

# The WorkSheet

## Beins, Axelrod, P.C.

1625 Massachusetts Ave., NW, Suite 500 Washington DC 20036  
(202) 328-7222 FAX (202) 328-7030 [www.beinsaxelrod.com](http://www.beinsaxelrod.com)



## Firm News

→ On May 1, 2007, **Justin P. Keating** joined the Firm as a shareholder. Justin worked in the International Brotherhood of Teamsters' (IBT) Legal Department for seven years. While at the IBT, he served as counsel to the Teamsters UPS National Negotiating Committee, including during the negotiation of the 2002-2008 National UPS Agreement and during the early contract negotiations in 2007. Justin has arbitrated many cases under both that contract and other Teamster contracts. He also tried cases in state and federal courts and advised the IBT and its local unions on day to day legal matters. He will be using his experience and knowledge of the IBT and the labor movement to assist the Firm's clients in a wide variety of matters. Please feel free to call Justin at (202)328-7222 or e-mail him at [jkeating@beinsaxelrod.com](mailto:jkeating@beinsaxelrod.com).

→ In March 2007, the *New York Times* named **Jon Axelrod** in its "2007 Washington DC Super Lawyers" for Labor and Employment. Both **Hugh Beins** and **Jon Axelrod** were named in the *Washington Post's* list of "The Best Lawyers in Washington for Labor and Employment Law." These honors are awarded based on professional achievement and peer assessment.



**Hugh before he moved from the basketball court to the courtroom**

→ **Hugh Beins** was ranked 59th in a Georgetown alumni poll of the 100 Best Basketball Players in 100 Years of Georgetown Basketball. Considering the number of stars that played at Georgetown over the years, we believe 59th is a very high honor. If legal achievement, service to working families, and sense of humor were factors, we are sure he would have been ranked #1.

→ Georgetown Law School has appointed **Jon Axelrod** to its Phased Retirement Working Group to study possibilities for employees to work reduced hours or to take sabbaticals funded, in part, by their defined benefit plans. Jon's work with the Committee will involve implementation of provisions of the 2006 Pension Protection Act.

## Firm & Client Successes

Our Firm's successes are really our clients' successes. Our clients have had several recently, and our Firm's attorneys have had the privilege of playing a role in them:

→ **Hugh Beins**, on behalf of **Teamsters Local 992** prevailed in an arbitration against Pepsi-Cola. The Arbitrator ruled that the employer did not have just cause to discharge a Local 992 shop steward. See Page 2 for more about this case.

→ **Jon Axelrod** successfully argued a case to the US Court of Appeals for the District of Columbia on behalf of a marine pilot who was deprived by the Coast Guard of the ability to work. See Page 2 for more about this case.

→ See inside on Page 2 for a story of how **Beins Axelrod** teamed up with **Teamsters Local 326** for a long term victory for the Union's members and for US soldiers.

## July 2007

### In This Issue

---

Supreme Court's 2007 Decision Show Little Regard For Unions, Working People

---

7<sup>th</sup> Circuit Upholds Employees' Rights Under WARN Act

---

7<sup>th</sup> Circuit Court of Appeals Protects FMLA Rights

---

Dept. of Labor Issues New Rules on LM-30 Reports

---

Congress Passes Labor Law Reform; Corporate Opposition Stalls Process

---

**This newsletter discusses cases and legal issues that may be of general interest to the Firm's clients and friends and is for general informational purposes only. The newsletter does NOT necessarily represent the views of any of the Firm's clients. Any editorial comments are for entertainment (and perhaps therapeutic purposes) only. The newsletter should not be seen as a substitute for specific legal advice. If you have any questions, please call us.**



# Victories for workers!

## Success for Workers, Safety for Soldiers

**Teamsters Local 326**, a longtime client of the Firm, organized M-Cubed, Inc. in 2004. M-Cubed employs over 150 members of Local 326 who make body armor pieces for our military. For two years, the Company conducted a vicious anti-worker campaign, forcing a decertification election in 2005. With help from the **International Brotherhood of Teamsters**, Local 326 prevailed in the decertification election and won a good contract in 2006. **Hugh Beins** advised and represented Local 326 throughout the organizing campaign, the decertification process, the contract negotiation, and several arbitrations against the Company. Local 326 used the ordeal to bring the membership even closer together. Finally, in early 2007, M-Cubed terminated its anti-union manager and agreed to a fair settlement of many outstanding grievances and arbitrations.

