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# NLRB Region 5

## BLUE SHEET

Summer 2008

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### *Musings from the Corner Office* Regional Director Wayne Gold

Welcome to the Summer 2008 edition of Region 5's newsletter. Region 5 staffers are pleased to provide this newsletter as a service to our customers: the labor-management community and employees in Maryland, Virginia, the District of Columbia, southern Pennsylvania and Delaware, and eastern West Virginia. We are here to serve!

As I travel through Region 5's territory, I frequently hear questions about the Agency and recent decisions from the Board. Two of the most common questions are what employers, unions, and employees can expect from the current two-Member Board, and what the Board's recent decision in Register-Guard said about employees' use of workplace e-mail.

As you know, in organization the NLRB is a rather unique government agency, with two separate and distinct functions: the investigation and prosecution of unfair labor practice charges, which is the responsibility of the Agency's General Counsel; and the resolution of representation issues and quasi-judicial function of issuing unfair labor practice decisions on appeals from administrative law judges' decisions, which are the responsibility of the Board. The National Labor Relations Act specifies there are to be five Board Members, serving staggered five year terms. For many reasons, the Board in recent years frequently has been forced to function with fewer than five Members, and since this past December has had only two Members - Republican Chairman Peter Schaumber and Democratic Member Wilma Liebman. Despite their obvious ideological differences, Chairman Schaumber and Member Liebman have issued decisions as a two-Member Board in 152 cases. Obviously, the railroad is running! They have done so by agreement to apply existing Board precedent to cases coming before them, even where one or the other of them may wish to reconsider that precedent. Incidentally, the authority of the two-Member Board to

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Region 5 staff are available to speak to service and advocacy organizations, employee groups, labor unions, and employer associations. Call us! Page 7

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issue decisions has been upheld by every court that has considered the issue to date.

One of the last, and most controversial, decisions of the full five-Member Board was *Register Guard*, 351 NLRB No. 70, issued on December 16, 2007. A Board held that, in general, employees have no Section 7 right to use an employer's e-mail system for union-related purposes even if the e-mail is sent from an outside computer. The Board majority also clarified the definition of "discrimination" to allow employers greater latitude to permit various non-business use of e-mail while still prohibiting employees' use of the company e-mail system for union activity. Traditionally, the Board had held that an employer discriminates against union activity if it forbids the use of e-mail, bulletin boards, or other employer resources for union-related purposes while permitting the use of those resources for other non-work related purposes beyond occasional "beneficent acts" such as an annual United Way campaign. The Board majority redefined "discrimination" to provide that a finding of disparate treatment requires that the uses of employer resources must be of a "similar character." The Board majority gave several examples of application of its new standard: an employer would act unlawfully if it allowed its e-mail system to be used for solicitation in favor of one union while prohibiting its use for solicitation in favor of another union; similarly, an employer would act unlawfully if it allows employees to use its e-mail system to oppose unionization, while prohibiting employees from sending e-mails supporting unionization; but, on the other hand, it would be lawful for an employer to prohibit union-related e-mails despite allowing employees free use of e-mail for non-organizational purposes such as sending jokes, baby announcements, party invitations, the occasional offer of tickets to sporting events, or solicitations for services such as dog walking.

On a lighter note, in the near future the NLRB will be making use of recent advances in technology to begin moving from paper-based case files to electronic case files. As the new system is gradually implemented beginning this fall, parties will be asked to submit their position statements, evidence, and other filings in electronic (PDF) format, preferably by electronic filing through the Board's website ([www.nlr.gov](http://www.nlr.gov)). Traditional documents will be scanned and converted to PDF files in the Regional office. While some of our more "seasoned" agents and managers (including me!) are grimacing at the prospect of further automation and technological "progress," we know a fight would be futile and intend to do our best to learn and implement the new technology. We hope you will help us.

*Wayne Gold*

## Highlights from Region 5: Fiscal Year 2007

In 2007, Region 5 had what can only be described as an excellent year.

