UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Drivers, Chauffeurs, and Helpers, Local Union No. 639, a/w International Brotherhood of Teamsters	:	
Charging Party,	:	Case Nos.: 5-CA-35687, 5-CA-35738, 5-CA-35965, 5-CA-35994
- and -	:	
Daycon Products Company, Inc. Respondent.	:	

RESPONDENT'S MOTION FOR EXPLANATION TO AVOID APPEARANCE OF PREJUDGMENT OR BIAS, AND TO PLACE ON THE PUBLIC RECORD ANY COMMUNICATIONS CONCERNING THIS MATTER, OR IN THE ALTERNATIVE FOR REFERRAL TO THE INSPECTOR GENERAL OR RECUSAL

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Attorneys for Daycon Products Company, Inc.

Dated: March 14, 2011

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A litigant is entitled to a proceeding before a tribunal free from bias, prejudice or of even the appearance of having prejudged any matter to be determined by the tribunal. This right is based on the assurance of due process and a fair trial, and mandated by statutes, canons of judicial conduct and the Constitution. Because there exists evidence that the National Labor Relations Board ("Board" or "NLRB") has prejudged the two legal issues at the heart of this proceeding, Respondent seeks a full explanation and airing of the relevant facts. Absent adequate explanation of the circumstances underlying the Board's issuance of a press release relaying to the public *as settled fact* the primary legal disputes it is called upon to decide in this matter, Respondent cannot be assured of a fair hearing before an impartial tribunal.

BACKGROUND

Following its issuance of several complaints based on unfair labor practice ("ULP") charges filed by the Union, the Region proceeded to trial before administrative law judge Joel P. Biblowitz ("ALJ") on November 17-22, 2010. Following the close of that hearing, on or about December 1, 2010, the Board authorized the Region to pursue 10(j) injunctive relief in the District Court of Maryland. The Region (on behalf of the NLRB) filed its petition for injunctive relief on December 17, 2010, and subsequently the District Court heard arguments and evidence on January 20 and February 10, 2011. The District Court took the matter under advisement, and the parties are currently awaiting a ruling. On February 15, 2011, the ALJ issued his recommended decision in the underlying matter.[1]

The next day, visitors to the Board's website (www.nlrb.gov) were greeted with a purported "news release," on the front page under a section titled "Highlights," trumpeting the supposed victory of the Board. (Exh. 1)(hereafter "the Press Release") This document is

[1] By separate filing, Respondent will take exception to numerous factual and legal rulings made by the ALJ.

headlined "**NLRB Judge finds Daycon Products violated labor laws; must reinstate workers and resume bargaining with union.**" (Id.) It opens by reiterating a few of the findings of the ALJ, but quickly devolves into a straight-forward recitation of the purported facts involved in the matter. Without any qualification or context, the Press Release states that:

> Daycon employees have been represented by the Drivers, Chauffeurs and Helpers Local Union 639, affiliated with the International Brotherhood of Teamsters, since 1973. In April 2010, after about 10 negotiating sessions for a new contract, the company declared it had reached impasse and implemented its last bargaining order.[2] Days later, union employees walked out on strike **because of** the **unfair labor practice.**
>
> In cases **where a strike is due to an employer's unfair labor practices**, the employer must reinstate striking workers when they offer unconditionally to return to work, even if it means displacing workers who were hired in the meantime. In January,[3] the Regional Office petitioned the federal court for a temporary injunction forcing the company to rehire all striking workers. That petition is still pending.

(Exh. 1)(emphasis added).

As will be seen, the very existence of the Press Release raises substantial questions concerning this case, and the Board's attitude towards it. But even worse, the Press Release declares as fact the two main legal issues in dispute between the parties and on appeal before the Board – namely, whether Respondent's declaration of impasse was in fact an unfair labor practice, and if so, whether the strike was due to the unfair labor practice.

In a single sentence, the Press Release assumes and affirmatively states as fact both of these legal conclusions: "Days later, union employees walked out on strike because of the unfair labor practice." (Exh. 1) It is clear from the context that the claimed "unfair labor practice" is the company's declaration of impasse and implementation of its last bargaining offer.

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[2] "Order" is probably meant to be "offer;" perhaps a Freudian slip stemming from the Board's zeal to issue a bargaining order.

[3] As noted above, the actual date was December 17, 2010.

Thus, the official mouthpiece of the NLRB declared on the front page of its website, under "Highlights," both that the impasse was *in fact* an unfair labor practice and that the strike was *in fact* "because of" the ULP. The Press Release then helpfully points out what these "facts" dictate: Daycon "must" reinstate the striking workers, regardless of whether it hired replacements. (Id.)

The Board's overzealous (and factually inaccurate) pursuit of Respondent, to the point (apparently) of an attempt to publicly shame the Company cannot be countenanced.[4] The Press Release prejudges both legal and factual matters certain to come before the Board. In order to ensure the protection of its rights to a fair hearing by an impartial tribunal, Respondent now moves this Board for (1) a full explanation of the circumstances surrounding the selection of the decision of the ALJ as worthy of a front page news release on the Board's website; (2) the identity and an explanation as to the role of any employee involved in the selection, preparation, review, approval and/or placement on the website of the Press Release, as well as the reasons for doing so; and (3) the placement on the public record of any and all relevant communications concerning the foregoing issues. Absent the foregoing actions, the impartiality of the Board is clearly called into question.

ARGUMENT

I. THE BOARD IS REQUIRED TO ASSURE IMPARTIALITY IN ITS PROCEEDINGS, AND TO DISCLOSE AND PLACE ON THE RECORD ANY IMPROPER COMMUNICATIONS AS WELL AS PROVIDE AN ADEQUATE EXPLANATION OF THE SELECTION OF THIS CASE AS THE SUBJECT OF THE PRESS RELEASE

As a party to a proceeding before the Board, Respondent is "entitled as a matter of fundamental due process to a fair hearing." Overnite Transportation Company, 329 NLRB 990,

[4] Last year, the NLRB's website had over 2.3 million visitors, with over 9.3 million page views. (Exh. 2) (excerpt from 2010 Performance and Accountability Report, p. 32) In addition, the Press Release would have been emailed to the subscribers to the Board's subscription service.