We are very proud of this long-term victory for Local 326 and its members. We see it as a model of the success that results when relentless union leaders, unified members, and **Beins Axelrod** attorneys work together towards a common goal. The fruits of the success will be enjoyed by US soldiers who wear body armor made by these skilled workers and by the workers themselves who are now treated fairly for their dedication to the Company and its customers.

## Beins Axelrod Helps Seaway Pilot Successfully Navigate Court System

How often does an appellate court find that the federal government's arguments are not "worth a tinker's damn" and "unworthy of the government"? Not very often, but at **Jon Axelrod's** urging, the D.C. Circuit did so, concluding that a licensed St. Lawrence Seaway pilot had a right to proceed with his lawsuit alleging that the Coast Guard had improperly disqualified him from employment as an independent pilot. The St. Lawrence Seaway Pilots Association (SLSPA) has been authorized by the Coast Guard to manage the pool of pilots licensed to navigate the St. Lawrence Seaway. The SLPSA is a corporation that profits from a very cozy arrangement with the US Government. It monopolizes the pilotage industry in the Seaway, depriving other groups of pilots from offering their services. When the plaintiff, Richard Menkes, fell out of favor with the SLSPA, the SLSPA took action with Government assistance to deprive him of his livelihood. The Coast Guard initially allowed him to pilot ships despite the SLSPA's objection, but later caved in to SLSPA pressure and revoked his license.

The Court concluded that the Coast Guard's actions were arbitrary and capricious and contrary to law because the Coast Guard, without explanation, changed its position by deciding not to license the pilot unless he bowed to the trade association's unreasonable restrictions. The Court directed the Coast Guard to reconsider its position and to make a "forthright ... interpretation" of the law that authorizes it to license such pilots. We were pleased that the court did not allow an anti-democratic organization to collude with the Government to the detriment of workers and the public. *Menkes v. Department of Homeland Security*, 486 F.3d 1307 (D.C. Cir. 2007).

## Justice in Hagerstown: Shop Steward Reinstated

A Shop Steward for **Teamsters Local 992** in Hagerstown, Maryland was fired by Pepsi for allegedly stealing Company products. **Hugh Beins** arbitrated the case on behalf of the Union before Arbitrator William Hockenberry.

The Company fired the steward for theft because he allegedly failed to return six 12 packs of damaged products to the distribution center. The Arbitrator observed that the Company never paid much attention to what the drivers did with such damaged product until *after* it fired the shop steward. (After the fact the Company acted as though failure to properly account for damaged products was a cardinal sin for an employee.) Arbitrator Hockenberry found that the Company's attempt to craft the strict policy on damaged product, or "breakage", *after* the discharge was "misplaced and corrupts the tenets of just cause."

The Company in this case, in an apparent attempt to give a lesson in how *not* to honor an employee's due process rights, also failed to even tell the steward why he was being fired when he was terminated. The Arbitrator looked unfavorably on that as well. He ordered the shop steward reinstated with back pay.

As our clients have heard Hugh Beins say many times over the years, "When your cause is just it shines like a beacon in the night."

Teamsters Local 326 proved that labor relations can be a "win-win" situation for all involved: Union members, management, and customers

Beins Axelrod is also litigating an antitrust case in federal court in New York on behalf of the aggrieved Seaway pilot.



# Regulatory News: It Could Be Worse, But It Could Also Be Better

## Just In Case Union Officials and Shop Stewards Did Not Have Enough To Do...

On July 2, 2007, the Department of Labor issued its long awaited changes to the LM-30 regulations. The LM-30 is a form created by the Department of Labor to implement reporting provisions of the 1959 Labor-Management Reporting and Disclosure Act (LMRDA). This reporting provision sat mostly obscure and unnoticed for over 40 years until the Bush administration decided it could think of no better use of our tax dollars than to focus its priorities on complicating the affairs of unions, union officers, and employees. It is unclear why the Bush administration is so concerned about union officers and employees' reporting requirements given that much of the administration's anti-labor policies seem to be intended to eliminate the labor union from the American landscape altogether.

