

the national lawyers guild

NEWSLETTER of the Labor & Employment Committee

<http://www.nlg-laboremploy-comm.org>



May 2013

Warehouse Workers for Justice: AN ALTERNATIVE ORGANIZING MODEL

BY MARGOT NIKITAS,
UE ASSOCIATE GENERAL COUNSEL

The deadly garment factory fire in Dhaka, Bangladesh on November 24, 2012, and even deadlier Rana Plaza garment factory collapse in Savar, Bangladesh on April 24, 2013, shocked and horrified consumers, government officials, and labor activists all over the world. The disasters in these factories—both of which produced clothing linked to Walmart—harkened back to labor conditions in the late 19th and early 20th century U.S. and led to calls on Walmart to enforce its ethical sourcing policies and supplier standards.



The garment industry historically has been characterized by layers of subcontracting. This structure facilitates the avoidance of laws designed to protect workers' rights, including the right to collectively bargain, earn a minimum wage, and workers' compensation if injured on the job. Moreover, due to this maze of subcontractors and temp agencies workers often do not know exactly who their employer is, which makes it

(continued on page 2)

JOIN US AT THE CONFERENCE!

The Labor and Employment Committee will be holding its annual breakfast meeting for all labor and employment lawyers at the **LCC Conference** this year in Pittsburgh. Join us on **June 3rd** at 7:00 a.m. in Conference Room B, located on the Conference Level of the Hotel, for an insightful discussion of **ORGANIZING OUTSIDE THE NLRA**.

This topic has been on labor's agenda for the last four decades, but is more urgent than ever. We will cover the Walmart warehouse campaigns, the recent strikes by federal contractors' employees and other organized but not unionized workers and what we have learned from these events. Our speakers will include **Jenn Jannon**, Working America Mobilization, Director, and **Margot Nikitas**, an attorney with the United Electrical, Radio and Machine Workers of America.

And we extend a special invitation for two panels in which long-time activists and Committee members **Ursula Levelt**, **Mike Healey** and **Claudia Davidson** are participating:

- Monday morning (repeating)—Union and Employer Mobilization of Workers for Electoral and Legislative Purposes
- Monday morning (repeating)—Coalition Work with Allies: Legal and Practical Considerations
- Tuesday morning (repeating)—Quo Vadis: The Ethics of Interviewing, Preparing and Presenting Witnesses

Our Committee will also hold a luncheon membership meeting during the Conference—come to our table for details on when and where.

Warehouse Workers for Justice

(continued)



even more difficult to hold accountable companies who abuse workers.

The warehouse industry in the U.S. is based on a similar structure as that of the garment industry, and likewise fosters the abuse of workers and evasion of protective laws. Just as companies like Walmart rely on low labor costs and substandard conditions in their garment supply factories abroad to keep consumer prices low and profit margins high, so do they exploit such conditions in the U.S. warehouse industry as part of their corporate model.

Warehouse Workers for Justice (WWJ), a non-profit affiliate of the Research and Education Fund of the United Electrical, Radio and Machine Workers of America (UE), understands this model all too well. WWJ is an independent workers' center for warehouse and logistics workers in the metro Chicago area which provides workers' rights workshops, unites warehouse workers to defend their rights on the job, builds community support and fights for policy changes to improve the lives of warehouse workers and community members. WWJ uses an alternative organizing model that focuses on building worker power outside of the processes of the National Labor Relations Board. Often termed "non-majority union organizing," this alternative model—which recalls that of the pre-National Labor Relations Act 1930s—focuses on direct action, creative legal work, and building solidarity both nationally and globally to improve conditions for warehouse workers. Although many of the organizing principles are similar to those of more traditional campaigns, using a non-majority model can make more sense when the focus of the campaign is not one defined workplace, but the layers of subcontractors and temp agencies that characterize the warehouse industry.

Along with groups such as Warehouse Workers United and Our Walmart, WWJ has been at the forefront of recent workers' struggles against the poor wages, working conditions, and anti-union policies propagated by Walmart. In October 2012, workers represented by Warehouse Workers Organizing Committee (a labor organization affiliated with WWJ) struck against Roadlink, a subcontractor which operated a Walmart warehouse in Elwood, Illinois. During the 21-day strike, strikers received tremendous community support and won their principal demand for an end to illegal retaliation against workers protesting poor conditions. They returned to work with full pay for the period in which they were on strike. The strike coincided with another strike against Walmart by Warehouse Workers United in California.

