January, 2007

B&K LABOR UPDATE

NLRB's Supervisor Decisions Create Numerous Issues.

In a long awaited development, the National Labor Relations Board has issued its interpretation of when an employee is a supervisor under the National Labor Relations Act and therefore is not entitled to Union representation and the protection of the Act. In deciding these cases, the three Republican Bush appointees devised an analytical framework that makes it easier for employers to prove that employees are supervisors under the Act. The two Democrat appointees dissented.

The three lead cases decided by the Board involved two cases in the health care industry and a third case in manufacturing. In the health care cases, the Board decided that charge nurses in Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006) were supervisors, but the charge nurses in Golden Crest Healthcare Center, 348 NLRB No. 39 were not supervisors. In the third case, Croft Metals, Inc., 348 NLRB No. 38, the Board decided that lead persons were not supervisors and therefore should be included in a production and maintenance unit. We shouldn't be fooled by the favorable outcomes in the two cases. The new standard stated by the Board will create more problems in organizing, will open more ways for employers to stifle employees' rights to choose to be represented, and will create problems in established collective bargaining relationships.

As an immediate result of these decisions, the Board on September 30, 2006 also remanded to Administrative Law Judges numerous cases that had been sitting undecided at the Board for years, in order to have the Judges apply the new standards to the cases.

The new standards will present a challenge in organizing. Not only will workers who an employer believes to be supervisors be subject to discipline for engaging in union activity, their involvement in a union campaign could scuttle the entire organizing effort. In a bargaining context, many union contracts cover member-employees who are or could be claimed to be supervisors. The ramifications flowing from their status should be understood by union representatives and employee benefit fund representatives for dealing with employers, and by unions for dealing with those individuals as members.

The two Democrat Board Members who dissented in these cases called the supervisory issue "among the most important in the Board's history." These cases and their implications will be discussed at length during Blitman & King LLP's Annual Labor and Employment Seminar to be held February 12, 2007 at the State Fairgrounds in Syracuse. We'll review the standards and how they apply to different work settings, and we'll also discuss with you steps that you should take in anticipating and responding to supervisory issues in organizing, in bargaining, within your membership, and in a benefit fund context.

Inside this Issue

Blitman & King LLP Annual Labor Seminar February 12, 2007

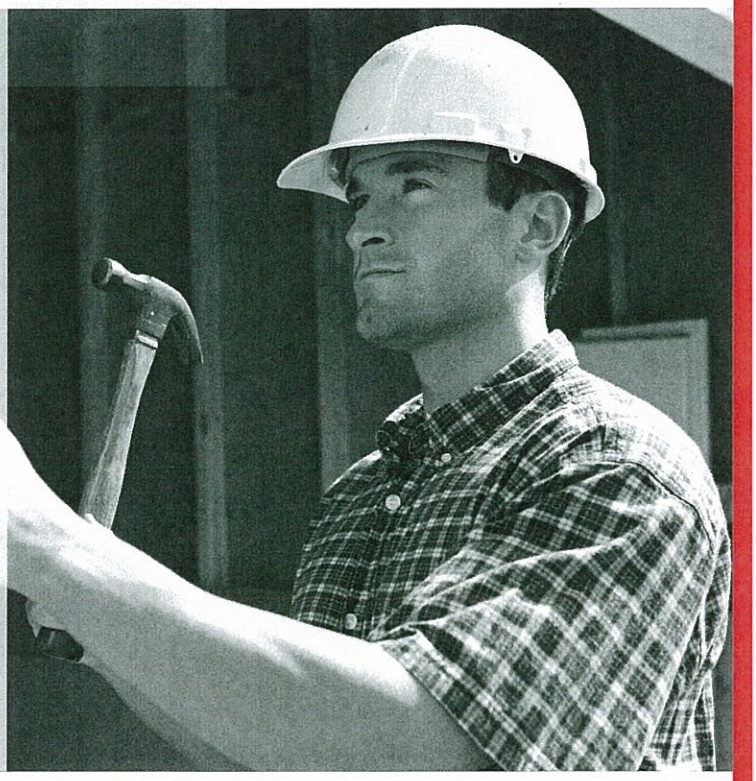
Construction Industry: Converting 8(f) To 9(a) Status Continues To Evolve.