Generally speaking, the LM-30 is a form which Union officers and employees (except clerical and custodial employees) are required to file with the Department of Labor if they have what the regulations deem to be actual or potential conflicts of interest. The new regulations leave much of the previous regulations intact. An officer or employee must file a report if he/she or his/her spouse or minor child receives a payment, gift, or benefit from, or holds some other financial interest in, a "business" as the term is defined in the regulations. From that simple theory, the regulations get complicated. But worry not, a defiant (or maybe just confused) union official will have plenty of time to read the regulations in his/her prison cell. Yes, it is a felony to file a false LM-30 report.

These are some situations (but by no means all the potential scenarios) which would give rise to an obligation to file a LM-30 report:

→ An employee working under a union contract who is paid by his employer, pursuant to the collective bargaining agreement, for doing "union business" must report such payments if they total over 250 hours in the reporting year. This rule may be particularly important for unions that have officers that still work full or part-time "at the craft" but are allowed, either by contract or by practice, to conduct or handle union business (such as contract negotiations and grievance processing) on company time. Keep in mind that if such payments are NOT provided for in the contract, then they should be reported if they total over \$250 per year; the rule for the 250 hours minimum appears to only apply if the payments are made pursuant to a provision in the contract. This rule even applies to shop stewards who receive pay from employers for assisting with union business. Being a shop steward is already a difficult job; now it may become even more difficult to deal with this additional "red tape."

→ An officer or employee of an international union is required to report payments, gifts, or other benefits he receives from an employer that does business with any lower level affiliate of the organization. An officer or employee is only required to report a payment, gift, or other benefit received from an employer if the value of all things received from any one source totals more than \$250 in the reporting year. Furthermore, any specific payment, gift, or benefit that is less \$20 in value does not need to be considered in determining whether the \$250 threshold is met. This portion of the rule is substantially different from the previous version, which also required that the payment or gift be "unrelated to the filer's status in the labor organization" and that any such payments or gifts be "sporadic and occasional." This is a substantial improvement from the more burdensome previous version.

→ A report must be filed for any payment of money or other thing of value from a Taft-Hartley benefit fund with which the union is affiliated.

→ Payments or other things of value given by another labor organization to a union officer or employee must be reported if they meet the \$250 threshold. Thus, the new rules make it clear that another labor organization will generally be considered an "employer" for LM-30 purposes.

→ If the spouse of a union officer or employee works as a "rank-and-file" employee for an employer that provides services or products (such as legal or accounting services, newsletter printing, t-shirt printing, etc.) to your union, the union officer or employee must report the spouse's income from that business and that business's dealings with the union.

In some aspects, the new LM-30 rules clarify the obligations of union officials. Still, the burdens that the rules impose on rank and file workers are heavy. In an era when large corporations have become multi-national pseudo governments, with relatively little transparency on their internal affairs, why is our Government so concerned with a Shop Steward who is allowed to use work time to productively resolve work place disputes?

If you would like any further assistance with navigating these regulations, feel free to give us a call.



# Current Supreme Court Proves Itself No Friend of Unions and Workers

## Court Allows More Curbs on Use of Union Dues: Coming Soon to a State Near You?

The Supreme Court has long held that the First Amendment prohibits public sector unions from using agency fees paid by objecting non-members for purposes not relevant to union administration and the representation of employees. Such unions must develop procedural safeguards so that an objecting non-member may obtain a refund of the portion of his/her agency fee used for such non-chargeable purposes. But the Court had also previously acknowledged that, particularly for public sector unions, a certain amount of lobbying and political activity was necessary to obtain improved wages, hours, and working conditions. It seemed clear to most that the refund procedure protected the First Amendment rights of non-members. In *Davenport v. Washington Education Association*, 551 U.S. ---- (June 14, 2007), the Court unanimously upheld a state law prohibiting public sector unions from using an employee's agency fee money for political purposes without the employee's affirmative authorization.

More disturbing than the result was the Court's reasoning. In a portion of the decision joined by all nine Justices, the Court reasoned that the statute authorizing a public sector union to negotiate an agency fee was akin to giving a private entity the power to tax government employees and that in this case the State of Washington "simply [placed] a condition on the union's exercise of this extraordinary power, prohibiting expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents." Because its prior decisions held that the refund procedure adequately protected the non-member's First Amendment rights, the Court could not hold that the state prior authorization requirement was also necessary to protect non-member rights. But the Court did hold that the procedural safeguards stated in its earlier cases were "a minimum set of procedures" which states could exceed and that the state's "modest limitation" in this case did not infringe on the union's First Amendment rights.