WWJ also has conducted research studies on the prevalence of "perma-temp" work in the Illinois warehouse industry and on sexual harassment in the warehouses, and is working to pass protective legislation on the state level. Since the deadly fire and factory collapse in Bangladesh, WWJ has formed relationships with Bangladeshi labor unions in a show of solidarity and recognition that the struggle for workers' rights is truly global in scope. For more information, please visit www.warehouseworker.org.



Margot Nikitas is Associate General Counsel for the United Electrical, Radio and Machine Workers of America (UE) in Pittsburgh. A native of central Illinois, Margot spent the past 10 years in Chicago, where she recently graduated from Chicago-Kent College of Law's Labor and Employment Law program. While in Chicago, Margot was active in the labor and immigrant rights' movements. In 2010, she completed an internship with UE's Warehouse Workers for Justice campaign. Since moving to Pittsburgh, Margot also has been active in Fight Back Pittsburgh, the Pittsburgh chapter of the USW Associate Membership Program.

D.R. Horton: Is There Life After *Concepcion*?

BY URSULA LEVELT

Arbitration is an informal tribunal meant to efficiently adjudicate disputes. It has served this purpose well in the context of commercial arbitration and in labor arbitration between unions and employers.

But arbitration becomes a vehicle for stripping people of their rights when the parties are not equally matched. A particular problem arises in arbitration when the corporation is a repeat player while the plaintiff is only there for a one shot deal. As Marc Galanter has detailed in his study *Why the 'Haves' Come Out Ahead*, repeat players have the benefit of certain strategic advantages: “[the] capacity to structure the transaction, play the odds and influence rule development and enforcement policy.” (Galanter 1995, 118).

This is exactly what corporations achieved in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011): they chose the arbitration structure to deal with possible disputes, picked a case with an otherwise acceptable arbitration agreement to appeal to the Supreme Court, and in so doing implemented a rule allowing class action waivers in arbitration agreements.

The case involved Vincent and Liza Concepcion, who had entered into a service contract with AT&T that included both an agreement to submit disputes to arbitration and a waiver of any right to arbitrate claims on a class basis. When the Conceptions discovered that they were charged a \$30 sales tax for a “free” phone they filed a class action lawsuit. The Supreme Court held that the FAA required enforcement of the arbitration agreement had to be enforced, including its waiver of the right to proceed as a class, and that the Conceptions had no recourse but to proceed as individual claimants in the arbitration procedure that AT&T had chosen.

The *Concepcion* decision treats the question whether consumers have the right to bring a class action as strictly a procedural rather than substantive concern. But is it? While the law allows corporations to bundle the resources of many individual shareholders, promising them protection from any personal liability—the ultimate form of concerted

economic action—*Concepcion* denies their customers the same right to act concertedly against them.

We are witnessing the development of a two-tier system whereby the big players have access to the courts to resolve

disputes among themselves, but all sorts of other claims involving smaller players get diverted to community courts, mediation, and slanted arbitration proceedings. Galanter has painted a picture of a society in which powerful parties litigate their claims to the full extent of the law, a law he calls “higher,” based on values of universalism and equality. Less powerful parties are relegated to informal systems of private remedies (such as arbitration) insulated from the requirements of the “higher” law. This legal system

accommodates “inequality in fact, while establishing equality at law” and facilitates action by “great collective combines while celebrating individualism.” (Galanter 1995, 321)

A society in which different social groups are entitled to different tribunals and different rights under the law is a society based on status rather than one based on equal protection under the law. This is a profoundly anti-democratic policy that will allow corporations all the

advantages that the law provides, while forcing consumers to deal with corporations as isolated individuals—the way that yellow dog contracts barred individual employees from organizing to deal with their employers before the Norris-LaGuardia Act and National Labor Relations Act outlawed them.

Which brings us to Section 7 of the NLRA. Nowhere is a public policy favoring collective action more beautifully articulated than in this Act. Its preamble refers to “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.” NLRA § 1, 29 U.S.C. §151. It then proceeds to promise the protection of the law so that employees can exercise full freedom of association. In other words: collective action by workers is needed to counteract the power of employers organized in corporations! It is a recognition of the importance of democracy in the workplace, which is scarcely understood by employers and employees alike nowadays.

The National Labor Relations Board relied on these Section 7 rights—and years of precedents applying Section 7 to similar activities—in *D.R. Horton*, 357 NLRB No. 184 (2012), in which it ruled that the NLRA prohibits class

(continued)



Figures taken from the complaint in *People v. National Arbitration Forum*, CGC-08-473569 (San Francisco Superior Court).