We have discussed before the technicalities surrounding efforts to convert a Section 8(f) bargaining relationship to one governed by Section 9(a). Without such a conversion, a construction union at the end of the labor agreement can be faced with a runaway employer who is entitled to simply go non-union without bargaining. With the current Republican majority NLRB, we don't see this area loosening up, but a December 2006 decision of the D.C. Court of Appeals, affirming the Board's decision, does help in one respect.

In the case, M&M Backhoe Service, Inc. v. NLRB, DLR No. 232 (12/4/06), after the union specifically asked for recognition and 9(a) status under the NLRA, the employer agreed to language stating that it:

"acknowledges and agrees, based on a showing of signed authorization cards, that a majority of its employees have authorized the Union to represent them in collective bargaining" and that it "hereby recognizes the Union as the exclusive bargaining agent under Section 9(a) of the National Labor Relations Act."

However, the employer did not ask to see the signed cards. The employer argued before the Board and the Court that the conversion to Section 9(a) status hadn't taken place, because the union had failed to "prove" its majority status. Both the Board and the Court ruled that the employer could not walk away from its recognition agreement by declining to review the proof that the union had majority status, provided that the union's majority status back when the language was entered into was proven at trial. It is worth noting that in deciding the case at the NLRB level, two current Board Republicans, Chairman Battista and Member Schaumber, joined with a Democrat, Member Liebman, in upholding the conversion agreement.



This is another area of the law that has seen changes in recent decisions, and we will cover those changes in depth at the Blitman & King LLP Annual Labor and Employment Seminar in February, 2007.

Union Reporting On Taft-Hartley Funds: Labor Department Issues Final Rules On Form T-1.

New Rules for Form T-1 – What is it?

In October 2003, the U.S. Department of Labor issued a final rule requiring each union that files an LM-2 to file a Form T-1 on each "significant trust" in which the union has a financial interest, including training funds, pension and welfare plans, and educational funds. The T-1 contains information on the trust's assets, liabilities, receipts, disbursements, purchases and sales of certain assets, liability liquidation, and loans extended below market value or written off. In 2005, the Court of Appeals struck down the 2003 rule as overly broad, noting that it covered trusts over which the union had neither management control nor financial domination. The DOL has now issued a revised final rule, on September 29, 2006, which changes the extent of control a union must have over a trust in order for the reporting requirements to apply.

Who must file it?

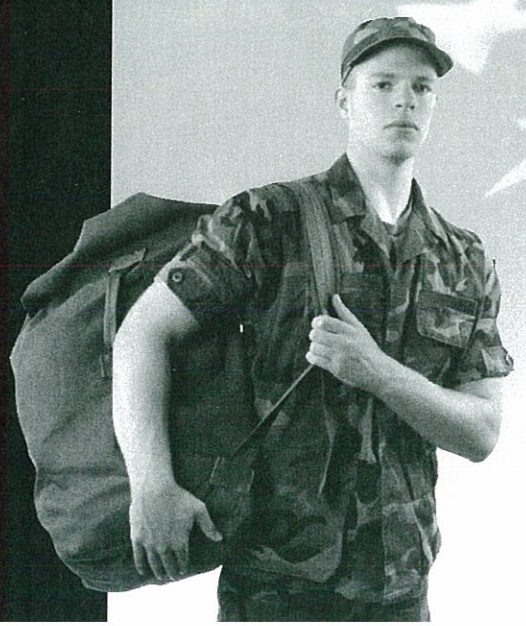
The new rule requires unions that have annual receipts of greater than $250,000 to file Form T-1 if: (1) a trust had annual receipts of $250,000 or more, and the union contributed $10,000 or more to the trust; and (2) the union, alone or with other unions, either appoints or selects a majority of the trust fund's governing board or contributes more than 50% of the trust's revenue during the one-year reporting period. Employer contributions made pursuant to a collective bargaining agreement are considered union contributions for purposes of the rule.

Are there any exemptions?

