordinated the litigation of charges and union objections to elections involving seven regions. The litigation team was successful in obtaining a complete remedy from the Board, including *Gissel* bargaining orders involving a number of Overnite facilities. While the Fourth Circuit Court of Appeals refused to enforce the bar-



Jim Fox, center, with wife Robin and family.

gaining orders, it otherwise affirmed nearly all of the unfair labor practices found by the Board. Although it had less national impact, Jim also represented the General Counsel in a complaint issued against *Food & Commercial Workers Local P-9*, an Austin, Minnesota union involved in a high-profile, extremely contentious strike against *Geo. Hormel & Company*. Local P-9 attempted to enmesh seven bank locations owned or partially owned by First Bank System (now U.S. Bancorp), by handbilling and picketing them. I remember that Local P-9’s conduct, insofar as it included the corporate headquarters located in downtown Minneapolis, made the local nightly news on almost a daily basis. The Board ultimately held that Local P-

9’s conduct violated the secondary boycott provisions of the Act. 281 NLRB 986 (1986). Yet another example is a case often cited by the Board in deciding whether a party has engaged in surface bargaining - *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), where both the Board and Eighth Circuit Court of Appeals had no trouble concluding that the hotel engaged in bad faith bargaining. These three cases are representative of a career devoted to protecting employee rights to engage in Section 7 activity, and protecting employers from illegal secondary conduct.

Since Jim became a supervisor and then regional attorney, his legacy is the staff he trained. Jim assisted

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Exceptional Case by an Extraordinary Lawyer Cont'd

By Jim Fox, Retired Regional Attorney

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The “alibi” defense. The discharged employee testified that he was at a medical appointment some 75 miles from Austin at the time of the first telephone call. Corroborating evidence marshaled by Marlin established that he was in fact at the appointment at about the time the call was made. However, according to the Administrative Law Judge, this corroborating evidence left open at least a theoretical “window of opportunity” in which the employee could have made a call from either a nearby pay phone or a phone in the doctor’s office. (Precursors to today’s cell phones existed but were uncommon.) The employee, corroborated by his wife, testified that he was working in the yard at the time of the second telephone call. Once again the ALJ was not persuaded. Even crediting the wife despite the obvious possibility of bias, her testimony left open at least a theoretical possibility that the employee could have snuck into and out of the house without her noticing and made the call. Interestingly, there were no telephone records that would have conclusively established the origin of either call.

The “misidentification” defense. The Federal Rules of Evidence permit voice identification by a number of means, including both lay and expert witness testimony. With respect to lay testimony, as noted above, three supervisors who had worked with the employee identified his voice on the tapes. Three rebuttal witnesses testified they knew the employee in various contexts, they listened to the tapes (in the employee’s presence), and the voice on the tapes was not the employee’s.

Hormel also sought to establish the identity of the caller through expert testimony. Its witness, a college professor who was an “acknowledged expert” in the field of “voice stress analysis,” which purportedly can detect falsehood based on voice analysis, was prepared to testify that in his opinion the discharged employee and the caller were one in the same. However, Marlin’s cross-examination of the expert convinced the ALJ to exclude the expert testimony on grounds of subjectivity and reliability.

This was, to be sure, a close and difficult case. All trial lawyers end up losing cases they probably should have won, and vice versa. Alas, this was such a case. The ALJ ultimately concluded, based almost entirely on credibility resolutions, that the General Counsel failed to meet its burden of persuasion. The Board virtually never reverses ALJ decisions that are based on credibility, and it declined to do so here. But the outcome is not the point of my telling.

What I observed during the trial of this case is what I have observed throughout Marlin’s distinguished career. Close reading of the case law. Painstaking attention to detail. Tenacity. Scrupulously evenhanded and ethical conduct. And a superior intellect. All qualities that make for an extraordinary lawyer and public servant.

Congratulations to Marlin on a remarkable career.

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Extraordinary Legal Scholar Cont'd

By Marlin Osthus, Regional Director

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current Supervisory Attorney Nichole Burgess (who at the time was a staff attorney) in litigating a series of charges against Whitesell Corporation, one of the most challenging cases the Minneapolis office has litigated in the last ten years. Besides two administrative hearings and ALJ and Board decisions, the Region was embroiled in two 10(j) injunctive proceedings. As late February 2016 – and only weeks before his retirement – Jim and a less experienced staff attorney were in Sioux City, Iowa contesting the discharge of an employee who was terminated for expressing safety concerns in a Facebook post. Jim also shared his expertise at the national level, as a member of the planning committees and as a trainer at Agency trial training conferences.