**93.1%** of meritorious unfair labor practice cases were settled by Region 5's staff.

**38 days** was the median period from the filing of a petition to the holding of an initial election in Region 5, with 100% of all elections conducted within 56 days.

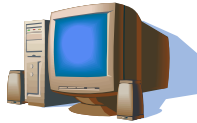
**83.3%** of Board and Administrative Law Judge decisions were won by Region 5 in whole or in part.

**\$3,070,966** was recovered on behalf of employees by Region 5 as backpay or reimbursement of fees, dues and fines.

**98.9%** of Region 5 cases were processed within the NLRB time targets.

**12,321** public inquiries were answered as part of the Region's Public Information Program.

## Save Time—Visit us online at [www.NLRB.gov](http://www.NLRB.gov)



by Field Examiner Katherine Hannah

*The Agency's website, [www.NLRB.gov](http://www.NLRB.gov) was recently recognized by the National Security Archive as one of the five best in the federal government. Many documents may now be filed through the website with the field offices, as well as the Division of Judges, General Counsel's Office of Appeals and the Board's Executive Secretary's Office. To use this feature from the website, visit "My NLRB" under the E-Gov tab, and then select the "E-File" tab to file documents. Some documents may not be filed electronically, including unfair labor practice charges, representation petitions and petitions for advisory opinions*

*The redesigned website also provides several options for conducting legal research. From the home page, view the "I am a labor professional" section. There you will find links to several great resources, including:*

- The **Casehandling Manuals** are a great place to begin any research project as they contain the Board's policies and procedures for unfair labor practice (ULP), representation and compliance cases.
- **Decisions** by the Board, ALJs and the Regional Directors provide you with the most recent legal precedents and how they are being applied.
- **GC Memos** describe, among other things, the General Counsel's stance on novel issues and legal issue of particular interest to him. They also lend insight into what the GC will look for in a quality investigation. See for example GC 08-06 which includes checklists for investigation of different types of ULP allegations.
- **OM Memos** inform the public of updates to NLRB policies. For example, see OM 08-54, *Grosvenor Orlando Associates, LTD*, which describes a discriminatee's obligation to look for work.
- **Advice Memos** provide information on the General Counsel's position on issues for which there is not clear legal precedent.
- The Board's **Rules and Regulations** provide procedural information, including various deadlines and how different documents may be submitted and served on other parties, including which documents may be filed or served by fax.

## Practical Advice on Maximizing Backpay Eligibility: Look for Work!

*Under a recent Board decision, discriminatees are urged to keep careful records of when and where they seek employment.*

In *The Grosvenor Resort*, 350 NLRB No.86 (2007), the Board emphasized the obligation of discriminatees to look for replacement employment. The Board found that:

- Almost always, a work search must begin within 2 weeks of a discharge or refusal to hire, or backpay may be tolled.
- If a work search begins within 2 weeks, the backpay period starts with the discrimination; if the search is delayed, the backpay period starts when the search begins.
- Applying for work one or two times a month is not an adequate effort to mitigate. Searches must be reasonably diligent.
- If the discriminatee cannot show that he or she actively sought work, any backpay due may be reduced.

### The take-home message:

To maximize your entitlement to backpay, start looking for work soon after the discrimination even if a merit

## News on SALTS

By Field Attorney Johnda Bentley



### *"Salts" and "Salting"*

*The Board defines salts as "those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign" and who are subject to the union's disciplinary control. The Board defines "salting" as "the act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees."*

The NLRB issued two decisions in 2007 that affect what the Union needs to provide to the NLRB during an investigation regarding an employer's discriminatory refusal to hire salts. These decisions also affect what evidence will be sought from the Union to determine the backpay period.

- ***Toering Electric Company, 351 NLRB No. 18 (2007)***

### OLD RULE

In *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), enfd. 301 F. 3d 83 (3<sup>rd</sup> Cir. 2002), to prove that an employer violated 8(a)(3) of the Act by discriminatorily refusing to hire applicants, the Board required the General Counsel to show that: (1) the employer was hiring; (2) the applicant had experience or training relevant to the announced or generally known job requirements; and (3) anti-union animus contributed to the decision to not hire the applicant. The burden then shifted to the employer to make counterarguments, one possibly being that the applicant did not genuinely seek employment.