D.R. Horton (continued)

action waivers in employment contracts, a direct challenge to the *Concepcion* ruling in the employment arena. The NLRB held that arbitration agreements that require employees, as a condition of employment, to waive the right to bring a lawsuit or arbitration on a class action basis violate the Act, since they prohibit employees from acting in concert in bringing a collective complaint about conditions in the workplace to arbitration, or the courts for that matter.

D.R. Horton is likely to make it to the Supreme Court. The decision has already been appealed to the Fifth Circuit, where the employer and amici have argued the matter is solely procedural. The NLRB has countered that class actions may be procedural under Rule 23 of the Federal Rules of Procedure, but that Section 7 conveys a substantive right to engage in them under the NLRA.

The employer acknowledged as much by stating that it requires employees to waive their right to engage in class actions as part of the arbitration agreement in order to blunt their ability to use the threat of litigation as an economic weapon. That, of course, runs directly counter to the basic purpose of the NLRA: to allow employers and employees to use economic weapons, within the limits allowed by the Act, to come to an agreement on terms and conditions of employment. Labor rights cannot get any more substantive than that.

The Board has an ally in the Second Circuit, which found that a class action waiver in an arbitration agreement could not be enforced when it would make it impossible to vindicate a statutory right, in that case rights under federal anti-trust laws. *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012). We will soon see, however, whether the Supreme Court really meant what it said when it promulgated the “effective vindication doctrine” in cases such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985) and *Green Tree Financial Corp. v. Alabama v. Randolph*, 531 U.S. 79 (2000) now that it has granted certiorari in the *American Express* case.

That case recently came up for oral argument before the Supreme Court, where the Justices were faced with trying to justify a ban on class arbitration of anti-trust claims, which are notoriously complex and expensive cases to litigate, without overturning their own precedents in *Soler* and *Green Tree*. Two justices asked whether demanding that customers accept the arbitration clause might be an anti-trust violation in its own right or part of a larger unlawful tying agreement—which sounds very much like the Board’s theory in *D.R. Horton*. Others noted that the arbitration agreement in that case also contains a confidentiality clause that would make it far more difficult for customers to share information—the sort of prohibition on concerted activity that the Board

has outlawed for years. See, e.g., *Banner Health System*, 358 NLRB No. 93 (2012). We’ll know in a month or so whether either of these practical concerns carry any weight with the Court.

D.R. Horton’s reasoning received short shrift, on the other hand, from the Eighth Circuit, which did not allow the pursuit of a collective FLSA claim in view of an arbitration agreement waiving class actions. *Owen v. Bristol Care*, 702 F.3d 1050 (2013). The court distinguished *D.R. Horton* on the ground that the arbitration agreement in *Bristol* was somewhat narrower than the one in *D.R. Horton*. It also attacked the Board’s position frontally by not granting the Board any deference in interpreting the FAA and holding that the FAA should override Section 7 rights, since it was reenacted nine years after passage of the FLSA. The court did not consider that the NLRA not only was enacted ten years after the FAA, but that both acts were reenacted in 1947 (the FAA on July 30 and the NLRA on June 23), without any mention at the time that the FAA should neuter the NLRA.

Needless to say, the court gave no deference to the Board’s interpretation of the NLRA. The Eighth Circuit ignored the basic premise of the NLRA: that workers can only defend their rights effectively if they are allowed the same freedom to act collectively as employers.

The same twisted protection of individualism lurks behind the *Citizens United* decision. Whatever corporations are, they are not persons. If anything, they are collectivities, a bundling of the resources of many individuals, shareholders, directors, managers and employees. The rights this society accords to these collectivities to proceed in court as persons completely overwhelm the rights of any other collectivity, be it labor unions, non-profit organizations, or individuals banding together to proceed as a class to resolve a dispute. In addition, this society is well on track to create a two-tier system of justice where litigation under the full protection of universalism and equality is only reserved for those with the most resources.

This is the real holding of *Concepcion*: individuals may bundle their capital resources into corporations and proceed in court, but other individuals may not bundle their resources and have their day in court. The Court has already given corporations the sort of feudal privilege to write the laws to suit themselves that relegate consumers to the status of serfs; it remains to be seen whether it will do the same to workers’ rights.

Reference:

Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change* in THE LAW & SOCIETY READER (Richard L. Abel, ed. 1995).