Although the Court emphasized that its decision applied only to public sector unions, the majority also noted that the same result could apply to private sector unions because the 1988 Supreme Court decision in *CWA v. Beck*, imposes similar restrictions through the duty of fair representation. With a Supreme Court that is already showing hostility towards unions, this could be taken as an ominous hint of more destructive decisions to come.

## Employer Need Not Consider Merger with Multi-Employer Plan

In another 9-0 decision, *Beck v. PACE International Union*, 551 U.S. ---- (June 11, 2007), the Court held that an employer sponsoring a single-employer defined benefit pension plan has no fiduciary obligation to consider a merger with a multiemployer plan as a method of terminating the plan. By terminating the plan, the employer in this case was able to obtain a \$5 million reversion after satisfying the plan's obligations to participants and beneficiaries, money which it then used to satisfy creditors in its bankruptcy proceeding.

The Court explained that an employer's operation of its defined-benefit pension plans placed it in dual roles as plan sponsor and plan administrator; but its fiduciary duties under ERISA are implicated only when it acts as plan administrator. Which hat the employer is wearing depends upon the nature of the function performed. An employer's decision whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations. Because decisions regarding the form or structure of a plan are generally settlor functions, the decision to merge plans is normally a plan sponsor decision. Thus, the employer had no fiduciary obligation to consider alternatives to terminating its plan. Furthermore, the Court held that ERISA sets out the exclusive procedures for terminating pension plans. A standard termination requires the distribution of plan assets to participants, which may be done by purchasing annuities, as the employer had done in this case. In contrast, ERISA does not list a merger as a form of plan termination. And a merger would have prevented the \$5 million reversion.

The Court's reasoning indicates an unfavorable attitude to multiemployer plans. The Court explained that if the employer had merged its pension plans into the multiemployer plan, the plan assets would have been combined with the assets of the multiemployer plan, where they could then be used to satisfy the benefit liabilities of participants and beneficiaries other than those from the employer's original plans. Those assets would remain within ERISA's purview, the PBGC would maintain responsibility for them, and if the employer continued to employ the plan participants it too would remain subject to ERISA. Finally, plan participants and beneficiaries would have their recourse not through state-contract law, but through the ERISA system, just as they had prior to merger. There was no suggestion in this case that the multiemployer plan would not have been able to pay the proper benefits to the participants. We would not previously have thought putting these employees in the multiemployer plan would be a bad result. The Court found a way to let the employer avoid such a solution though.

The Supreme Court's recent decision only applies to public employee unions, but its reasoning could be a step down the road toward silencing unions' efforts to protect their members rights in the halls of government

The Supreme Court seems to miss the point that multiemployer plans play an important role in our economy by diffusing the risks among various employers, thereby protecting employees of many different employers

# Current Supreme Court Proves Itself No Friend of Unions and Workers



## Sex Discrimination Claims Subject to Harsh and Unreasonable Time Limitations

A salaried employee under a performance-based salary structure proved to a jury that throughout her career her evaluations, and thus her salary, had been reduced by sex discriminatory performance evaluations. In a bitterly contested 5-4 decision, the Supreme Court held that pay discrimination claims must be based on discriminatory paychecks that were actually issued during the EEOC charging period. Because the plaintiff's last pay increase was not directly affected by discrimination, the Court majority found that the plaintiff's claim was untimely. *Ledbetter v. The Goodyear Tire and Rubber Co., Inc.*, 550 U.S. ---- (May 29, 2007).

As the Court explained, the Court has long held that a claim based on discriminatory seniority practices was timely unless the actual discrimination occurred during the limitations period. For example, the Court has held that 1965 discrimination which produced a seniority date did not "carry forward" with each reissuance of the seniority list. Thus, while current events may show the continuing impact of past discrimination, there must be a "present violation" for a charge to be timely. The Roberts majority refused to create an exception for pay claims: "current effects alone cannot breathe life into prior, uncharged discrimination".

The Court's division centered on the interpretation of *Bazemore v. Friday*, a 1986 Supreme Court decision. In the *Bazemore* case, prior to Title VII's extension to state employees, a state agency segregated black and white employees into separate branches, with black employees receiving less pay; later, the employees were merged into a single branch, but still with unequal pay. After the extension of Title VII, the black employees sued, claiming that the pay disparities attributable to the old dual pay scale persisted. A unanimous court held that when an employer adopts a facially discriminatory pay structure that puts some employees on a lower pay scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. The Court held that the discriminatory intent continues as long as the pay structure is used.