Yes, there are several exemptions from the filing requirement. Unions do not have to file Form T-1 for the following trusts: (1) a political action committee trust if the trust files publicly accessible reports with federal or state agencies; (2) a political organization for which reports are filed with the IRS; and (3) an employee benefit plan that timely files a complete annual report under ERISA (Form 5500) for the plan year. For a trust for which an independent audit was conducted in accordance with ERISA, an abbreviated report will suffice.

When is the new rule effective?

The rule is effective January 1, 2007. No Form T-1 need be filed for any trust's fiscal year that began before the effective date. Since the form must be filed within 90 days after the end of the union's fiscal year, and must cover the trust's most recent fiscal year beginning on or after January 1, 2007, the earliest deadline to file a Form T-1 is March 31, 2008, which applies if both the union and the trust have a fiscal year beginning on January 1, 2007. If the union's first fiscal year beginning after January 1, 2007, begins on one date, and the trust's first such fiscal year begins on a later date, the union must wait until the end of its fiscal year after the end of the trust's fiscal year. For example, if the union's fiscal year begins on April 1, 2007, and the trust's fiscal year begins on September 1, 2007, the T-1 would not be due until June 29, 2009. This date is 90 days after the end of the first fiscal year of the union (March 31, 2009) which follows the end of the trust's first fiscal year beginning.



Support for Our Military

For 2006, our Firm is again contributing to the Fort Drum organizations that provide support services for our military at the 10th Mountain Division. This is the most deployed division in the Army, and they can use our help. If your organization is looking for a great charity to support, you can contact Jim Sheets at Med VA Government Readjustment Counseling Services 315-772-0795.

NLRB Republican Member Schaumber Sides With Unions In Two Contested Decisions.

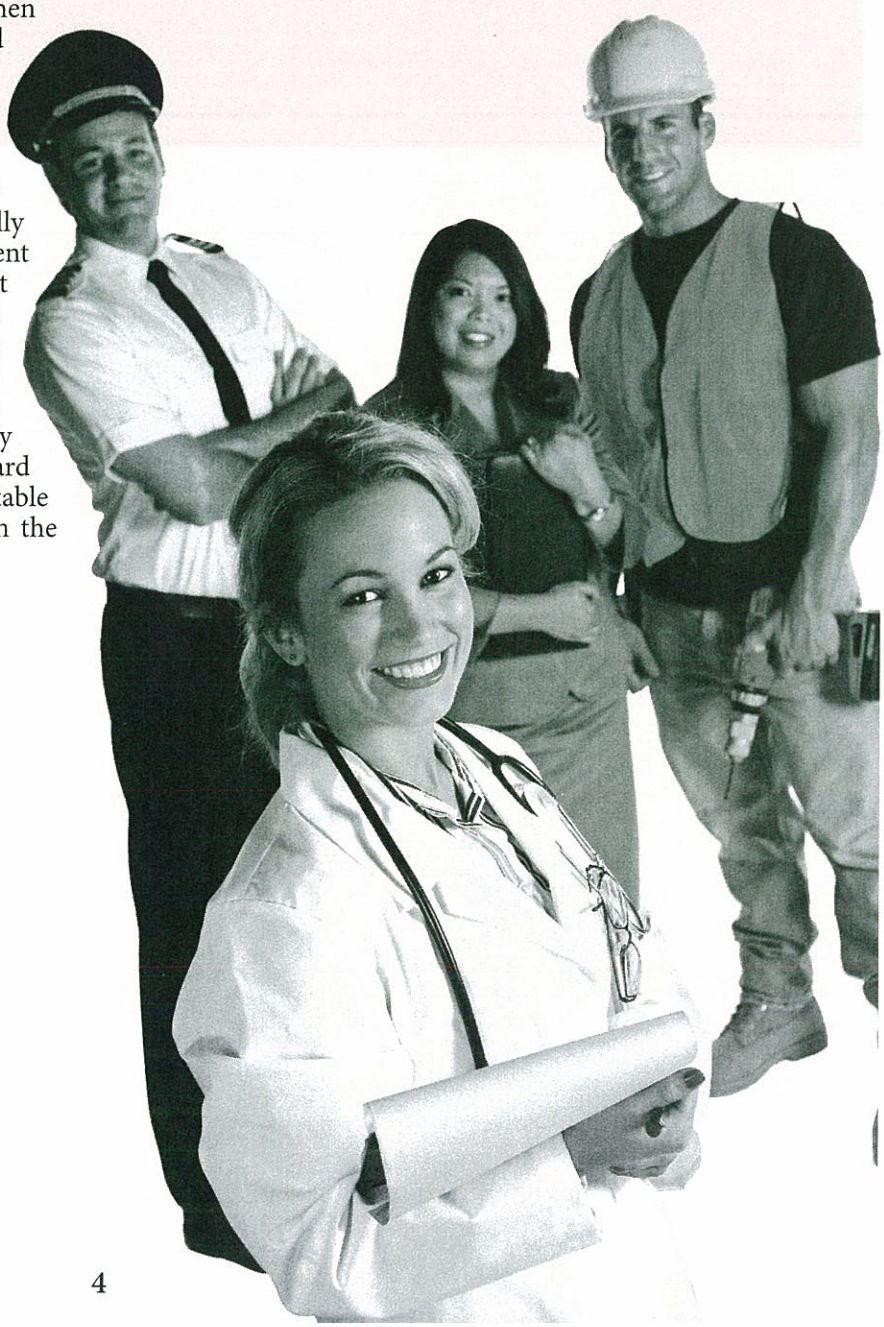
The Bush NLRB is marked by a Republican majority of three, with two Democrat appointees, no news there. Nevertheless, its decision-making remains important, since the NLRB can often-times be the only remedy available to a union against employer actions. It is encouraging that one of the Republican appointees, Member Peter Schaumber, in two recent decisions has broken with Republican Chairman Battista in order to find in favor of the unions.