### NEW RULE

In *Toering Electric Company*, the above rule from *FES* was generally upheld, except the Board added a piece to the General Counsel's initial burden in the case of salts. Now the General Counsel must also prove that the applicant is "genuinely interested in seeking to establish an employment relationship with an employer," rather than the employer having the burden of proving the applicant had no such interest.

There are two components to this new burden: (1) there was a bona fide application for employment; and (2) the applicant had a genuine interest in becoming employed by the employer.

- (1) Bona fide application for employment

determination on your case has not yet been made by the Regional Director, and keep good records! If you lose your replacement job, start your job search again as soon as possible.

## NLRB-Speak

*Has a Board agent ever used terms that left you scratching your head? Here are a few translations that might help:*

**R-case:** A case involving a question concerning the representation of a group of employees, such as a certification or decertification petition.

**C-case:** A charge alleging one or more unfair labor practices (ULP).

**Discriminatee:** An individual found to have suffered illegal discrimination under the Act.

**Agenda:** A meeting of select Regional Office staff at which evidence gathered in support of an allegation is analyzed, case law is considered, and a determination is made by the Regional Director. Agendas are also held to determine courses of action in meritorious cases and to discuss settlement proposals.

**10(b):** The section of the Act that describes the 6-month statute of limitations for filing ULP allegations with the Board and serving the charge on the Charged Party.

- This requires proof that the individual actually applied for employment or that the individual authorized someone else to apply on his or her behalf.
- Once this is proven, the General Counsel's burden is met unless the employer raises a reasonable question as to the applicant's actual interest in going to work for the employer.

### (2) Genuine Interest in employment

- The General Counsel only needs to address this issue of the applicant's genuine interest in employment if the employer raises it. The employer might raise this issue by introducing evidence such as: the applicant recently refused similar employment with the employer or made offensive comments on his or her application; the application was stale or incomplete; or the applicant engaged in disruptive behavior while applying.
- To prove that an applicant has a genuine interest in employment, the General Counsel can present rebuttal evidence such as: showing that an applicant applied in accordance with the employer's procedure, arrived on time to interviews, made follow-up inquiries, had relevant work experience with other employers, and/or was seeking similar employment with other employers.

- ***Oil Capitol Sheet Metal, 349 NLRB No. 118 (2007)***

### OLD RULE

Under *Dean General Contractors*, 285 NLRB 573 (1987), the Board presumed that workers in the construction industry, like workers elsewhere, would have continued to work for the employer indefinitely. The employer could challenge a backpay period by proving that it would not have transferred or reassigned the worker after the project ended.

### NEW RULE

In *Oil Capitol Sheet Metal*, the Board decided that in the case of salts, it would no longer presume that employment would have continued indefinitely. Instead, the General Counsel (meaning the Board attorney) must now prove that the salts would have worked the entire backpay period alleged. The presumption of continued employment still exists for non-salts and it is the employer's job to prove someone is a salt.

What evidence is needed?

This new rule will normally raise two issues in backpay cases:

- (1) whether the salt would have worked for the employer for the entire duration of the project; and
- (2) whether, and for how long after the project's end, the salt would have worked for the employer through transfers to other projects.

## How to File a Representation Petition

Filing NLRB representation petitions can be simple and convenient. An Information Officer can assist you in completing a petition form. (See page one for our contact numbers). If you complete the petition yourself, keep these helpful tips in mind:

Prepare your petition on our website at: [www.nlr.gov](http://www.nlr.gov)

Know the job titles used by the employer and the employee shift schedule.

Provide the Region with authorization/membership cards, or other proof of interest, signed and dated by at least 30 percent of the employees you are petitioning to represent.

Be prepared for a hearing within 10 days of filing the petition by knowing: (1) the employer's operations; (2) the community of interest of various employee job categories; and (3) who the "supervisors" are.