The Roberts majority interpreted *Bazemore* to mean that where each paycheck was based on the continuation of an illegal salary structure, a charge is timely. But, said the Roberts majority, an employment practice not unlawful on its face does not become unlawful "just because it is related to some past act of discrimination." Nor are pay claims different because they are based on the cumulative effect of individual acts, where none of those acts was within the limitations period.

The dissent interpreted *Bazemore* to mean that the unlawful practice is the current payment of salaries infected by discrimination, a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man. Justice Ginsburg argued that pay disparities are often difficult to discover, especially where the employee receives a raise but males received a larger increase. Furthermore, correcting pay discrimination does not involve the vested rights others enjoy in a seniority system in *Teamsters*.

The Court's decision is very troubling. In one sense, it seems to condone discriminatory pay practices by allowing an employer to commit pay discrimination in very small amounts over a number of years. By the time the affected employees become fed up with the discrimination and pursue legal action, most of the discriminatory acts will not be considered. And while this decision is easily seen as an impediment to gender equality in the workplace, its effects could be even worse for racial equality. Employees who receive lower pay because of their gender may sue under the federal Equal Pay Act. (The plaintiff in *Ledbetter* had initially sued under that law as well but later dropped that claim. The Supreme Court majority noted several times that its conclusion may have been different if it had been deciding the case under the Equal Pay Act instead of under Title VII.) Employee attempts to remedy racially discriminatory pay do not fall under the Equal Pay Act will be seriously impeded by this decision. The majority of Supreme Court Justices must not use the public entrance to the Court; if they did, they would be aware of the principle inscribed on the front of the building: "Equal Justice Under Law." This decision does not uphold that principle.

There is already talk on Capitol Hill that Congress may pass legislation specifically overruling the Court's decision and returning these important rights to workers who suffer discrimination at the hands of employers.



# Some Courts Still Protect Workers' Rights

## 7<sup>th</sup> Circuit Court of Appeals Protects FMLA Rights

The United States Court of Appeals for the Seventh Circuit issued an important decision on the FMLA recently, in *Repa v. Roadway Express*, 477 F.3d 938 (7<sup>th</sup> Cir. 2/26/07). We believe the court's decision could be very helpful to union members.

The plaintiff Repa worked for Roadway under the Teamsters National Master Freight Agreement (NMFA). Repa suffered a non-work injury and required time off. She properly requested FMLA leave from Roadway and properly applied for disability benefits from the Taft-Hartley Fund that provided her health benefits. Both requests were granted, but Roadway also required her to exhaust her paid leave (sick and vacation) during the time period.

The court agreed with Repa that such a requirement was illegal. Although the FMLA generally allows employers to require employees to use paid leave concurrently with FMLA leave, the FMLA regulations state that when leave is taken pursuant to a temporary disability benefit plan, the employer may not require the employee to exhaust her paid leave. The court rejected Roadway's argument that that portion of the regulations only applies to employee leave taken for the birth of a child.

This ruling could be a great benefit to your members who participate in joint labor-management (Taft-Hartley) Funds that provide disability benefits. (Please note that the ruling would also probably apply if the employees are covered by a Company-sponsored disability benefits plan.) Given that the employers will often try to restrict an employee's FMLA benefits, stewards and rank and file members should be instructed to remain vigilant for employer attempts to substitute paid leave where the employee is receiving temporary disability benefits through a plan.

## 7<sup>th</sup> Circuit Also Protects Employees' Rights Under WARN Act

In this case, the court rejected an employer's attempt to deny employees one of the few legal protections they still have.

The Employer announced to its employees on the last day of 2003 that it would be closing its doors effectively immediately. The Employer invited the employees to apply for jobs with Nortrak, a company which had earlier agreed to buy Employer's assets. The sale to Nortrak did not actually occur until January 8, 2004, by which time the original employer had severed all ties to the workers.

The workers filed a lawsuit in federal court under the Workers Adjustment and Retraining Notification Act, better known as the "WARN" Act. Generally, the WARN Act requires 60 days advance notice when an employer with 100 or more workers in a single location (which this employer had) subjects 50 or more of them to "employment loss." A violation of the Act entitles the affected employees to backpay and benefits for the period of the violation. Eventually, Nortrak hired about 55 of the employees.

