

What's Brewing in Region 30

SPECIAL POINTS OF INTEREST:

- Region 30 includes most of the state of Wisconsin and the upper Michigan peninsula
- Region 30's headquarter is in Milwaukee
- Milwaukee is a Native American word for "Milliocki" and means gathering place by the water

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FROM THE DIRECTOR'S DESK

As Regional Director, I welcome you to the inaugural edition of *What's Brewing in Region 30*. Our goal is to provide useful information that explains the Region's practices and procedures, discusses and illuminates Board decisions and General Counsel guidance memoranda, introduces Regional personnel to you, and provides a forum for your comments, questions and other feedback.

Since September 2008, Region 30's managers (I, Deputy Regional Director Ben Mandelman, Deputy Regional Attorney Percy Courseault, and Supervisory Attorney Paul Bosanac) have conducted regular meetings of the Region 30 Policies

and Procedures Committee. The Committee's purpose is to provide an ongoing forum to discuss Regional policies and procedures, address participants' questions, and address changes imposed by



Irving Gottschalk, Regional Director

shifts in Board law and/or mandates from the General Counsel directly or through

the Agency's Division of Operations-Management. The Committee meets three times a year, in January, May and September, on the third Thursday of that month. Participants have included attorney and non-attorney representatives of labor and management, mediators, and professors who teach labor and employment law courses. I encourage you to participate in this forum if you are not already doing so. If you are interested, please notify Secretary to the Regional Director Carla Becker at carla.becker@nrb.gov.

What kinds of cases come before Region 30? What kinds of pre-filing assistance

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White House Nominates Three Persons To Fill the Board's Vacancies Amidst Current Challenges To The Two-Member Board

On July 9, 2009, the White House announced the nominations of Greg Becker, Mark Gaston Pearce, and Brian Hayes to fill the Board's three current vacancies. The five seat Board has been operating with only two members for more than a year. The nominations of

Becker, Pearce, and Hayes are long overdue and come amidst a challenge to the two-member Board. In *Laurel Baye Healthcare of Lake Lanier, Inc., v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), the court held the Board lacked the requisite quorum to operate as a Board and its two-member panel lacked the au-

thority to issue binding decisions. *But see Snell Island SNF LLC v. N.L.R.B.*, 568 F.3d 410, 419-420 (2d Cir. 2009) (deferring to the Board's interpretation of the National Labor Relations Act holding the Board reasonably interpreted the Act to mean that it may continue

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DIRECTOR'S DESK CONTINUED

do we provide members of the public? What are some recent noteworthy cases the Region has handled? What is our agenda process, where I am presented with the unfair labor practice (ULP) investigation results and relevant case law so I can determine whether there is reasonable cause to believe the National Labor Relations Act has been violated, and what happens as a result of the decision? In the event merit is found and, following either a voluntary settlement, or litiga-

tion and a Board decision upholding the Region's prosecution, what happens to ensure there is compliance with the remedy? How are representation cases processed, and what kinds of issues are typically addressed to determine whether a secret ballot election will be conducted to permit the affected employees to vote on whether they wish to be represented by a union? The answers can vary greatly due to the wide variation in fact patterns presented by individual cases.

I hope you will find each issue of this newsletter to be informative and accessible. I encourage you to write to the newsletter's editor, Attorney Christina B. Lee at Christina.lee@nlrb.gov, with any ques-

tions, comments or suggestions you may have regarding what you read in these pages or any other issue of concern. All such correspondence will be carefully reviewed and answered. We also will print appropriate correspondence and our replies, though edited as may be necessary to protect privacy interests or due to space considerations. I look forward to discussing what we do and learning from you about what we can do to improve the quality of our public service.

LERA 2009

**LERA
Conference
11/ 3/ 2009**

The Wisconsin chapter of LERA is composed of members from the management, labor, academic and public sectors. Currently, Regional Director Gottschalk is the President of the chapter. The chapter conducts monthly luncheons from September to March and a dinner meeting in April, at Alioto's in Wauwatosa.