998 (1999)(separate statement of Member Liebman). Indeed, one of the essentials of administrative hearings "is the resolution of contested questions by an impartial and disinterested tribunal." Berkshire Employees Ass'n. v. NLRB, 121 F.2d 235, 238 (3d Cir. 1941). Accordingly, "it is the Board's policy not only to avoid actual partiality and prejudgment, but also to avoid even the appearance of a partial tribunal." Center for United Labor Action, 209 NLRB 814 (1974). The Board's rules and regulations reflect this sentiment. See NLRB Statements of Procedure, Sec. 101.10(b)(noting that proceedings are to be "conducted in an impartial manner" and "in conformity with section 8 of the Administrative Procedure Act (5 U.S.C. § 557)[.]").

The Administrative Procedure Act ("APA") notes that "The functions of presiding employees and of employees participating in decisions ... shall be conducted in an impartial manner. [O]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as part of the record and decision in the case." 5 U.S.C. § 556(b).[5]

In addition, the Government in the Sunshine Act prohibits communications between any "interested person"[6] and "a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process[.]" 5 U.S.C. § 557(d)(1). Any such communications, whether

[5] Undersigned counsel has attached an affidavit pursuant to this statute. (Exh. 8)

[6] "The term 'interested person' is intended to be a wide, inclusive term covering any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have. The interest need not be monetary, nor need a person ... be a party to, or intervenor in, the agency proceeding[.] The term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated." PATCO v. FLRA, 685 F.2d 547, 562 (1982). Here, given that whoever drafted the Press Release and placed it on the website spoke on behalf of the Board, any communications of those involved in the selection, drafting and approval process for the Press Release and/or its placement on the website should be disclosed.

written or oral, must be placed "on the public record of the proceeding[.]" 5 U.S.C. § 557(d)(1)(C).[7] One court has noted that "the sweep of the Sunshine Act is broad" and its "statutory proscriptions are inviolate." Electric Power Supply Ass'n. v. FERC, 391 F.3d 1255, 1258 (D.C. Cir. 2004).

Consistent with the foregoing standards, the Fifth Circuit nearly seventy years ago made plain that "trial by a biased judge is not in conformity with due process of law," and noted that the requirement of impartiality is applied even more strictly to administrative agencies:

> [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, **the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication** where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

NLRB v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943)(emphasis added).

These standards mandate that where, as here, an objective observer would conclude that there is some evidence of prejudgment, the matter must be fully explained.

II. THE SELECTION OF THE OPINION OF THE ALJ AS WORTHY OF A FRONT PAGE PRESS RELEASE, AS WELL AS THE FACTUAL ASSERTION OF THE TWO PRIMARY LEGAL ISSUES IN DISPUTE BETWEEN THE PARTIES CONSTITUTES *PRIMA FACIE* EVIDENCE OF BIAS SUFFICIENT TO WARRANT AN EXPLANATION

A. The singular selection of this case for a press release out of hundreds of similar cases raises substantial questions

[7] Of course, should any improper communications or bias appear here, any involved Member would be required to recuse him or herself, as in such a case his or her "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The standards applicable to federal judges apply to Members of the Board. See Overnite Transportation Company, 329 NLRB 990, 998 (1999)(separate statement of Member Liebman). An article in the Maryland Gazette two days after the Press Release was issued notes that Nancy Cleeland, the head of the Office of Public Affairs at the Board had written an email to the Gazette the day following the Press Release. (http://www.gazette.net/stories/02182011/businew155207_32555.php)

Under the "News & Media" tab on the Board's website, it states "This is the place to find news about **significant** cases, settlements, complaints and decisions, as well as background material on the Agency and its leaders." (Exh. 3)(emphasis added) Similarly, under "News Releases" it states "News releases are issued in cases of **national and regional significance**, and to announce initiatives of the Board and General Counsel." (Exh. 3)(emphasis added).

Over the past decade, Administrative Law Judges have issued anywhere between 169 to 422 decisions annually. (Exh. 4)(74th Annual Report of NLRB, p. 9 Chart 8) Moreover, the Board almost always wins – for example, last year the Board won 91% of the decisions issued. (See Exh. 2) Given these facts, it is reasonable to question why the minor victory of winning a single case before an ALJ was plucked from obscurity to land on the front page of the Board's website – in short, why was this decision worthy of a "highlight;" why not some other decision?

A brief review of the press releases posted on the Board website over the past several years reveals that the treatment of the instant case appears to be unprecedented – indeed, a review of the headlines establishes that nearly every press release deals with either a decision of the Board itself, a Board initiative or statement, or a settlement. (See e.g. Exh. 5) In addition the press releases generally relay only allegations, making clear that the statements are allegations, or findings of the Board. Based on a review of the archived press releases from the past few years, there appears to be no similar treatment afforded any decision of an ALJ (probably because such a decision is not final until adopted by the Board, see, NLRB Rules and Regulations, Sec. 102.48(a)), much less a Board-issued factual statement in a press release of the very issues likely to be appealed.

Indeed, the very day that the decision was issued, there were three other decisions issued by administrative law judges – apparently none warranted a press release. As of March 11, 2011, there had been more than thirty decisions issued by ALJs; none were selected for a press release except for this one. The Board itself has issued roughly forty decisions since the beginning of the year; only one of those has merited mention in a press release. The day before the ALJ issued his decision in this case, the National Football League filed unfair labor practice charges against its players' union; was this case more newsworthy (from the public's standpoint) than that development?

One wonders why this case, and the common occurrence of a Board victory in a lowly ALJ proceeding merits such attention – out of the hundreds of decisions issued by ALJs annually, what is it about the Daycon case that calls for front-page treatment? Why does this case apparently have "national and regional significance" that apparently no other decision issued by an ALJ over the last several years has had? In these circumstances it is clear that the selection of the Daycon decision for "front page" treatment raises serious questions as to the Board's approach to and handling of this case.