The issue for the court was whether the delay in actually completing the deal with the new company, and the temporary loss in employment that went with it, qualified as "employment loss" under the WARN Act. The court decided that there was an "employment loss", and no matter how short it was, the employees who suffered from it were entitled to WARN protection. It also did not matter that the employer suggested to the employees that they would have a good shot at getting jobs with the successor company.

The court took a very hard line against the employers. It was not enough for the employer to simply argue that the agreement to sell the company would take place soon. The court correctly pointed out that such deals in the business world often fall apart, and the Act protects employees from getting harmed by such a broken deal.

Unions should be aware of this type of situation any time an employer plans to "change hands." Any loss of employment, no matter how temporary, that is brought about in conjunction with the sale, could give the employees relief under the WARN Act. *Phason v. Meridian Rail Corp.*, 479 F.3d 527 (7<sup>th</sup> Cir. 3/15/07)

The 7<sup>th</sup> Circuit's FMLA decision prevents employees from effectively being penalized for being participants in a union-negotiated disability benefits plan

The 7<sup>th</sup> Circuit recognized that even though a WARN Act violation might only result in a few days backpay, it is still a violation and employee rights must be vindicated

# Some Judges Uphold Worker Rights



## Union's Public Demonstration at Anti-Union Casino (Still) Protected by NLRA

A Las Vegas labor union seeking to represent employees at the Venetian Hotel & Casino held demonstrations outside the hotel in 1999, shortly before its scheduled opening. The Venetian had already refused to enter into a neutrality agreement with the union. The Venetian argued that the sidewalk was private property and the union should be prohibited from holding its rallies there. The local district attorney, however, disagreed. The Venetian had previously agreed with the local government to construct the sidewalk in return for the government allowing the Venetian to eliminate the old public sidewalk to accommodate its design desires.

At the union's rallies, the Venetian announced over a public address system that the demonstrators were trespassing and would be subject to arrest. Venetian officials asked, in the presence of demonstrators, police officers on the scene to issue criminal citations to the demonstrators and to block them from the sidewalk. Venetian security guards told the rally's leader that he was being placed under "citizen's arrest." Although they did not actually attempt to take the union leader into custody, they promptly reported the "arrest" to the police.

The NLRB found that this conduct violated the NLRA. The court affirmed the NLRB's decision with respect to the Venetian's attempt to disrupt the demonstration. The court found that because the demonstration was an effort to communicate its labor dispute to the public and an attempt to enlist the support of prospective employees in making the Venetian operate union, that the action was protected by Section 7 of the NLRA. The court also reaffirmed the principle that unions and their members are generally allowed to peacefully demonstrate on public sidewalks in front of the targeted employer.

The court's decision was really a simple one, reminding employers that an attempt to disrupt peaceful union demonstrations violates the NLRA. At a time when we have watched some basic labor rights disregarded by the NLRB and federal courts in the past few years, it is encouraging to see the NLRB and the court show respect for the basic right to demonstrate. All faith in our system of justice is not lost.

## Union "Salts" Right to Backpay Reinforced

On June 13, 2007, an NLRB ALJ issued a decision in a union organizing case that enforced the rights of union "Salts"- union organizers who apply for jobs in an effort to organize the employer. The NLRB had previously held, in 2006, that a Kansas construction company discriminated against union members/organizers who applied for jobs at the company. The Board ordered that the organizer be offered the jobs for which they applied and be paid backpay for the relevant period. In its decision the Board held that the employer could require the organizers to pass a drug test and physical screening test routinely administered by the employer to new employees. After the Board's decision, the organizers declined the employer's forced offer of employment.

At the compliance stage of the proceeding, the company raised several baseless defenses which were rejected by the ALJ. First, the Company argued that the organizers should not be entitled to any back pay at all because they never passed the pre-employment tests which the Board stated the employer could require. The ALJ disagreed, finding that the Board's ruling on that point was conditioned on the organizers actually accepting the offer of employment. The ALJ correctly found that, given the organizers' decision to not accept the employment after the Board's order, there should be no presumption that the organizers would have failed the pre-employment tests.

Next the ALJ rejected the employer's argument that the backpay period should have ended several months after the organizers' application date when the union began picketing the employer. Although the organizers testified that they would not have worked for the employer at any time the union had a picket up against the employer, the ALJ found no evidence that such picketing would have commenced had the two organizers been hired.

