

September, 2005

LONG ISLAND NEWSLETTER

LONG ISLAND LABOR AND EMPLOYMENT RELATIONS ASSOCIATION

Peter Bee  
President

Phil Nicholson  
Editor

PRESIDENT'S PERSPECTIVE:

(photo of Peter Bee, vtwnt05&lera 023.jpg)

As of this writing, we have not yet identified the speaker for September meeting. However, I can assure you that we will have an exciting program. I'm sure much of the informal dinner table conversation will be about the recent pull-out of the SEIU & Teamsters from the AFL-CIO. Will this be a separation or a full-blown divorce? And, as with any break-up, where will the money go? What will this mean for Long Island's labor movement?

I am hoping we all take fuller advantage of LI LERA this year. We've been in existence as a Chapter since 1979, attracting management, union and neutral representatives, both public and private sector, to informative speakers and networking opportunities in informal, relaxed dinner settings (generally alternating between a Suffolk & Nassau restaurant).

If you haven't already received it, we publish a membership directory; if you've got it, use it! Call each other! Pick each other's brains! Don't be shy; if someone was unwilling to be called, they wouldn't have joined a networking organization! We are also listed with our own page on the National LERA website ([www.lera.uiuc.edu](http://www.lera.uiuc.edu)), award scholarship money, and sponsor a yearly Spring Conference. Your officers & directors all serve as volunteers, and we encourage our membership to become active through committees, etc.

If you know anyone who would be interested in becoming a member, please let us know so that we can get a membership application out to them!

--Peter A. Bee

LERA SPRING CONFERENCE SPOTLIGHTS WAL-MART

The Long Island LERA Spring Conference at the De Seversky Conference Center on Friday, May 6, 2005 dealt with the theme: Shaping the Workplace of the Future. Two

panels and a featured speaker took up the related themes of the global economy, Wal-Mart, and labor organizing in this new environment.

The first panel was titled: "Is Wal-Mart Good for Long Island or the Country?"<sup>ll</sup> It was presented in a modified debate form with questions from the audience addressed to the two speakers, Dr. Philip Nicholson who accepted the challenge of representing the Wal-Mart position since the corporation declined its invitation to participate, and Mr. John Sarno, President of Local 338 RWDSU, who presented the union side. Dr. Jerry Grayson served as moderator.

Professor Nicholson placed the responsibility for Wal-Mart's notorious labor practices on current public policy in the USA and the lack of international standards to protect employees from exploitation and abuse. He noted that while commodities of all kinds are subject to strict codes and regulations, including patent and copyright agreements, no similarly enforceable standards protect the rights of workers. Our patchwork system of health insurance and part time and temporary employment similarly encourages poor working conditions for millions. Wal-Mart simply is the biggest and the best at taking advantage of this situation. When they do so, they drive prices down, provide work, pay taxes, and serve as a retail center wherever they are located.

John Sarno highlighted Wal-Mart's infamous low wage and benefits policy, its poor record in discrimination and other lawsuits, its successful efforts (so far) to block the unionization of its workers, and its harsh impact on local communities and small shopkeepers.

(insert photo of three lawyers who are left to right for the caption: Gwynne Wilcox, Mark Sussman, Al Blyer)

A three-person panel, "How Employees and Labor Organizations Can Deal With Organizing Campaigns,"<sup>ll</sup> introduced and moderated by Mr. Richard J. Roth, was comprised of Mr. Al Blyer, the Regional Director of Region 29, NLRB, Mr. Mark Sussman, Esq., and Ms Gwynne Wilcox, Esq. The panel discussed current legal aspects of union organizing campaigns with special emphasis on card checks and neutrality agreements in contrast to traditional organizing tactics. The traditional NLRB election process currently offers employers an advantage because of the communication edge they enjoy in their control of the workplace. Card checks and voluntary agreements are favored by some union organizers, but, as Ms Wilcox pointed out, these practices are vulnerable to NLRB rulings to reduce or eliminate their use. Voluntary agreements can also be undercut by a Board decision to allow speedier decertification elections. (see Roth article below)

(Insert photo of Charles Kernaghan, attached as spring 05015 with his name in the caption)