B. The Board's internal procedure for the approval and issuance of a press release raises the inference that high-level Board employees were involved in the selection, drafting and/or approval process

If this were merely the decision of a low-level intern, not attributable to the Board, that would be one thing.[8] But it is clear that even the Board's Office of Public Affairs ("OPA") does not have the authority acting on its own to issue a press release concerning a

[8] It is clear that someone had to put it there; press releases don't just magically appear on the website. Moreover, as illustrated by the fact that the Board recently retracted a press release issued on its website only two days after the instant press release, the Board's press releases are followed and noticed at the highest levels. See (http://www.huffingtonpost.com/2011/03/09/nlrb-white-house-muzzled- n 833354.html) In short, nlrb.gov is the public face of the Board, and its pronouncements are and should be treated as authorized by the Board in the absence of some valid explanation.

Board matter without seeking approval from the highest levels of the Board. In a memorandum issued by the General Counsel last year, this is made clear.

In Memorandum GC 10-02, the General Counsel articulated the Board's "Press Release Policy," noting that it is "appropriate that the public be informed in a timely fashion of **significant** NLRB case developments." (Exh. 6)(emphasis added). While the memorandum notes that "[t]here are no hard and fast rules as to what actions in what cases warrant a press release," it details the procedure to be employed when a press release is to be issued. It states:

> When the Region, the OPA and the Division of Operations-Management agree with the appropriateness of a press release on the subject and its wording the necessary clearance for release will be pursued.

(Exh. 6, p. 1)

Plainly then, the decision to issue a press release, as well as the wording of that press release, is subject to high-level scrutiny at the Board. Indeed, as Memorandum GC 10-02 makes clear, once the Region and two separate department heads agree: (1) that a press release on a particular subject is appropriate, and (2) on the wording of the intended press release; only then will "the necessary clearance for release" be pursued. Id. Thus, neither the OPA nor the Division of Operations-Management has the authority to independently draft and issue a press release. Obviously then, the "necessary clearance" for the actual official release of a press release extends to the highest levels within the NLRB.

If the "necessary clearance" extends to or includes anyone involved in any way in the decisional process, it is very problematic.[9] Certainly, if any Member drafted, authorized, saw or approved the Press Release, this fact could merit his or her disqualification. But the basic problem lies in the fact that the Board itself – based solely on the selection and issuance of the

[9] Even so, it must be remembered that www.nlrb.gov is the official website for the NLRB as an entity.

Press Release – can legitimately be seen as having predetermined the outcome in this appeal. Certainly, in light of the stringent process to select and gain approval of the subject and wording for inclusion in a Board-issued press release, it is not unreasonable to assume that any such press release constitutes the official position of the Board qua the Board.[10]

Here, this creates an obvious issue as to the Board's having prejudged this case, as the problem with the purported facts communicated by the Board in the Press Release is not only that these facts are in dispute, but also that they are the primary legal matters to come before the Board on appeal. It is akin to the Supreme Court issuing a press release "highlighting" the decision of a lower court, and stating as fact the legal issues likely to come before it.

Even a cursory review of the language used in the Press Release demonstrates that an objective reader could easily conclude that the Board has already determined the facts and law of the case. The statements made in the third paragraph are factual assertions; they are not couched in cautious language or preceded by "The ALJ found," or "the judge ruled…:" (Exh. 1) Instead, they are contained in entirely separate paragraphs and conspicuously devoid of any qualifying or limiting language. There is no way around it: the direct assertion that the "union employees walked out on strike because of the unfair labor practice" presupposes both the illegal nature of the declaration of impasse and the cause of the strike – two of the primary issues before the Board in this very appeal.

Accordingly, as the selection of this case as the subject of a front-page press release seems highly unusual on its face, as does the presented-as-fact wording of the release, an explanation of the decision-making process and authorization for the issuance of the Press Release is warranted. See 5 USC § 552(B) (Agency must make available all "statements of the

[10] At the bottom of the press release, this fact is confirmed, as the final paragraph makes clear that the release is issued on behalf of the "National Labor Relations Board" as "an independent federal agency[.]" (Exh. 1)

general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available"). This is especially so when the Board Members themselves have already heard and passed on the underlying facts and merits of this case.

III. PRIOR TO THE ISSUANCE OF THE PRESS RELEASE, THE BOARD HAD ALREADY "REVIEWED THE UNDERLYING FACTS" AND "EVALUATED THE MERITS" OF THE CASE

This matter must be seen through the lens of the Board-authorized 10(j) proceeding; because of which, the facts and positions of the parties have already been reviewed by the Members of the Board. This was expressly admitted by the Counsel for the General Counsel before the District Court. Counsel for the General Counsel informed the District Court that "the Board has already reviewed ... the underlying facts of the case," and "authorized me to be here. ... So we view the chance of respondent prevailing on the merits as very slim." (Exh. 7, p. 6)(Tr. of Jan. 20 Hearing) Counsel for the General Counsel later repeated that "The Board has evaluated the merits and authorized me to be here, so there is slim chance of that situation taking place" (i.e., the Respondent prevailing on the merits). (Exh. 7, p. 86-87)

Counsel for the General Counsel acknowledged that the Region had requested 10(j) relief, and that the Acting General Counsel himself had drafted a memorandum directly to the Board detailing the relevant facts and legal issues involved in this matter. (Exh. 7, p. 87) He then explained to the District Court what this process involved:

> What [the Board] ha[s] done is taken a look at the underlying facts of the case and the parties' positions.... [S]o the Board has the factual basis on which the administrative trial will be proceeding, and they have the parties' positions. **They've heard this story before.**

Id. (emphasis added).