Ursula Levelt is in-house counsel for Transport Workers Local 100.

See you in San Juan!

This year's NLG Convention is in San Juan, Puerto Rico from October 23rd through the 27th. We encourage all Guild members—and in particular members of the Labor and Employment Committee—to join us there!

As many of you know, the NLG has been a decades-long supporter of Puerto Rican struggles for independence, labor rights, and environmental justice. Guild members' involvement includes:

- supporting the trade union movement's fight against the government's efforts to privatize the public sector and lay off 30,000 public employees;
- forming the NLG Puerto Rico Project in the late 1970's, to defend independentistas and trade union activists under attack and work with the movement to oust the U.S. Navy from the Puerto Rican island of Vieques;
- working with the Puerto Rican Nationalist prisoners in the 1970's, and later, from 1978 to the present, with the Puerto Rican political prisoners to advocate for their human rights while they served lengthy sentences in U.S. prisons for seditious conspiracy, as well as serving in the leadership of the successful international campaigns for their release from prison;
- in the mid-1980's defending independentistas in Hartford, Connecticut accused of expropriating large amounts of money for use in the independence movement;
- from the 1970s to the present, defending activists subpoenaed to federal grand juries in Chicago and New York;
- for decades, defending community activists and organizations in the U.S. and Puerto Rico under attack for their pro-independence work or for their work defending the integrity of the land and environment;
- presenting at the annual United Nations Decolonization Committee hearings on Puerto Rico;
- defending organizations, such as the Puerto Rico Bar Association, under attack from pro-statehood forces;
- defending civil disobedients for acting as human shields to try to stop the U.S. Navy's bombing and occupation of Vieques; and
- over the decades, standing with the people of Puerto Rico by calling on the U.S. government to end the crime of colonialism, remove its repressive forces, and release its political prisoners.



The Convention will provide an incredible opportunity for Guild members to learn more about the Puerto Rican labor movement, as well as the larger struggle for Puerto Rican independence and justice, and to build stronger ties of solidarity and support between the Guild and progressive forces within the Puerto Rican labor movement. We are working on a number of events that will give mainland lawyers the chance to discuss these issues with the Puerto Rican labor leaders and labor lawyers most involved in

the long struggle for workers' rights and an end to colonialism. The Convention will also feature Anti-Racism trainings which will incorporate an analysis of colonialism and systemic racism. ¡Unidos en pie de lucha!



SUPPORT LEGAL SERVICES WORKERS



The attorneys, paralegals, secretaries, process servers, and other professionals employed with Legal Services NYC—all represented by the Legal Services Staff Association, NOLSW/UAW Local 2320 (LSSA)—are on strike against LSNYC, which is trying to cut the heart out of the Union contract with a proposal that demands unprecedented cuts to health care and retirement benefits. We all need to do what we can to support them.

LSNYC's proposal would make significant cuts to health care coverage for particularly vulnerable members and their families, higher employee payments to health care premiums, a 29 percent reduction to 403(b) retirement contributions, and zero cost of living increases to salaries. These cuts would make it very difficult for experienced casehandlers and new employees to build a career at LSNYC,

undermining the critical work that LSNYC's staff does for low-income New Yorkers.

This from an organization that projects a \$10.5 million budget surplus at the close of 2013 and conservatively expects \$2 to 3 million in additional funding per year in 2013 and 2014. And which has a bloated managerial structure of one highly-paid manager for every three anti-poverty advocates.

The strike has gotten support from a broad range of community groups, political leaders and labor. We all need to show our support for these strikers. To give more than just moral support for the strike, send a letter to LSNYC at 40 Worth Street, New York, NY 10013 or email (1) LSNYC Executive Director Raun Rasmussen (info@LegalServicesNYC.org), (2) Board member Joseph Genova of Milbank, Tweed, Hadley and McCloy LLP (jgenova@milbank.com) or (3) Board member Michael Young (info@LegalServicesNYC.org) telling LSNYC to put its house in order, rather than slash benefits and freeze wages; please copy Gibbs Surette of the Union at gsurette@lssa2320.org on any email messages. Or join the picket lines at any of LSNYC's offices, or, if you can't make it to New York, send a check in support to UAW Local 2320, 256 W. 38th St., Suite 705, New York, NY 10018. Solidarity forever starts with solidarity now.



Labor & Employment Committee

c/o Kazan McClain Lyons Greenwood & Harley
Jack London Market
55 Harrison Street #400
Oakland, CA 94607