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#### How to File a Charge:

Anyone may file an unfair labor practice charge with the NLRB. To do so, they must submit a charge form to any Regional Office. The form must be completed to identify the parties to the charge as well as a brief statement of the basis for the charge. The charging party must also sign the charge. In order to be timely filed, charges must be filed within 6 months from the date of the alleged violation.

# NLRB REGION 11 OUTREACH

Issue 2

October, 2008

## Greetings From The Director

Willie L. Clark, JR.

This is the Region's second newsletter which stems from the Agency's nationwide emphasis on outreach. The Region intends to issue this newsletter on a periodic basis in order to apprise the public on recent developments in both the Region and the Agency.

For most of FY 2008, the Agency operated with a 2-member Board which includes Wilma Liebman and Chairman Peter Schaumber. As a result, the Board only issued decisions which did not involve a modification or deviation

from existing Board law. In addition, the Board granted the General Counsel decision making authority on 10(j) requests. The legality of the Board's majority being comprised of only two members and the General Counsel's authority on 10(j) matters has been challenged by respondents in various Circuit and District courts without success.

With regard to FY 2009, it is anticipated that the Agency will be operating under a continuing resolution until sometime in

January, 2009, once the results of the November elections take effect. This means that the Agency will operate under FY 2008 funding amounts.

#### Speakers Available:

Regional staff are available to speak to organizations. Contact the Region's Outreach Coordinator, Nancy Wilson at (336) 631-5230 or via email at [nancy.wilson@nlrb.gov](mailto:nancy.wilson@nlrb.gov) to make the arrangements.

## Representation Case News (cont'd on pg. 3)

The current fiscal year has continued the downward trend of R-case filings in Region 11 that was noted in our last newsletter. In FY 2007, 40 petitions were filed in the first eleven months. Through August, 2008, 32 petitions have been filed in FY 2008, representing a 20% decline.

Nationally, the downward trend reversed and there has been an increase in R-case filings in FY 2008. Through July, 2008, there were 2749 petitions filed vs. 2639 petitions filed through the first ten months of FY 2007, a 4.2% increase.

In addition to traditional

representation cases, the Board modified the principles of its recognition bar and contract bar policies in *Dana Corp., 351 NLRB No. 28 (9/29/07)*, which has resulted in a new type of case, the VR case. The decision in *Dana* establishes a new procedure for employers and unions to

Forms are available for download from the NLRB website at [nlrb.gov](http://nlrb.gov). Forms may also be obtained from any NLRB office. NLRB offices have information officers available to discuss charges in person or by phone and to assist with filling out charge forms.

**When a Charge is Filed:**

The NLRB Regional Office will investigate. The charging party is responsible for promptly presenting evidence in support of the charge. Usually evidence will consist of a sworn statement and documentation of key events.

The Region will ask the charged party to present a response to the charge, and will further investigate the charge to establish all the facts.

After a full investigation, the Region will determine whether or not the charge has merit.

**GENERAL COUNSEL RONALD MEISBURG ISSUES A REPORT ON THE BOARD'S RECENT DECISION IN THE REGISTER GUARD**

On December 16, 2007, the Board issued its decision in *The Register Guard*, 351 NLRB No. 70 (2007) and held, *inter alia*, an employer's policy prohibiting employee use of its e-mail system for "non-job-related solicitations" did not violate Section 8(a)(1). On May 15, 2008, GC Meisburg issued a

report on the case developments under *Register Guard* (GC 08-07). In this report, five *Register Guard* cases that had been submitted to Advice were discussed. Based on those cases, the GC concluded that if an employer permits a union representing its employees to use its e-mail, it can place reasonable lim-

its on its use. Further, complaint will issue in cases where the evidence establishes a discriminatory enforcement or promulgation of a valid rule. The Regions are continuing to submit *Register Guard* cases to Advice "to assure a consistent approach to our casehandling".

**BOARD'S DECISION IN TOERING ELECTRIC COMPANY, 351 NLRB NO. 18 (September, 2007) CHANGES THE GENERAL COUNSEL'S BURDEN OF PROOF IN SALTING CASES.**

On February 15, 2008, GC Meisburg issued a memorandum (GC 08-04) in response to the Board's recent decision in *Toering Electric*. This memo advised the Regions that when investigating "salting" cases, that in addition to establishing the elements un-

der *FES*, 331 NLRB 9 (2000), that the GC must also establish that (1) there was a bona fide application for employment; and (2) the applicant had a genuine interest in becoming employed by the employer. Once the GC establishes element no. 1, its burden

has been met unless the employer raises the issue of the applicant's genuine interest in employment. The GC will then bear the burden of proving by a preponderance of the evidence that the applicant was "genuinely interested" in an employment relationship.

**GC MEISBURG ISSUED A MEMO RE: ULP CHARGES INVOLVING POLITICAL ADVOCACY**

On July 22, 2008, GC Meisburg issued a memorandum (GC 08-10) describing the framework to be used when considering ULP issues that arise when employees participate in nationwide and local demonstrations

organized to protest legislative proposals. Essentially, the GC will consider whether there is a "direct nexus between the employment-related concerns and the specific issues that are the subject of the advocacy."

Second, the GC will consider whether the "specific means employed" is protected under the Act. The memo concludes by stating that all such cases will be submitted to the Division of Advice for consideration.