The keynote speaker, Charles Kernaghan, Esq., the Executive Director of the national Labor Committee for Worker and Human Rights, presented startling details of corporate

exploitation and abuse of workers in China, South and Central America, and Asia. He reserved some of his most poignant and devastating criticism for Wal-Mart practices. The giant retailer knows that its international codes are widely violated and exist as largely unenforceable cosmetic cover. Kernaghan presented evidence of ruthless use of child labor, arbitrary and brutal physical punishments, and ninety-hour workweeks by contractors supplying Wal-Mart and other huge retailers. ¶The workers who made the clothing for Kathie Lee Gifford, ℓ said Kernaghan, ¶were thirteen-year-old kids. ℓ His dramatic presentation was accompanied by photographs and garments that vividly underscored his message about the unconscionable profiteering, misery, and brutality that are behind the low prices that corporate internationalism brings so proudly to consumers. Kernaghan said that only a tiny adjustment in prices (\$.05 per garment) would quickly bring workers out of their misery, but the will to do so is pitifully weak among price conscious shoppers and profit seeking retailers.

### The NLRB at Seventy: Where It Is and Where it is Going

On May 25, 2005, a conference was held at the NYC Bar Association sponsored by the American and New York State Bar Associations that was attended by former and current General Counsels of the NLRB as well as former and present Board members. They gathered to reflect on the 70th anniversary of the National Labor Relations Board, an agency created in 1935 during the administration of Franklin Delano Roosevelt. Many labor relation professionals forget that one of the original reasons for creation of the NLRB was to prevent industrial strife among employees, employers and labor organizations. There was recognition at the time of its creation that there was not a fair or level playing field, since employers had most of the power and employees, as well as labor organizations, had little or no rights. Seventy years later, in an age when labor organizations have declined from representing about 35% of employees at the height of their power, to the current situation where they represent less than 8% of the private labor force, there are radically different views of the current effectiveness of the law as it is now carried out.

As a former career employee of the NLRB, where I served for 30 years and obtained the position of Assistant to the Regional Director at Region 29 (Brooklyn) before retiring in 1996, I am personally dismayed by what has happened to the Agency I loved. I do not believe I have any great bias when it comes to the rights of management or labor. Rather, I always tried to protect the rights of employees against the excesses of management or labor organizations. I have been witness to the decisions of Board appointees during the Johnson, Nixon, Carter, Reagan, Bush 1, Clinton, and Bush 2 administrations. While I did not agree with every one of these decisions, I felt that most of the appointees had a reasoned and basic understanding of the purposes of the Act. Regretfully, I do not believe that the two new appointees to the Board have this fundamental understanding of the Act or are concerned with the precedents laid down by seventy years of Board decisions. These new Board members are Robert J. Battista, a Detroit attorney who represented management before his appointment by President Bush as Chairman in December 2003 and Peter C. Schaumber, an attorney who served on a number of industry panels and held various legal positions for the District of Columbia

before his appointment in May 2004. They are joined by Board member Wilma B. Liebman, who was appointed by President Clinton in November 1997 and reappointed for a 5 year term that is to expire in August 2006. There are still two vacancies on the Board, but it is doubtful that the Senate will agree on new members in the current acrimonious political climate.

I base my opinion on some of the Board decisions that were made in the past year. On June 9, 2004, the Board issued a decision in IBM Corp. denying the request of three non-union employees to have co-workers present as witnesses during investigatory meetings. The Board majority reasoned that co-workers in non-union settings do not represent the interests of the entire unit as union representatives do in union settings. The dissent quoted the section of the Act that stated that "all workers, union-represented or not, have the right to engage in concerted activities for the purposes of mutual aid or protection." It is hard to imagine an act more basic to mutual aid or protection than turning to a co-worker for help when faced with an interview that might end with the employee fired.

On July 13, 2004, the Board issued the Brown University decision in which the majority reversed precedent finding graduate research and teaching assistants were employees, and now decided that they were primarily students and thus not entitled to the protection of the Act. Currently, there are labor disputes at New York University and Columbia University involving these employees and both universities may withdraw union recognition for them.