While it is not improper for the Board to have "heard this story before" (at least in the context of a 10(j) proceeding), it most certainly should not know – or even imply that it knows – how "this story" ends. And that is what the Board-authorized Press Release – which again, states *as fact* the two main issues now before the Board – has effectively declared: the end of the story. An objective observer would surely have little trouble spotting the bias here.[11]

To sum up: by the time the Press Release was authorized and issued on the front page of the Board's website (1) the Region had requested 10(j) relief; (2) the Acting General Counsel had agreed and drafted a memorandum directly to the Members, detailing the underlying facts and the parties' positions; (3) the Members had already "reviewed ... the underlying facts of the case," and "evaluated the merits;" and (4) the Board had authorized 10(j) relief against the company. While some familiarity with the facts may be expected in a 10(j) proceeding, former Chairman Gould has previously noted that "There is understandably an inherent disquietude whenever a Board member adjudicates a case involving a respondent against whom he has earlier authorized 10(j) proceedings." Detroit Newspaper Agency, 326 NLRB 700, 711 (1998)(Gould, dissenting).

This disquietude was amplified in the instant matter when, within one day of the issuance of the ALJ's decision,[12] the Board drafted the Press Release, and (presumably) the Members (or some other high-level person or persons at the Board) granted the "necessary clearance" to issue the Press Release on the Board's website; an action which appears to be unprecedented in these circumstances.

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[11] Indeed, the University of Maryland campus newspaper ran an editorial the week after the Press Release, taking the position that if the company appeals the decision, the university should terminate its contract with Daycon. (http://www.diamondbackonline.com/opinion/staff-editorial-restoring-the-union-1.2008672)

[12] The recommended decision of the ALJ was not even received by counsel for the company until February 22, 2011. Had it not been for the Region immediately filing the decision with the District Court, it is likely that the company would have learned of the decision only as a result of the Press Release.

The singling out of this case from hundreds of similar cases as the subject of a press release, as well as the injudicious language used in the Press Release, raises the issue of bias – in short, "something is rotten in the state of Denmark." *HAMLET*, ACT 1, SCENE 4. This is not some crazy conspiracy theory, the Press Release is objective evidence of prejudgment – somebody at the Board noticed the decision and decided to draft a press release prejudging the two primary legal issues in this case. Somebody in a high-level position at the Board gave the necessary clearance authorizing its release. And somebody at the NLRB pushed a button to put this case on the front page of the Board's website, relaying the prejudged "facts" for all the world to see. Under these circumstances, Respondent is entitled to a full explanation of precisely what is going on here. [13]

While Respondent is at this time seeking only an explanation, it is instructive that "The test for disqualification has been succinctly stated as being whether a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970). Surely, in the instant situation a disinterested observer could easily conclude that the Board has – in some measure – adjudged the facts as well as the law. The need for transparency here is apparent – as noted by the Phelps court, "Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand." Phelps, 136 F.2d at 564. If the Board cannot or chooses not to fully explain this matter, it should either refer the matter to the Inspector General for a thorough investigation, or recuse itself from hearing the case.

[13] Respondent is not the only one to wonder what is going on at the Board lately. Within the last two weeks, the Board was caught advertising "Find Info on How to Start a Union -- Get the Process and More on Our Site!" on Google.com. (http://www.politico.com/blogs/bensmith/0311/Googles_union_spirit.html?showall), and subsequently issued a one-of-a-kind "Fact Check." (http://www.nlrb.gov/news-media/fact-check)

CONCLUSION

The Board should not be seen as "cheerleaders" for or against any cause or party. Rather, in order to remain an effective agency worthy of the public's confidence and the litigants' trust in its judgments, it should (indeed *must*) be seen as fairly hearing and *then* deciding the matters that come before it. This Board should not appear to the public as Lewis Carroll's Queen of Hearts, shouting "Sentence first – verdict afterwards." Rather, the Board is statutorily mandated to avoid even the appearance of partiality, bias or prejudgment. Respondent expects no more; and this Board should ensure no less.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, copies of the foregoing **MOTION FOR EXPLANATION TO AVOID APPEARANCE OF PREJUDGMENT OR BIAS** were electronically filed and served by email upon the following:

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March 15, 2011

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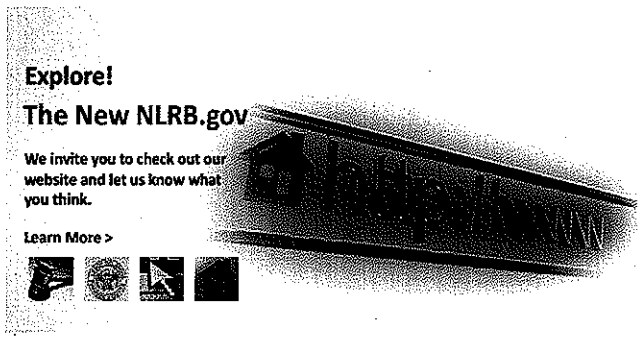
EXHIBIT 1



Highlights

February 16, 2011

NLRB Judge finds Daycon Products violated labor laws; must reinstate workers and resume bargaining with union

An NLRB Administrative Law Judge has issued a decision finding that a Maryland manufacturer of janitorial products violated federal labor laws by breaking off negotiations with its employees' union, and by refusing to reinstate striking workers when they offered to return.

February 11, 2011

Chairman Liebman issues statement on today's House hearing

This morning, a subcommittee of the House Education and The Workforce Committee held a hearing on "Emerging Trends at the National Labor Relations Board". In response to requests for comment, Chairman Wilma Liebman issued a statement. "The most significant 'emerging trend' at the NLRB," she began, "is that the agency is coming back to life after a long period of dormancy."

February 9, 2011

New NLRB website launches today with more information and greater ease of navigation

The National Labor Relations Board today announced the launch of a new agency website that is more flexible, timely, easy to navigate, and useful to a variety of audiences, from practitioners to first-time visitors.

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Sign up for updates or to access your subscriber preferences.

NLRB Judge finds Daycon Products violated labor laws; must reinstate workers and resume bargaining with union

February 16, 2011

Contact:
Office of Public Affairs
202-273-1991
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www.nlrb.gov

An NLRB Administrative Law Judge has issued a decision finding that a Maryland manufacturer of janitorial products violated federal labor laws by breaking off negotiations with its employees' union, and by refusing to reinstate striking workers when they offered to return.