Successor Employer.

The most recent case involved a successor employer context. In these cases, a union's rights are typically determined by the NLRB. When a new owner buys the assets of a unionized employer, current law usually gives the buyer the right to declare before the employees are actually hired that the buyer will be establishing new terms and conditions of employment for the workers. The union typically would then have to start bargaining from those reduced levels after the employees were hired. In a recent decision, Road & Rail Services, Inc., 348 NLRB No. 77 (November 30, 2006), Members Schaumber and Walsh upheld a contract negotiated by the union with the buyer before the hiring of the workforce by the buyer actually took place. The panel majority, over the dissent of NLRB Chairman Robert Battista, ruled that since the buyer was a successor employer that had signified its intent to take over the existing workforce and negotiate a contract with the union, there was nothing in the law to stop the parties from working out that deal. This is a fairly significant development, the first time the Board has faced this particular situation and it is notable that this Republican dominated Board ruled in the union's and workers' favor.

Neutrality/Card Check Agreement.

In another case, Heartland Industrial Partners, LLC, 348 NLRB No. 72 (November 7, 2006), Members Schaumber and Walsh, again over the dissent of Chairman Battista, upheld contract language requiring the employer to in turn require a new business that it controls to remain neutral during the union's organizing campaign, and to grant recognition based on a card check. This panel majority refused to find the language unlawful on its face as a violation of Section 8(e) of the Act.



Blitman & King LLP Attorneys Take Leadership Positions.

Blitman & King LLP attorneys are continuing a tradition of involvement in important professional activities that benefit our clients. This past August at the American Bar Association's Annual Meeting, Managing Partner **Jim LaVaute** was elected Chair-Elect of the **ABA's Labor and Employment Law Section.** Jim will succeed to the position of Chair of the Section in August, 2007, and will head the Section's 21,000 members including union, employer and government lawyers, and arbitrators. Both of these positions will give us continuing contact with top government officials involved in regulating employer-union relations and unions themselves. In September, Jim was invited to and attended NLRB Member Wilma Liebman's swearing-in ceremony at the Senate office building in Washington, D.C. In December, Jim welcomed a select group of lawyers to a special conference with the five NLRB members, the NLRB's General Counsel, the Director of the FMCS, and their senior staffs, in Washington, D.C., where issues of importance to labor were discussed with these government officials.