The ALJ's decision did not allow the employer to apply its assumptions as to what might have happened to reduce the organizers' back pay entitlement. Once the employer commits the initial violations, it is no longer entitled to such presumptions. This may seem like an obscure procedural point, but such rules make it more difficult for employers to obstruct organizing efforts and will also deter them from even attempting to do so, given that rulings like this one will make it more costly to do so.

Not only is the court's decision an affirmation of unions' basic rights, but the situation in the case reminds us not to patronize businesses that deny workers' their basic fundamental rights.

Union organizers who apply for employment at the craft are entitled to back pay the same as any other applicant who is discriminated against because of his support for a union



# Do You Need Another Reason to Put a Friend of Working Families in the White House?

## Big Business Can Buy Itself Some Time, But Labor Law Reform Is On the Way

In June, Congress almost passed the most comprehensive pro-worker labor law reform since 1934. Although a solid majority of the House and a thin majority of the Senate voted for it, corporate backed Republican senators “saved the day” for their corporate constituents. The Employee Free Choice Act (EFCA) has 3 important aspects: First, it would increase penalties for violations of labor laws; second, it would require employers to respect employee desires to organize as expressed in union authorization cards without subjecting them to a coercive, employer-dominated election process; and third, it would help unions with what many union officials believe to be the most difficult part of an organizing campaign: Getting a first contract.

Big Business spent millions on TV and radio advertising leading up to Congress’ votes. The ads themselves insulted the intelligence of most working people. (Typical of employers to underestimate their employees’ intelligence.) In that sense, they may ultimately backfire on the employers. The ads portrayed the EFCA as anti-democratic, but ignored the simple fact that the employers themselves have perverted the current organizing process into a sham of democracy. Corporate America as defender of workers’ democratic rights? It would be funny if it did not affect people’s well-being.

The employers may have stalled this reform for now. But the majority votes in Congress have sent the message that reform is on the way. In two years, when George Bush is out to pasture in his adopted state of Texas (with his secured pension and health care coverage), our next President will work with Congress to re-establish the right to organize as it should exist in a truly free and democratic society.

## DC Circuit Rejects (Again) Government’s Disregard For Highway Safety

On July 24, 2007, the DC Circuit Court of Appeals unanimously rejected the Hours of Service rules promulgated by the Federal Motor Carrier Safety Administration (FMCSA). The Hours of Service rules regulate the amount of time truck drivers are allowed to spend driving and the minimum amounts of rest time they are allowed between driving shifts. In 2005, the DC Circuit unanimously rejected an earlier attempt by the FMCSA to revise the rules.

In the current lawsuit, a group including the International Brotherhood of Teamsters (IBT) sued to have the regulations rejected once again. The court found that the FMCSA improperly failed to provide the public with an opportunity to comment on the FMCSA’s method for determining how drivers become fatigued. Specifically, the FMCSA did not address the “cumulative fatigue” that the increased driving would have on a driver over the course of a work week.

As a result of FMCSA’s failures, the court vacated the portion of the rule that increased the maximum hours of driving per day to 11, effectively returning to the previous maximum of 10 hours per day. In addition, the court also vacated the 2005 rule’s “34 hour restart provision.” That provision allowed a driver to effectively restart his workweek after taking 34 consecutive hours off duty. (The rule limits drivers to 60 hours driving in a seven day work week.) Thus, the rule reverts back to pre-2003 status in which a workweek cannot be restarted by resting for 34 hours but is instead restricted to a 60 hours in seven days or 70 hours in eight days cycle.

A procedural rule effectively delays the court’s ruling from having any effect for 45 days from its date of issuance. We will have to wait and see how the Bush administration responds to this latest rebuke by the DC Circuit. Throughout the Hours of Service revision process, the Bush administration has shown a troubling tendency to agree with the trucking companies (particularly the non-union trucking companies) rather than side with safety of the truck drivers and the driving public.

The ongoing Hours of Service controversy reminds us that unionized truck drivers are safer drivers and have less incentive to “bend” the rules because of the protection their union contract gives them. Working “union” does not just benefit the particular employee, it benefits all of us.

If you received The WorkSheet from someone else and would like to get on our e-mail list, or if you would like someone else to receive The WorkSheet, please e-mail your request to [irogers@beinsaxelrod.com](mailto:irogers@beinsaxelrod.com).

Working America is one step closer to proving that Corporate America’s endless supply of money cannot defeat the will of the people

The Government cannot disregard the right of the public to comment on such important matters as highway safety