In his decision, issued on February 15, Judge Joel P. Biblowitz ordered Daycon Products Company, Inc. to reinstate the employees and make them whole for any losses incurred because of the refusal to reinstate them earlier. The judge also found the company illegally subcontracted out work without negotiating with the union. He ordered the company to rescind any unilateral changes and to resume bargaining.

Daycon employees have been represented by the Drivers, Chauffeurs and Helpers Local Union 639, affiliated with the International Brotherhood of Teamsters, since 1973. In April 2010, after about 10 negotiating sessions for a new contract, the company declared it had reached impasse and implemented its last bargaining order. Days later, union employees walked out on strike because of the unfair labor practice.

In cases where a strike is due to an employer's unfair labor practices, the employer must reinstate striking workers when they offer unconditionally to return to work, even if it means displacing workers who were hired in the meantime. In January, the Regional Office petitioned the federal court for a temporary injunction forcing the company to rehire all striking workers. That petition is still pending.

The National Labor Relations Board is an independent federal agency vested with the authority to safeguard employees' rights to organize and to determine whether to have a union as their collective bargaining representative, and to prevent and remedy unfair labor practices committed by private sector employers and unions.

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Resources

The NLRB Process
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EXHIBIT 2

with its employees due to trimmed benefits and alterations in salary structure and offered to work with the employer and the CWA to ensure workers were treated fairly. Another letter raised concerns that the employer's plan to impose new compensation to employees might result in layoffs and noted a desire to ensure that employees were treated fairly. A third letter to the employer offered to host an open forum for the parties to discuss the issues in an atmosphere free from innuendo or threats. The Board determined that the employer failed to show by specific evidence that there was prejudice to the election, rejecting the employer's arguments that the aforementioned letters by third parties would mislead reasonable employees into believing that the Government supported the union in the election and/or that the letters threatened adverse economic consequences if the union lost the election.

Texas Dental Association (Case 16-CA-25840) – The Regional Office in Fort Worth, TX (Region 16) distributed $900,000 in backpay awards to two former employees who were fired in relation to a petition complaining of poor management and unfair treatment. The Texas Dental Association also agreed to post a notice informing employees that they cannot be fired for acting together for mutual benefit and protection. One employee who had helped write the petition was fired after a fragment of it was found on his computer. The second employee, a supervisor who refused to divulge the names of employees involved in the petition, was also fired. An ALJ found the first employee was unlawfully fired for engaging in protected activity, and that the supervisor was fired for refusing to engage in unlawful activity by divulging the employees' identities. The Judge's ruling was upheld by the Board. The matter was settled when the case was pending before the 5th Circuit. □

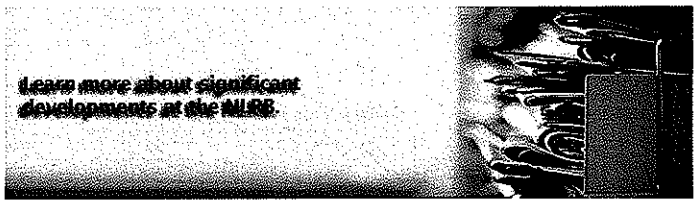
Alden Leeds (Case 22-CA-29188) – Region 22 (Newark, NJ) obtained a temporary injunction and reinstatement for about 50 employees, who were unlawfully locked out during bargaining for a successor collective bargaining agreement. The ALJ similarly found the lockout to be unlawful. □

Independent Residences, Inc. (Case 29-RC-10030) – Region 29 (Brooklyn, NY) deftly handled a representation case where the employer filed objections to the election based on the existence of a state law that precluded state funds being used to encourage or discourage union organization or participation in an organizing drive. The Board applied a third-party analysis and determined that the state law did not interfere with the conduct of the Board election because it did not bar any form of campaign speech or conduct and the evidence demonstrated that the employer did engage in a vigorous campaign to defeat the union. □

STATISTICAL HIGHLIGHTS □

- The Board issued 315 decisions in contested cases in FY 2010.
- 95.1 percent of all initial elections were conducted within 56 days of filing of the petition.
- Initial elections in union representation cases were conducted in a median of 38 days from the filing of the petition.
- Acting on the results of professional staff investigations, which produced a reasonable cause to believe unfair labor practices had been committed, Regional Offices of the NLRB issued 1,243 complaints, setting the cases for hearing.
- A 95.8 percent settlement rate was achieved in the Regional Offices in meritorious ULP cases.
- The Regional Offices won 91 percent of Board and ALJ ULP and Compliance decisions in whole or part in FY 2010.
- A total of $86,557,683 was recovered on behalf of employees as backpay or reimbursement of fees, dues, and fines with 2,250 employees offered reinstatement.
- The Agency received in FY 2010 116,223 inquiries through its Public Information Program.
- Agency representatives participated in 630 outreach events during FY 2010.
- In FY 2010, the NLRB's Web site attracted 2.3 million visitors with over 9.3 million page views.
- The Agency received 27,129 calls through its toll-free number in FY 2010.

EXHIBIT 3



News & Media

The Office of Public Affairs is dedicated to helping journalists and the general public understand the mission and activities of the National Labor Relations Board. This is the place to find news about significant cases, settlements, complaints and decisions, as well as background material on the Agency and its leaders.

Contact the Office of Public Affairs

Have questions about our news and initiatives? Contact the Office of Public Affairs for more information.

Learn more >

News Releases

News releases are issued in cases of national and regional significance, and to announce initiatives of the Board and General Counsel.

Learn more >

Announcements

Check here for significant personnel changes, such the naming of a new Regional Director, and other internal Agency news.

Learn more >

Backgrounders

The NLRB occasionally prepares background kits about important issues that may include fact sheets, links to documents, and statistical information.

Learn more >

Fact Check

This feature encourages accuracy in the media by correcting common misperceptions and errors of fact when they are brought to our attention.

Learn more >

Graphs & Data

In its 75-year history, the National Labor Relations Board has counted millions of votes, investigated hundreds of thousands of charges, and issued thousands of decisions. The numbers tell an important part of the Agency's story. In this section, we have compiled some of that data into charts and tables, organized into five sections that reflect the NLRB's work. Over time, we plan to add more graphics to this section, and welcome your comments and suggestions at publicinfo@nlrb.gov.