Luncheon is followed by a speaker in the area of labor relations. In addition to luncheons, Region 30 and LERA are co-sponsoring a one day conference on November 3, 2009 in Milwaukee. For more information on memberships, luncheons or the conference, contact Suzanne Clement, secre-

tary-treasurer, at 414-297-3883 or Suzanne.clement@nlrb.gov.

WHAT IS PROTECTED CONCERTED ACTIVITY?

The Act protects more than just an employee's right to form, join or assist a labor organization. Section 7 of the Act also states that employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Examples of such activities include the following: (1) where at least two employees speak to their employer about improving their conditions and/or pay; (2) where one employee speaks to the employer on the behalf of one or more co-workers about improving their working conditions; or (3) where two or more employees discuss amongst themselves their pay or other work related concerns.

Salting As An Organizing Tool



Andrew S. Gollin, Attorney

A. Introduction

Salting is a highly controversial organizing tactic in which union applicants seek and accept employment with targeted non-union companies with the overt or covert purpose of organizing their employees.* Although salting had been used for decades in the construction industry, it gained prominence and popularity following the U.S. Supreme Court's 1995 decision in *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 116 S. Ct. 450 (1995), *on remand to*, 106 F.3d 816 (8th Cir. 1997), wherein the Court held that paid union organizers (i.e., salts) had the same protections under the National Labor Relations Act ("Act") as all other "employees."

B. Analytical Framework

In *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002), the Board established a framework to analyze claims in which an employer is alleged to have unlawfully refused to consider or refused to hire salts. To establish an unlawful refusal to hire claim, the General Counsel must show: (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer had not adhered uniformly to such

requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants. Once the General Counsel produces the necessary evidence to establish a claim, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the employer asserts that the applicants were not qualified for the positions it was filling, it is the employer's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others who were hired had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. The appropriate remedy in a refusal to hire case would be a cease and desist order, an order requiring the immediate reinstatement of the discriminatees to the positions for which they applied or, if the positions no longer exist, to substantially equivalent positions, and to make the discriminatees whole for any losses.

To establish an unlawful refusal to consider claim, General Counsel must show that: (1) the employer excluded applicants from the hiring process; and (2) anti-union animus contributed to the decision not to consider applicants for employment. Once this is established, the burden will shift to the employer to show that it would not have considered applicants even in the absence of their union activity or affiliation. The appropriate remedy in a refusal to consider case is a cease and desist order, an order to place discriminatees in the position they would have filled absent discrimination, to consider them for future openings and to consider them for openings in accord with nondiscriminatory criteria.

*Salts are generally divided into two groups: the "overt" salts who identify themselves as union organizers during the hiring process (i.e., wearing clothing with a union insignia when visiting the employer, identifying their affiliation with the union on their employment application, stating their affiliation with the union during an interview, etc.); and the "covert" salts who hide their union affiliation until some time after they have been hired.

SALTING AS AN ORGANIZING TOOL CONT'D.

In *Toering Electric Company*, 351 set up the employer so the union can file NLRB No. 18 (September 29, 2007), the Board charges alleging hiring discrimination that modified the *FES* framework to require proof force the employer to expend time, money and that the alleged discriminatee had a genuine resources defending itself. interest in establishing an employment relationship with the employer sufficient to entitle him or her to the Act's protection. The change was in direct response to what the Board majority views as an abuse of the changes will be made to how salts are treated Board's processes by unions who send paid under the Act, and whether further changes will union organizers (or "salts") to apply with a occur to clarify the legal protections salts will non-union employer not with the purpose of have in the future. obtaining employment to organize, but rather to

C. Conclusion

It is unclear what, if any, further changes will be made to how salts are treated under the Act, and whether further changes will occur to clarify the legal protections salts will have in the future.

HOW TO FILE A PETITION

Typically, a petition for certification of union representation is filed by a union. The petition must be supported by a 30 percent showing of interest. A showing of interest contains a statement saying the employees wish to be represented for collective bargaining purposes by a specific labor organization, and the showing of interest in-

cludes signatures from 30 percent of the proposed bargaining unit with a date accompanying each signature. If the petition is to decertify the union, the petition may be filed by an individual. As with the petition to certify a union, a 30 percent showing of interest must support a petition to decertify. The showing of interest statement will generally contain a statement saying the employees no longer wish to be represented for collec-

tive bargaining purposes by the existing labor organization. Such petitions may be filed at any time after the contract expiration or after the third year of a longer agreement, or, for non-health care employers, 61 days or more but not more than 90 days before the end of the contract up to three years.