On September 10, 2004, the Board issued the Brevard Achievement Center decision in which the majority found that disabled janitors at the Center were not employees eligible to form a union since their relationship with their employer was primarily rehabilitative rather than economic. The dissent declared that "the majority thus relegates the employer's disabled janitors and all similarly-situated workers to the economic sidelines, making them second-class citizens both in society and in their own workplace." This decision seems to defy federal policies that have given the disabled more equal opportunities in the workplace.

On October 15, 2004, the Board issued its decision in Holling Press. In that case, a female employee solicited her co-worker to be a witness in support of the sexual harassment case she filed with a state agency against her supervisor. Holling fired the employee for soliciting her co-worker to help her. The Board decided in favor of the employer when it ruled that the employee was only acting in self-interest, not mutual protection, since there was no evidence of harassment against other employees. The dissent argued that the Board has long recognized that alleviating unlawful discrimination in the workplace is in the interest of all employees. At bottom, the decision encourages victims of sexual harassment to remain silent.

On November 19, 2004, the Board issued its decision in Oakwood Care Center (a Long Island employer), finding that temporary agency staff who joined with permanent staff to organize, could not do so since the two groups of workers should not be part of one bargaining unit. The Board majority reversed precedent when it ruled that for multi-employer units such as this one, temp agency employees will need the permission of both their agency and the employer in order to bargain as one unit. The dissent vehemently disagreed, saying if the majority were correct, then the Act itself could not guarantee an important and growing segment of American workers the right to collective bargaining.

It caustically noted that "the problem here is not the statute, but the agency that administers it." This decision is incomprehensible on its face since no temp agency will have any reason to give permission to its employees to unionize. Rather, that decision should be the employee's choice, not the employer's. The decision could also encourage employers to create more temp positions as a method to deter union organizing campaigns.

In *Lutheran Heritage Village-Livonia*, issued by the Board on November 19, 2004, a non-union employee was fired for violating a work rule prohibiting profane language. The employee filed charges with the NLRB arguing that several of the employer's work rules were overly broad and were directed toward limiting union activity. The Board majority ruled that the rules prohibiting "abusive and profane language, harassment and verbal, mental and physical abuse" were lawful attempts to maintain workplace order. The dissent noted that the rules were ambiguous and could subject employees to discipline and thus inhibit an angry conversation with a supervisor "for a loud protest over safety conditions. A California professor believes this ruling could chill union activity in the workplace because broad language in such a rule can be used in a way that inhibits speech and intimidates employees from exercising their rights.

These are just some of the recent decisions issued by the new Board majority. Many pro-employee advocates fear that there may be worse to come, including an important pending decision on the lawfulness of voluntary recognition agreements. A former General Counsel of the Board, Leonard R. Page, noted many of the other failures of the NLRB. For example, NLRB contested elections now routinely take two to three years from filing of petition to the start of bargaining. The election process itself has become one-sided and unfair; employers have a huge access advantage in communicating their message to the working voters. That message is almost always tainted with half truths, promises, fear and intimidation. And if the employer ever has to bargain, good faith bargaining has been interpreted to mean simply staying awake during bargaining sessions and offering almost any proposal for a labor agreement. Both strikes and lockouts have been redefined as employer weapons to get rid of unionized workers. The 60-day notice posting remedy is almost meaningless. It does not restore the situation to what it was before the Act was violated. Even where there has been a discriminatory discharge, the make whole remedy more often results in a financial settlement for the discriminatee rather than actual reinstatement. In other words, the troublemaker is paid off to go away, notwithstanding that the union organizing campaign has been destroyed in the meantime.

The Dunlop commission noted in 1994 that even where unions win elections, they only succeed in getting first contracts 56% of the time. Another study by Dr. Kate Bronfenbrenner, Director of Labor Research at Cornell University published in September 2000 found that of the 400 elections studied, there were specific or thinly veiled threats to eliminate jobs if the union won in 51% of the elections. In 25% of these elections there were illegal discharges for union activities with a mean average of 4 workers being terminated. The Dunlop Commission also pointed out that 40% of all non-union workers believe that their employer would fire or mistreat them if they campaigned for the union. Interestingly, a 1999 nationwide study of worker attitudes conducted by Richard Freeman and Joel Rogers indicated that 44% of private sector employees would join a union if provided a genuinely free chance to exercise their choice.