Learn more >

Multimedia

This section contains official portraits of the Chairman, Board Members and the General Counsel, photos from regional offices, and historic photos for use by the media.

Learn more >

Printer-friendly version

EXHIBIT 4

SEVENTY FOURTH

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

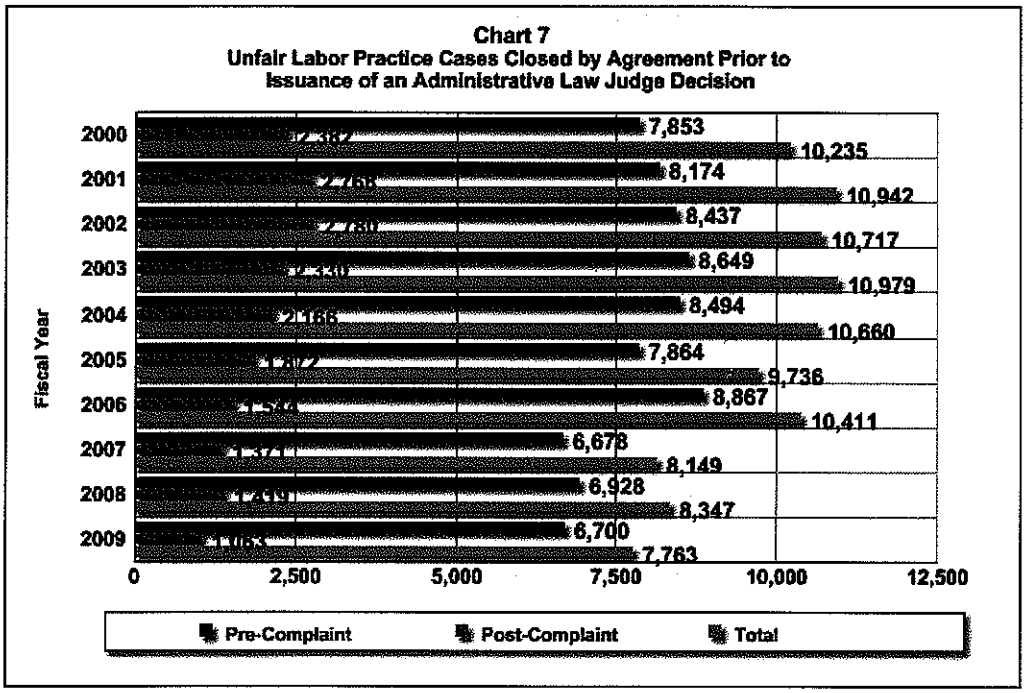
FOR THE FISCAL YEAR

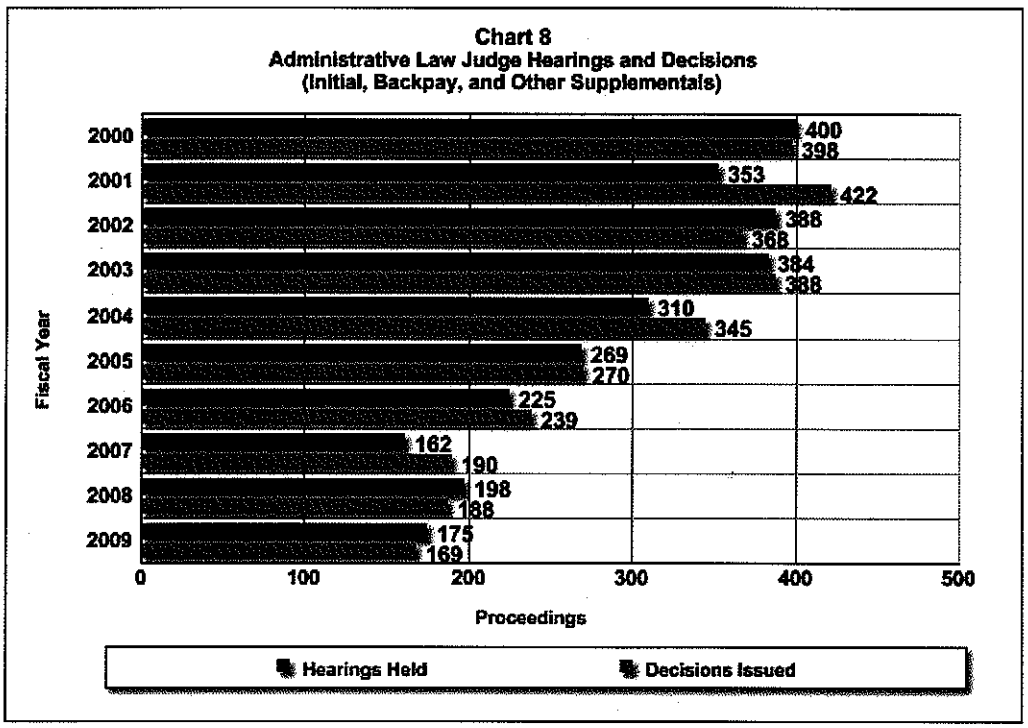
ENDED SEPTEMBER 30

2009

UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C. • 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

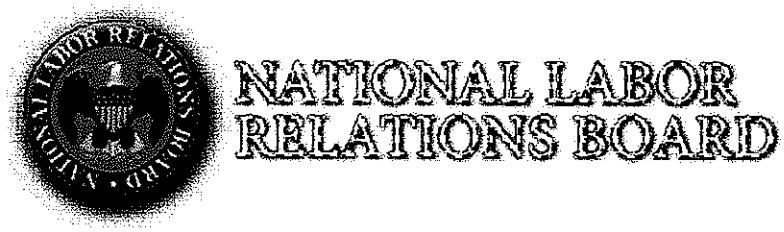




By filing exceptions to judges' findings and recommended rulings, parties may bring unfair labor practice cases to the Board for final NLRB decision.