Be prepared for the election to be conducted 42 days or fewer from the date of filing.

Always call or email the assigned Board agent with questions or concerns.

The following factors are relevant to proving the length of a salt's backpay period:

- (1) the salt's personal circumstances during the backpay period;
- (2) union policies and practices with respect to other salting campaigns at the time of the discrimination;
- (3) specific union plans for the targeted employer;
- (4) instructions or agreements between the salts and the union about the expected duration of the assignment;
- (5) historical data regarding the duration of employment of the salts at issue and other salts in similar organizing campaigns by the same union.

## New Rules on Voluntary Recognition

*By Field Examiner Janet Schaefer*



On September 29, 2007, in *Dana Corp.*, 351 NLRB No. 28, the Board held an employer's voluntary recognition of a union will not bar a decertification or rival union petition for election, if filed within 45 days of unit employees receiving notice of the recognition. Prior to this, once an employer granted recognition based on evidence the union had majority support, no petition could be filed. This modification is prospective only; no voluntary recognition occurring prior to the Board's Dana decision is affected.

### How It Works

Following voluntary recognition, the employer or the union provides, to the NLRB Regional Office, a copy of the recognition agreement, including a description of the unit and date of recognition.

Once notified, the Regional Office provides to the employer an official NLRB notice, to be posted for 45 days. This notice informs unit employees of the employer's recognition of the union. It also advises

## Speakers Available

Members of Region 5's staff are available to make presentations before your organization to describe what the Act's protections cover, how we investigate and resolve unfair labor practice charges, the election process, or any NLRB topic of interest. There is no charge for this service.

To arrange for a speaker and to discuss possible topics, please do not hesitate to contact Outreach Coordinator Emily Hunt at (410) 962-2864 or [emily.hunt@nrlb.gov](mailto:emily.hunt@nrlb.gov). You can also make a request for a speaker by visiting the NLRB's website at [www.nrlb.gov](http://www.nrlb.gov) and click on the "Speakers" link.

employees of their right to request, within 45 days of the posting, a secret ballot election.

After completion of the posting period, the employer submits a certification of posting to the Regional Office. If no petition for an election has been received, the case is closed and, to give the union and employer an opportunity to negotiate a contract, no petition will be allowed for a reasonable period of time thereafter.

### WHAT UNIONS NEED TO KNOW

- If an employer voluntarily recognizes a union after September 29, 2007 and fails to post the required notice, there is no bar to an election, even if a contract has been signed.
- Following voluntary recognition, a union may notify the NLRB. The union need not rely on the employer to take this action.
- The Regional office will provide a copy of the notice to the union but will not routinely notify the union of the date the employer posts the notice.
- The time period for filing a petition is 45 days from posting, not 45 days from recognition.

## WHEN A CHARGE IS FILED . . . .

*By Field Examiner Nathan Seidman*



We want to make sure our investigative process is transparent to you, our customers. Here's what happens when you file a charge with our Agency:

### FILING THE CHARGE

Once you file a charge with a Regional Office, you are called the Charging Party, and you will be called upon by the Region to promptly present evidence in support of the allegations you made. Here is how it works: When we get your signed and dated charge, it will be given a case number and assigned to a member of our professional staff to investigate. We will serve a copy of your charge on the party against which you are making allegations—the Charged Party. (Our very strict six-month statute of limitations actually requires you to serve the charge on the Charged Party, and we strongly encourage you to do so as well). The agent assigned to your case will contact you within 7 days to hear a brief explanation of the allegations you are making and arrange to take your evidence. It is very important that you be

## Remedies for Violations

When there has been a violation, the Act does not impose fines or other direct penalties. Rather, it requires remedial action to correct the violation and its effects.