As noted above, union density in the United States in the private sector is now under 8%. Union density in the public sector, and in Canada, Mexico, Europe and Japan is significantly higher. Multinational employers do not practice union avoidance at their foreign subsidiaries. Wal-Mart stores in China are organized. A former General Counsel of the NLRB has noted that multinational employers resist American workers' efforts to be organized because the law is so weak. I am not so naïve as to believe that there is any real chance of labor law reform in the present administration. However, there must be more pressure brought to bear by both labor and enlightened management advocates to urge the current and future administrations to have a more balanced and fair-minded Board. If that fails, maybe it is time to consider a proposal from a former Republican Board Chairman that the NLRB be abolished and replaced with a federal labor court with lifetime judges. Anything would be an improvement over the current situation at the Board.

- Richard J. Roth

#### FORTHCOMING MEETINGS, NOTICES, ETC.

September 1, 2005. 2005 Conference on Labor and Employment Law hosted by the National Labor Relations Board Regions 20 and 32, San Francisco Bay Area IRRA Chapter and the Labor and Employment Law Section, the Bar Association of San Francisco at the Marriot Hotel in California. Contact Walter Slater, IRRA, (415) 334-2876, or Olivia Garcia, NLRB, (415) 356-5138.

September 15-16, 2005. Negotiating Labor Agreements: New Strategies for Achieving Better Collective Bargaining Outcomes. The Program on Negotiation at Harvard Law School and The Institute on Work and Employment Relations at MIT. Contact Ms Monica Dane, Center for Management Research, 55 William Street, Wellsley, MA 02481. Phone (781) 239-1111, or fax (781) 239-1546, or go to [www.pon.harvard.edu](http://www.pon.harvard.edu)

November 30-December 2, 2005. Southwest Labor Management Conference 2005. Conference features prominent presenters in the field of labor/management relations including FMCS Commissioners, Arbitrators, NLRB Representatives and more than fifteen workshops at the Circus Circus Hotel and Casino in Las Vegas, Nevada. Contact [www.swimc.com](http://www.swimc.com)

December 8-9, 2005. Negotiating Labor Agreements: New Strategies for Achieving Better Collective Bargaining Outcomes. The Program on Negotiation at Harvard Law School and The Institute on Work and Employment Relations at MIT. Contact Ms Monica Dane, Center for Management Research, 55 William Street, Wellsley, MA 02481. Phone (781) 239-1111, or fax (781) 239-1546, or go to [www.pon.harvard.edu](http://www.pon.harvard.edu)

January 5-8, 2006. LERA 58th Annual Meeting. Sessions and Workshops on the theme: Labor and Capital in the 21st Century: Human, Social, and Financial Contributions to Creating Wealth. Boston, Massachusetts. Contact [www.LERAoffice@uiuc.edu](mailto:www.LERAoffice@uiuc.edu) or call 217-333-0072

#### LABOR AND EMPLOYMENT RELATIONS

#### GENERAL MEMBERSHIP MEETING

SEPTEMBER 15, 2005

GUEST SPEAKER: TO BE ANNOUNCED

Place: LA POMODORINO  
648 MOTOR PARKWAY  
HAUPPAUGE, NEW YORK  
(631) 951-0026

Time: 4:00 pm, Executive Board Meeting  
5:30 pm, Cocktail Hour (cash bar)  
6:30 pm, Dinner

Date: September 15 2005

Reservation Form

To: Eugene S. Ginsberg, 300 Garden City Plaza, 5th Floor, Garden City, NY 11530  
(516) 746-9307

Please register the following person(s) for the September 15, 2005 meeting. I understand that the fee for dinner for members is \$35 if prepaid, and \$40 at the door. For non-members the fee is \$45. Dinner checks should be made payable to LI L.E.R.A.

Name: \_\_\_\_\_ Organization

Address: \_\_\_\_\_

E-Mail Address: \_\_\_\_\_

Number of Persons: \_\_\_\_ Check Amount: \_\_\_\_ Telephone: \_\_\_\_\_

President	Peter Bee
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Notices of address change should be sent to Membership Chairman, Richard Roth at richarbit@aol.com

Inquiries about this publication, as well as submissions, letters, etc., should be sent to Phil Nicholson at pynich1@aol.com