WHITE HOUSE NOMINEES TO FILL BOARD'S VACANCIES; CHALLENGES TO TWO-MEMBER BOARD CONT'D.

to operate in panels as few as two and such a two-member panel may issue binding decisions despite the Board's lack of a quorum); *see New Process Steel, L.P. v. N.L.R.B.*, 564 F.3d 840 (7th Cir. 2009) (holding the two member quorum had the authority to hear labor disputes and issue orders regarding the unfair labor practices). The ultimate decision as to whether such operation was in violation of the National Labor Relations Act remains for the United States Supreme Court to decide. In the interim, the current nominees await Senate confirmation.

Impact on Backpay for Salting Cases

Richard J. Neuman, Compliance Officer

In 2007, the Board issued its decision in *Oil Capitol*, 349 NLRB 1348 (2007). This case altered backpay cases involving union salts (unpaid and paid professional union organizers) as well as the burden of proof for the General Counsel. The General Counsel must now present affirmative evidence that a salt/discriminatee, if hired for the job that he applied, would have worked for the respondent for the backpay claimed by the General Counsel. When jobs at a construction site ends, the investigation must include whether the salt would have been transferred to other job sites after the project at the original site was completed. Previously, Board standard as set forth in *Dean General Contractors*, 285 NLRB 573 (1987), applied a “rebuttable presumption” of continuing employment for a salt in the construction industry.

In all cases involving the refusal to hire and discharge of union salts, compliance officers will collect evidence relating to the individual circumstances of the case including: (1) the discriminatee’s personal circumstances during the backpay period; (2) union policies and practices with respect to salting campaigns; (3) specific union or-

ganizing plans for the targeted employer; (4) instructions or agreements between the salt and union concerning anticipated duration of the assignment; (5) historical data regarding the duration of employment of the salt and other salts in similar salting campaigns; (6) evidence regarding how the salt came to apply with or become employed by the company; and (7) evidence as to whether the salt would have continued working for the employer and transferred to a new job site.



Richard Neuman

This list is not exhaustive; however, the compliance officer will focus on these factors when investigating compliance issues involving salting discriminatees. In practice, the Region’s *Oil Capitol* investigation has included obtaining detailed affidavits from the discriminatees regarding these factors and their search for work. In addition, the parties were requested to produce numerous documents and legal arguments to support their positions.

Suburban Electrical Engineers/Contractors, Inc., 351 NLRB 1 (2007) had the potential for lengthy backpay periods. The Region applied *Oil Capitol* and began an investigation concerning how the new standard was to apply to the current case. During this investigation, the employer appealed the Board’s decision to the United States Appellate Court for the District of Columbia. The Region worked with the Board’s Appellate Court Division in efforts to reach a resolution in mediation. These efforts were successful and all parties signed an agreement resolving all outstanding issues.

In *Steven’s Construction Corp.*, 350 NLRB 132 (2007), the Region completed a full *Oil Capitol* investigation. *Oil Capitol* impacted some of the Region’s decisions regarding the duration of backpay and entitlement to reinstatement. After the investigation and exhaustive negotiations, the parties were able to reach a bilateral resolution. The parties were also able to resolve two outstanding cases which dated back to 2004. The Regional Director approved these settlement agreements on July 30, 2009.


Organization

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Please contact the Region if you would like one of us to come to your organization and/or university to talk about your rights under the National Labor Relations Act.

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**D o n ' t F o r g e t ! H a v e y o u s i g n e d u p f o r t h e
L E R A C o n f e r e n c e ?**



The Conference is scheduled for November 3, 2009. Last year's Conference was a huge success, and you don't want to miss this year's events.

For more information on the conference, contact Suzanne Clement, Secretary-Treasurer, at 414-297-3883 or Suzanne.clement@nrb.gov.

Sue Clement