In fiscal year 2009, the Board issued 195 decisions in unfair labor practice cases contested as to the law or the facts—159 initial decisions,

EXHIBIT 5



Release Date	Subject
February 7, 2011	Settlement reached in case involving discharge for Facebook comments
January 31, 2011	Federal judge orders Indiana concrete company to restore drivers' pay, recognize and ba with their union
January 28, 2011	Vote counts released for elections at Ohio health care facilities
January 14, 2011	NLRB advises Attorneys General in four states that secret-ballot amendments are preem by federal labor law
January 10, 2011	Jimmy John's election results set aside as employer settles charges
January 10, 2011	NLRB invites briefs regarding charter school jurisdiction
January 5, 2011	White House nominates Lafe Solomon to be General Counsel, Terence Flynn to be Board Member
January 3, 2011	Iowa gelatin manufacturer agrees to rehire seven employees
December 22, 2010	NLRB invites briefs regarding appropriate bargaining units in long-term care facilities
December 21, 2010	Board proposes rule to require posting of NLRA rights
December 20, 2010	Acting General Counsel builds on initiative seeking real-time remedies for serious violatic during organizing campaigns
December 17, 2010	Federal judge orders Kaiser Permanente to grant promised raises
December 9, 2010	U.S. judge orders New Jersey nursing home to rehire two employees
December 6, 2010	Board finds employer and union agreement in Dana case was lawful

Release Date	Subject
November 19, 2010	Los Angeles hotel settles NLRB case with $1.3 million payment
November 17, 2010	NLRB invites briefs in case involving nonemployee union access at Milwaukee area retail locations
November 16, 2010	Federal judge orders New York laundry to rehire employees
November 10, 2010	Briefs received, posted on cases involving successor employers and voluntary recognitio agreements
November 8, 2010	Fifth Circuit Court of Appeals affirms injunction sought by NLRB
November 8, 2010	Employees at Michigan turkey processor reject union in NLRB election
November 4, 2010	Sacramento Coca-Cola will recognize Teamsters in NLRB settlement
November 2, 2010	Complaint alleges Connecticut company illegally fired employee over Facebook comment
October 29, 2010	Complaint issued against hair salon chain for 'secret ballot' pledge
October 28, 2010	Security firm to pay $276,000 to make whole former trainees in Texas
October 25, 2010	Board orders compound interest, electronic notice posting

1 2 3 4 5 6 7 8 9 ... next › last »

EXHIBIT 6

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-02 March 31, 2010

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Press Release Policy

NLRB case actions can have an important impact not only on the individuals, labor organizations and employers who are directly involved, but also on local communities and the broader public. Agency action in these cases is undertaken in pursuit of the public policy objectives expressed in the National Labor Relations Act and it is, therefore, appropriate that the public be informed in a timely fashion of significant NLRB case developments.

Accordingly, I am asking all Regional Directors to cooperate with the Agency's new Office of Public Affairs (OPA), directed by veteran journalist Nancy Cleeland, as it develops a more active public information policy. As part of that effort, Regional Directors, working with their AGCs should provide the OPA with notice of upcoming events in significant cases such as the issuance of complaints, pursuit of injunctive relief, settlements, issuance of Decisions and Directions of Elections, Post-election reports and scheduling of elections.

There are no hard and fast rules as to what actions in what cases warrant a press release. An OPA memo on 'What Makes News' is attached to aid in that analysis, but Regional Directors should use their discretion in deciding what to propose. Even an issue of apparent consequence only to a local constituency could be part of a national trend and therefore of interest to a larger audience. When in doubt, Regions should err on the side of suggesting a topic for an Agency press release.

The most efficient way to start the process is to email Ms. Cleeland and your Operations-Management contact a brief description of the case and case action concerning which a press release may be warranted, attaching relevant documents if possible. Typically, Ms. Cleeland will arrange for a brief phone discussion and then, if warranted, will draft a press release. The draft will then be emailed back to the Region and your Operations-Management contact for review. When the Region, OPA and the Division of Operations-Management agree with the appropriateness of a press release on the subject and its wording the necessary clearance for release will be pursued.

The Region should also suggest local news outlets to be contacted. When the proposed press release concerns a settlement or stipulation for election, the Region will be responsible for giving advanced notice to the party representatives that a press release may be issued.

Your cooperation in this effort to bring to the public information about the important work that we perform will promote the principles of open government, will advance the policies of the National Labor Relations Act and is consistent with President Obama's Open Government Directive.

Questions concerning this outreach effort should be directed to Ms. Cleeland at nancy.cleeland@nlrb.gov or at 202-273-0222; or your Assistant General Counsel.

/s/
R. M.

Enclosure
Release to the Public

cc: NLRBU
NLRBPA

What Makes News?

Timely – Timing is the single most important factor in getting our story out. Ideally we should have a release ready within a few hours of an event, and no less than 24 -- even better if we can give reporters a heads-up beforehand.

Big Impact – Higher news value if the event (decision, 10(j), etc.) impacts many people, or a significant subgroup of people.

Name-recognition– A familiar brand (e.g. Starbucks, Hershey) or a famous person raises news value.

Surprising – The old 'man-bites-dog' rule still holds.

Inspiring – A story of heroism, altruism or personal growth will catch attention.

Outrageous – Behavior that most people would view as outrageous – such as mass firings, physical harm – is newsworthy.

Trend – 'Three makes a trend' is a familiar newspaper adage. Journalists love to be out in front on a trend.

Record – The biggest, longest, shortest, oldest, etc. is always more notable.

Anniversary – News organizations and radio talk shows love anniversaries, as they provide a peg for a story that otherwise wouldn't be news.

Think you have a news story? We'd love to hear about it. Please contact Public Affairs Director Nancy.Cleeland@nlrb.gov, 202-273-0222; or New Media Specialist Anthony.Wagner@nlrb.gov, 202-273-0187.

EXHIBIT 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

WAYNE R. GOLD	.	
vs.	.	DOCKET 10-3540
DAYCON PRODUCTS COMPANY	.	GREENBELT, MARYLAND
	.	JANUARY 20, 2011

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE DEBORAH K. CHASANOW
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

FOR THE PETITIONER: SEAN R. MARSHALL, ESQ.