Since I have been Regional Director, I have relied on Jim to review complaint drafts prior to issuance. In the more complex cases, Jim usually drafted the complaints himself, invariably coming up with a structure that simplified seemingly impenetrable legal theories. In addition, Jim was responsible for the Region's approach in responding to various pre-trial motions, for the accuracy of 10(j) pleadings, and for the review and editing of decisions and legal memoranda. He has a keen

analytical mind, which I took advantage of in factually or legally close cases, enabling the Region to make sound decisions on whether to issue complaints.

Jim and I started with Region 18 within months of each other (I started in February and Jim the following October, way back in 1977). We are both graduates of St. Olaf College in Northfield, Minnesota, as are our wives and daughters. In spite of the fact that we were two years apart at St. Olaf, we even made a brief connection in college, when Jim was tutoring students who needed help in a logic class, and I needed the tutoring. The logic class was taught by the philosophy department, and while we were both philosophy majors at St. Olaf, Jim veered to the left brain with his other major in mathematics, while I with my second major in religion – did not. Thus, Jim was not only an integral member of the staff at Region 18 – he also got me through a logic class I had to take in order to major in philosophy.

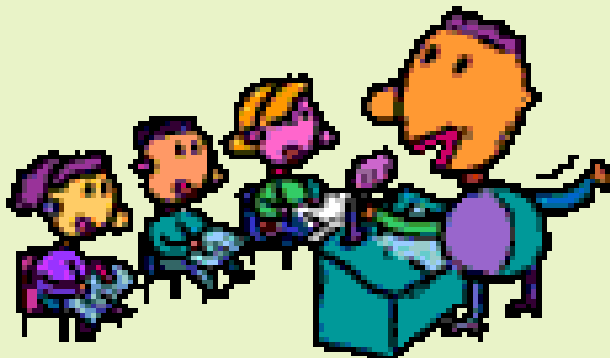
Congratulations to Jim on an extraordinary career, and the entire staff wishes him an equally successful retirement.

Outreach: Want A Speaker For Your Organization?

The NLRB is continuing its efforts to reach community groups with information about the Agency. Regional staff members are available to speak to organizations, large and small, at your request. We regularly provide speakers to make presentations to colleges, high schools, technical schools, labor unions, employer associations, staff of legal services or other civil rights agencies, or any group with a particular interest in the nation's labor laws.

We have given presentations on introductory and general information such as the history of the Agency and the National Labor Relations Act, how to file charges and petitions with the Agency, and how the Agency investigates cases. The Region has also given more in-depth

presentations on specific issues such as successorship, the duty of fair representation, *Beck* Rights, protected concerted activity in a non-union workplace, etc.



For Region 18 inquiries, please contact the Region's Outreach Coordinator, Chinyere Ohaeri at 612-348-1766 or via email at Chinyere.Ohaeri@nlrb.gov to make arrangements for a speaker.

For Subregion 30 inquiries, please contact the Subregion's Outreach Coordinator, Percy Courseault at 414-

297-3877 or via email at Percy.Courseault@nlrb.gov to make arrangements for a speaker.

Training and Awards at Compliance Conference

By Richard Neuman, Compliance Officer

In mid-September, almost 80 field employees working in the area of Compliance gathered for a Compliance Conference at the new headquarters of the National Labor Relations Board in Washington, DC. This included Supervisors, Professionals and Administrative Professionals. This was the first time the agency has held a Compliance Conference since 2010.

For those not familiar with Compliance: each Region has staff members who assure that Respondents and Charged Parties comply with settlement agreements, Board Orders and Court Orders. This often includes extremely complicated backpay calculations and is a very nuanced area of labor law. Only a few employees in each Region work in in this area. Region 18/ Subregion 30 was lucky enough to send Compliance Officer Richard J. Neuman and Officer-in-Charge Benjamin Mandelman (both from the Milwaukee office) to the conference.

The conference’s focus was on the importance of Compliance in processing cases. Probably best articulated by Former General Counsel John Irving, “No matter how substantial the remedy and no matter how expeditiously it is obtained, it is meaningless unless the respondent actually does that which has been ordered to do or that which it has agreed to do.”

The five days were filled with training sessions concerning a number of different areas including: Immigration Issues, Derivative Liability, Affordable Care Act, Bankruptcy, Compliance Hearings, Contempt, Debt Collections, and Techniques in Cal-

culating Backpay. These presentations and trainings were performed by Headquarters and Field employees. Neuman presented on two different topics: (1) Techniques in Calculating Backpay and (2) Requesting Distribution from the Department of Treasury.