NLRB remedies require those who have violated the Act to cease the violation, to inform employees or members that they will respect their rights, to reinstate employees who have been unlawfully fired or suffered discrimination in hiring, expunge files of reference to the illegal discrimination, reimburse unlawfully charged union dues, fines and fees, and to pay compensation for lost earnings, with interest. If the violation involved a failure to bargain in good faith, the Order may require bargaining, processing grievances or the provision of requested information.

available to meet with the agent and have all documents you might need ready. We promise you that we will start investigating your charge quickly, and we need your commitment to get us your evidence when we ask for it. In fact, if you do not, we will not be able to proceed and your charge may be dismissed.

### THE AFFIDAVIT

The first step is to take an affidavit—a sworn statement—from you or whomever is the person who knows most about the facts behind your allegations. We will use the phone number on your charge to contact you, so please make sure it is accurate. It is very helpful if you also provide your contact person's email address. You will be invited to the Regional Office to meet with the agent, or if you live a long way away, the agent will travel to meet you and important witnesses. Rarely, evidence will taken by telephone. Often, we will need your help in scheduling other witnesses. We will try to identify the witnesses when we first speak with you but additional witnesses may be added to the list when we take your statement.

Our agents are skilled at asking probing questions. Giving a statement can be a major time commitment. Plan to spend a few hours with the agent. It might take less time, but we can seldom tell you that in advance because before we hear it from you, we have no idea how involved your story may be. Board agents need details including dates, times, and who was present when events occurred. If you have notes of conduct or conversations you think might be important, by all means bring these with you.

### THE DECISION

Once we have received your evidence in support of the allegations, an initial assessment will be made by the agent and his or her supervisor. We will ask ourselves: "If all this is true, and there is nothing more to the story, would such a decision warrant further action?" If the answer to that question is "yes," we will proceed with the investigation. If the answer is "no," the agent will inform you of that and give you the opportunity to withdraw the charge. If you don't, it will be subject to dismissal. If we decide to proceed with the investigation, the agent will contact the Charged Party, confront it with the allegations (keeping witness identities confidential), and gather its rebuttal evidence. It may be necessary for the agent to contact you again in order to allow you to respond to issues or facts the Charged Party raised. Both you and Charged Party may submit position statements, including case law, in support of your positions. Once the investigation is finished, the facts, law and arguments will be presented to the Regional Director who will make a decision on the merits.



## Contact Region 5

There is always an information officer available at Region 5 to answer general inquiries or to discuss a specific workplace problem or question. The information officer can offer information about the Act and whether it appears to be appropriate to file an unfair labor practice charge. If filing a charge does appear to be appropriate, the information officer can assist in completing the charge form.

The information officer at Region 5 may be reached by telephone at:

1-866-667-6572  
(Toll free)  
or  
410-962-2822

[Se habla español](#)

## May we email future newsletter to you?

Please send your email address to Outreach Coordinator Emily Hunt at [emily.hunt@nlrb.gov](mailto:emily.hunt@nlrb.gov)

## Attend a Brown Bag Lunch

Please join Region 5 on Friday September 19th for a brown bag lunch. Regional Director Wayne Gold will speak briefly on basic rights under the National Labor Relations Act, introduce staff members, and answer your questions. If you wish, you may submit questions in advance. All members of the public are invited to attend.

Those attending should come at noon to:

**NLRB Region 5**  
Appraisers Store Building, 8th floor  
103 S. Gay Street (the corner of Lombard and Gay Streets)  
Baltimore, MD 21202

**NOTE: PHOTO ID REQUIRED TO ENTER BUILDING!!**

Please confirm your interest in the September 19th brown bag lunch, or ask to receive future announcements, by e-mail to [emily.hunt@nlrb.gov](mailto:emily.hunt@nlrb.gov).

*The rights protected by the National Labor Relations Act are available to private sector employees. Along with the Region's staff, I am committed to improving public awareness of the Act and of the recourse available through the NLRB to those who have suffered any violation of it.*

**Wayne R. Gold, Regional Director**  
National Labor Relations Board, Region 5

Reprints of this newsletter are available in English and Spanish.  
Please send requests to [emily.hunt@nlrb.gov](mailto:emily.hunt@nlrb.gov)

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