## Representation Case News (cont'd from pg. 1)

follow after voluntary recognition is granted if the parties want the benefits of the Board's recognition and contract bar policies. Under the new procedure, either the employer and/or the union must notify the Regional Office involved in writing that recognition has been granted. The notification to the Regional Office must include a copy of the recognition agreement, which must be reduced to writing and describe the unit and the date of recognition. Upon receipt of the voluntary recognition notification, the Regional Office will give the case a VR number and send notices of voluntary recognition to the employer to be posted at its facility for 45 days. During this 45-day period, an employee or a rival union may file a petition, supported by the required 30 percent showing of interest of the bargaining unit, seeking to have an election. If no petitions are filed within the 45-day period, the recognized union's status will be irrefutably presumed for a reasonable period of time and the contract bar principles also apply. It should be noted that while this procedure invokes the Board's processes, the Board neither monitors the posting of the notices nor gives its stamp of approval to the recognized unit. While failure to notify the Region of the voluntary recognition will not invalidate the granting of such recognition, it will also not allow the parties to claim either recognition bar or contract bar at any time in the future if a petition is filed.

Through July, 2008, 16 VR cases have been filed in Region 11, which resulted in the filing of two RD petitions. One of the petitions raised a unit scope issue because the RD petitioner was seeking an election to decertify the union at a single facility notwithstanding that the employer had recognized the union in a multi-facility unit. That petition is currently pending before the Board on a request for review regarding the scope of the unit.

### **Pilot Video Testimony Program in Representation Cases**

In a memo dated January 8, 2008 (OM 08-20) the General Counsel announced that the Board recently authorized it to implement a two-year Pilot Video Testimony Program in Representation case hearings. The General Counsel had recommended that the Board approve the pilot program in order to assess whether the use of video testimony will improve the Agency's ability to process representation cases more efficiently and will be more responsive to the public's needs.

The memo noted that the preference is to conduct hearings in which all parties, witnesses and the hearing officer are present in the same hearing room. However, it was recognized that there may be circumstances which would warrant the use of video testimony, i.e. a crucial witness is at a remote location and cannot travel to the hearing site in a timely manner. Under the pilot program, the Regional Director has the discretion to authorize, on a case-by-case base, the use of video testimony. While agreement by the parties involved in the case is preferable, the Regional Director has the discretion to order the use of video testimony over the objection of a party. It is anticipated that the most likely scenario where the use of video testimony would arise involve either a witness or a party representative at a location remote from the hearing site.

If video testimony is to used, the witness who would be testifying via video would do so from a neutral site— either another Region or another government office. To eliminate any obstacles, the Region would conduct a pre-hearing conference with the parties to cover any details such as the exchange of documents the witness would need to identify, the length of the witness' testimony and any other concerns the parties may have. At the conclusion of the hearing the parties will be requested to complete a questionnaire to be used to assess the success of the program. Currently, Region 11 has not had the opportunity to test this pilot program.

## REGION 11 IN RETROSPECT

Over the years, Region 11 has been fortunate to employ many high-caliber employees in the ranks of both field attorneys and examiners. Included in that number are five attorneys who served in various capacities in Region 11, then went on to become Administrative Law Judges (ALJ) with the Agency. Below is a brief account of the careers of these five individuals.

Bernard Ness began his career with the Agency in February 1948. He served as an attorney in the Cleveland and Buffalo Regional offices, as a supervisory appeals attorney in the Office of the General Counsel in Washington, D.C., and later as Regional Attorney in Winston-Salem during the 1960's. After serving as Region 11's Regional Attorney, he became Assistant General Counsel in Washington, D.C. He was appointed an ALJ on July 2, 1972, and retired from the Agency on January 12, 1980. Mr. Ness died on February 22, 1986.

Richard L. Denison joined the Agency in 1958 as a field attorney in Region 11 and later became a supervisory attorney. In 1973 he was promoted to Regional Attorney in the Agency's Albuquerque, New Mexico office. He was appointed ALJ on March 25, 1974. Mr. Denison retired from the Agency on August 27, 1990 and currently resides in Sarasota, Florida.

Charles M. Williamson joined the Agency as an attorney in Region 11 in 1961 and was promoted to supervisory attorney in 1974. In 1978 he went to Washington, D.C. to serve a detail in the Office of the Associate General Counsel. He was appointed an ALJ on October 14, 1979, and served with the Division of Judges in Washington, D.C. until 1984, when he became Chief Counsel for then-Board Chairman Donald L. Dotson. Mr. Williamson subsequently wrote articles as a labor law commentator and served as an arbitrator with the American Arbitration Association. He currently resides in Arlington, Virginia.

J. Pargen Robertson began his career with the Agency in 1965 as a field attorney in the Region 26 office in Memphis, Tennessee. He entered private practice beginning in the late 1960's, after which he re-joined the Agency as a field attorney in Region 11. He later returned to the Agency's Memphis office, where he became a supervisory attorney. He was appointed an ALJ on November 14, 1978, and served with the Atlanta Division of Judges until his retirement in 2007. He currently resides in Atlanta, GA.

George Carson II began his career with the Agency as a field attorney with Region 11 in 1973. He served as a trial specialist and was promoted to supervisory attorney in 1989. He became an ALJ with the Social Security Administration in 1993, after which, on September 1, 1996, he was appointed an ALJ with the Agency. He is currently assigned to the Atlanta Division of Judges.