Jules Smith, a partner in the Firm, is a member of the Planning Committee for the ABA Labor and Employment Law Section's Annual continuing legal education conference to be held in Philadelphia November 7 - 10, 2007. He is involved with selecting government and practicing lawyers for presentations at the conference. **Ken Wagner,** a partner in the Firm, is an Editor of **The Developing Labor Law, Fifth Edition,** published in November by the ABA Labor and Employment Law Section and the Bureau of National Affairs, Inc., Washington, D.C. This two-volume book set is recognized nationally as the preeminent desk top reference resource on the National Labor Relations Act. Ken is also a co-chair of the Regional Program Subcommittee of the ABA's Labor and Employment Law Section, where he plans presentations on the law to government and agency personnel in NLRB regional offices around the country.

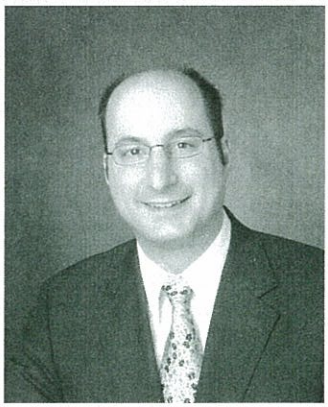
Tim Bauman, a partner in the Firm, was recently reappointed as co-chair of the Qualified Plans Subcommittee of the ABA Labor and Employment Law Section's Employee Benefits Committee.

Don Oliver, a partner in the Firm, is serving as President-Elect of the **Northern District of New York Federal Court Bar Association.** This organization is open to the more than 10,000 attorney members of the United States District Court for the Northern District of New York. They participate in professional activities, including presentations on the law, with all the judges in this federal district. Don is also Chair of the **New York State Bar Association Labor and Employment Law Section,** which is comprised of more than 2200 practicing attorneys, arbitrators and State government officials.

Nat Lambright, who became a partner in the Firm this month, has been elected as Labor Representative to the **Central New York Labor and Employment Relations Association.** Nat is also a Steering Committee member of the **Central New York Committee on Occupational Safety and Health.**

Jim LaVaute

Don Oliver



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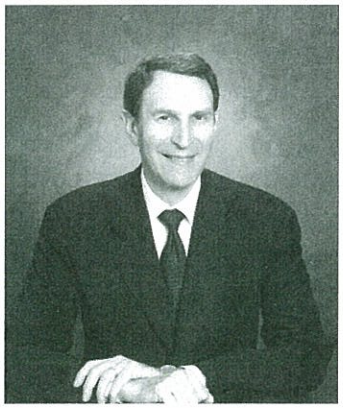

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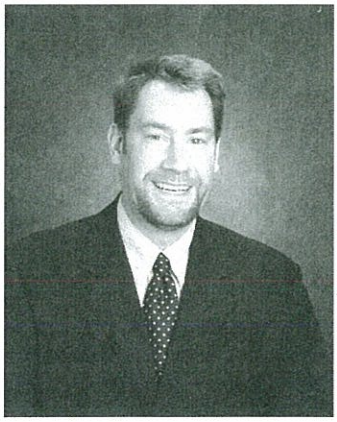
Kenneth L. Wagner



Nathaniel Lambright

Court Of Appeals Upholds Federal Convictions For Employer's Failing To Remit Withheld Employee Premium Co-pays And 401(k) Contributions.

One of the most difficult problems unions and benefit plans face is dealing with a bad employer that doesn't remit money withheld from employees' pay that is earmarked for contribution into employee benefit plans. A December 15, 2006 decision by the United States Court of Appeals for the Seventh Circuit in Chicago involves an additional and persuasive weapon in this fight.

The Seventh Circuit upheld the federal criminal conviction of the owner of two companies for "conversion" of funds withdrawn from employee paychecks and for making false statements relating to health care matters at his companies. The funds were intended for payment of health insurance premiums and contributions into a 401(k) program. They were deducted from employees' pay and kept in the company's general operating account instead of being paid into the plans. The owner was indicted on thirteen counts of violating Title I of ERISA, and his conviction on most of those counts resulted in a sentence of 90 months in jail, three years of supervised release, and direction to repay almost a million dollars in restitution. The withheld monies were found to constitute "plan assets" under ERISA, even though the monies had never been delivered to the benefit plans. In affirming these convictions, the circuit court agreed with the trial court that the jury could consider "wealth evidence", i.e., the owner's spending habits, to show the defendant acted willfully and with fraudulent intent, even though much of the money withheld had simply been kept in a company's general operating account.

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