The Conference featured an awards ceremony to honor noteworthy compliance successes throughout the country. General Counsel Richard Griffin presented Mandelman and Neuman an award for



From left to right: Subregion 30 Officer in Charge Ben Mandelman, Compliance Officer Rick Neuman, and General Counsel Richard Griffin

“Outstanding Achievement in Compliance” for their work in resolving *American Standard Companies, Inc.*, 356 NLRB No. 4 (2010). The American Standard case was transferred to Subregion 30, Milwaukee from Region 8, Cleveland. It involved a contract that was unilaterally implemented in 2002 and affected over 850 employees. After an extremely detailed calculation involving over 27 different components for each employee, the parties reached a resolution settling this 13-year-old dispute. It was an honor to receive this distinction, as only two other compliance employees in the agency received awards.

This was a very rewarding and enjoyable experience which included an opportunity to attend an outing to a Washington Nationals game. We were able to learn from and build relationships with others agency employees throughout the country that perform the same work. Since there are not many of us in Region 18/Subregion 30 that perform compliance work, we use our contacts in other regions as a resource in performing our duties. These relationships are crucial in performing our jobs to the best of our abilities. We look forward to the next conference and hope that it will not be another 6 years.

DID YOU KNOW?

- Every day there is someone here to answer your questions.
- The information officer is responsible for incoming phone calls and visitors. We rotate the responsibility daily, and make an effort to answer all inquiries before the close of business.
- The information officer cannot offer legal advice, but can provide information about NLRB procedures and the NLRA, refer you to the appropriate government agencies, and log questions for future reference.

Fond Farewell cont'd

By Nichole Burgess, Supervisory Attorney

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While Jim's article takes a very logical approach to describing Marlin's many attributes, I'll take the more orange approach. In addition to his keen sense of humor, the orange and blues among us agree that Marlin is even-handed, open-minded, supportive, committed to enforcing the statute and protecting employees, pragmatic, sensitive and diplomatic. He handled professional, personnel and personal issues with a level of sensitivity and diplomacy which is really unparalleled and which allowed smooth functioning of the Regional Office. While I could go on and on, it is sufficient to say that Marlin has been an outstanding manager and leader and he will be greatly missed.

“Marlin brought out the best in us. He always considered everyone's opinion before deciding a case, and kept his ego out of his decision making. He examined all the evidence dispassionately and exhaustively, and brought intellectual rigor to every deliberation. He was a gentleman in the best sense of that word – polite, respectful and fair.”

-Pam Scott, Former Deputy Regional Attorney

Though he similarly shares a sense of humor and commitment to office camaraderie, Jim on the other hand, is truly a gold. Thus, I will use a legal story to pay homage to him. Jim second chaired my first trial. As detailed in Marlin's article, Jim is a great trial attorney and an evidence guru. The trial was against Ryder Transportation, and involved an organizing campaign among

school bus drivers. One of Respondent's primary defenses was that its Human Resource Manager was so experienced that he would never do anything to “run afoul of the Act.” Well, this seemed a bogus defense to me, so I racked my brain trying to figure a way to undermine it. A Westlaw search turned up another case where that same manager, represented by the same attorney, was found to have personally committed an 8(a)(1) violation and been involved in an unlawful termination. I asked Jim whether I should attempt to elicit this testimony and then impeach the manager with the case. He looked at me and said, “Absolutely! You've got to get your jollies while you can.” We continue to use that phrase in the office today. That sentiment stuck with me over the years, and I credit it for helping make the Regional office both a fun and extremely rewarding place to work, due in no small part to the great staff lead by our departing giants, Jim and Marlin.

This article was authored by Supervisory Attorney Nichole Burgess (orange) with editing by Field Attorneys Abby Schneider (gold) and Chinyere Ohaeri (blue), who toned it down a bit.

Each day, an agent is responsible for serving as the Region's Information Officer (I.O.). In this series, we share particularly interesting and informative I.O. questions and answers.

Dear Abby...

I work for a company that was recently sold, but all of my coworkers and I were kept on. Before the sale we had a union election. The union lost. Is there still a 12-month election bar before we can have another election?

A new election is barred only in a “unit or any subdivision” in which a previous election was held. Section 9(c)(3) applies to the unit, NOT THE EMPLOYER, so an election is barred in the same unit in the case of a SUCCESSOR employer during the 12-month period. *Kraco Industries, 39 LRRM 1236 (Feb. 20, 1957).*