FOR THE RESPONDENT: MARK McKAY TRAPP, ESQ.
PAUL ROSENBERG, ESQ.
KARA MATHER MACIEL, ESQ.

Court Reporter: Sharon O'Neill, RMR
Official Court Reporter
United States District Court
6500 Cherrywood Lane
Greenbelt, Maryland 20770

1 appeal? And isn't that what I have to look at, is what harm
2 would they suffer if I grant an injunction but ultimately they
3 prevail?
4 MR. MARSHALL: Well, I think -- I think you phrase it
5 correctly, Your Honor. But we view the harm to the respondent
6 as being very slight, given that the Board has already reviewed
7 on the underlying facts of the case. It's not the
8 administrative record but the underlying facts of the case, as
9 well as the parties' argument, and as authorized.
10 I'm here because they authorized me to be here.
11 Otherwise I wouldn't be here. So we view the chance of
12 respondent prevailing on the merits as very slim.
13 THE COURT: Is that appropriate for me to take into
14 account on the prong of balancing the equities, the hardships?
15 MR. MARSHALL: I don't think that these, that the
16 four elements of traditional equitable criteria are each to be
17 considered in a vacuum. They're all to be looked at in one
18 consistent examination of whether the relief sought is
19 equitable.
20 And the final element, Your Honor, is that the
21 equitable relief is in the public interest.
22 THE COURT: And in this context what does that mean?
23 MR. MARSHALL: In this context, Your Honor, I think
24 that it probably is best described as a petitioner is not a
25 private party seeking to assert a private right.

1 of harms? Somebody has this job, a permanent replacement.
2 MR. MARSHALL: That's correct.
3 THE COURT: And if the union -- if the company is
4 correct that this, that they're not obligated to take back the
5 striking workers --
6 MR. MARSHALL: Um hum.
7 THE COURT: -- then that person is there and has a
8 legitimate right to that job.
9 MR. MARSHALL: That's correct.
10 THE COURT: Assume you're right that the union
11 employees had the right to it. They can't both have it right
12 now.
13 MR. MARSHALL: That's correct.
14 THE COURT: So isn't that equipoise? Balance of
15 equities don't favor the union employee. They don't favor the
16 other. They're in equipoise. But you have to prove that the
17 balance of hardships favors the Petitioner. If that's what you
18 want me to look at, then tell me why that isn't the situation.
19 MR. MARSHALL: I think -- I think that that
20 evaluation by necessity has to consider the likelihood of
21 success on the merits, and that the Board has considered, at
22 least in terms of the merits of that possession, which I think
23 if I understand your question, Your Honor, depends on a merit
24 resolution.
25 The Board has evaluated the merits and authorized me

1 to be here, so there is a slim chance of that situation taking
2 place, Your Honor.
3 THE COURT: But the ALJ hasn't issued a decision.
4 The Board hasn't reached the merits.
5 MR. MARSHALL: That's correct. But what they have
6 done is taken a look at the underlying facts of the case and
7 the parties' positions. If I could just speak briefly about
8 how the process works.
9 The region that I work for, region five, investigates
10 the case, and it's a rather all encompassing investigation,
11 culling information from both the charging party, in this
12 instance the Teamsters, as well as from the employer who, to be
13 fair, Your Honor, was also the charging party against the union
14 in charges that were dismissed and upheld on appeal. So there
15 was quite a bit of information about what happened in the
16 parties' course of bargaining that was available to the region.
17 The region then makes a recommendation to an office
18 in Washington called the Injunction Litigation Branch. They
19 then evaluate the region's memo. They make a recommendation to
20 the action General Counsel, in this case Wayne Solomon.
21 He writes a memo to the Board itself, so the Board
22 has the factual basis on which the administrative trial will be
23 proceeding, and they have the parties' positions. They've
24 heard this story before.
25 THE COURT: Um hum.

EXHIBIT 8

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Drivers, Chauffeurs, and Helpers, Local Union No. 639, a/w International Brotherhood of Teamsters	:	
Charging Party,	:	Case Nos.: 5-CA-35687, 5-CA-35738, 5-CA-35965, 5-CA-35994
- and -	:	
Daycon Products Company, Inc.	:	
Respondent.	:	

AFFIDAVIT OF APPEARANCE OF PREJUDGMENT OR BIAS, IN SUPPORT OF MOTION FOR EXPLANATION

1. My name is Mark M. Trapp. I am an attorney with Epstein Becker & Green in Chicago, Illinois. I am counsel of record for the Respondent in this matter.

2. I make this affidavit based upon my own personal knowledge of the matters discussed herein.

3. I am filing this affidavit pursuant to 5 U.S.C. § 556(b), in order to receive an explanation regarding what I perceive to be bias or prejudgment of the above-named matter.

4. On February 16, 2011, I viewed the website at www.nlrb.gov. There I saw a press release issued by the Board, titled "NLRB Judge finds Daycon Products violated labor laws; must reinstate workers and resume bargaining with union." This article is attached to the Motion filed herewith.

5. Over the past several years, I have regularly reviewed items on the Board's website. I do not recall seeing an opinion of an ALJ which was subject to appeal before the Board being the subject of a press release.

6. On March 11, 2011, I reviewed the www.nlrb.gov website, and the press releases found there. I did not see any that are comparable to the one named in paragraph 4 above. In addition, I reviewed the exhibits attached to the Motion for Explanation filed herewith.

7. Based upon my review, I feel there is objective evidence of prejudgment and/or bias in this matter, in the selection of it as the subject of a press release, and in the wording of the press release. I ask that the Board review this matter thoroughly, and place on the public record of this proceeding information sufficient to dispel any basis for bias or prejudgment.

FURTHER AFFIANT SAYETH NOT.

Mark M. Trapp

SUBSCRIBED and SWORN to before me
This 15th day of March, 2011.

Notary Public

"OFFICIAL SEAL"
LaKeisha J Brookins
Notary Public, State of Illinois
My Commission Expires 8/24/2013