

NATIONAL LABOR RELATIONS BOARD

REGION 17

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Kansas City Strip



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Region 17 Announces New Regional Director

When Region 17's Newsletter Committee began to conceptualize the Kansas City Strip, it was our intention to have the first article of every issue be an address from the Regional Director. It seems appropriate, however to have the first article in this first issue of the Kansas City Strip announce the selection of our new Regional Director, Daniel L. Hubbel.

Daniel Hubbel, or Dan as he is called in the Region, is a long-time member of Region 17. Dan started his employment with the Board on July 16, 1978 as a field examiner. During his tenure as a field examiner Dan processed numerous unfair labor practice and representation cases. Dan became known both inside and outside of the Agency as an extremely competent and conscientious Board agent.

In July of 2001, Dan was

promoted to the position of Supervisory Field Examiner. As a supervisor Dan provided critical and capable guidance to his team members. Due in no small measure to his outstanding service as a supervisor, in April of 2004, Dan was awarded the position of Assistant to the Regional Director.

On October 2, 2007 Dan was selected as Region 17's Regional Director.

The employees of Region 17 enthusiastically congratulate Dan and offer him our best wishes as he takes the Region's helm.

Daniel L. Hubbel is a graduate of the University of Kansas with a degree in business. Dan has been married to his lovely wife Leslie since October 1980. Dan and Leslie have one son Matthew, who is currently attending Kansas State University.



Outreach

The NLRB has placed a special emphasis on outreach. The Kansas City Strip is a result of those efforts.

The Outreach Program was established to help educate the citizens we serve and provide needed services to those who rely upon the NLRB to enforce the National Labor Relations Act.

As part of the Outreach program, NLRB representatives

are available at no cost to speak at and participate in your events. NLRB professionals will provide information about the NLRB, its mission, and the processes for filing charges and petitions as well as current legal developments.

If you are interested in arranging to have an NLRB expert speak to your group, or have questions that you would like to have addressed in our

newsletter, please contact our Outreach Coordinators:

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Recent Case Developments - Oil Capitol

If a tree falls in the woods and no one is around to hear it, does it make a sound? I was reminded of this philosophical conundrum when recently reviewing the Board's Decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007). Setting aside the obvious distinctions between lumber and sheet metal, in *Oil Capitol*, the Board sought to resolve a similar question: when a union organizer (commonly referred to as a union salt) applies for employment and an employer unlawfully refuses to hire her because of her union affiliation, how can we determine how long she would have worked?

Calculating backpay for a discriminatee who has been denied employment is often an inexact science. Irrespective of whether the discriminatee is a union organizer, the General Counsel must evaluate the relevant circumstances to reach a reasonable approximation of how long that individual would have worked. Usually, the General Counsel has been able to successfully argue that discriminatees—even union organizers—who have been unlawfully terminated or refused employment, enjoy a presumption of continuous employment. Accordingly, until an employer offered the discriminatee a job or unless the employer presented compelling evidence to establish that the discriminatee's employment would have terminated, her backpay continued to accrue. As discussed herein, with its 3-2 decision in *Oil Capitol*, the Board majority changed the manner in which it evaluates backpay claims on behalf of salts.

The factual background in *Oil Capitol* was not atypical for a refusal-to-hire case involving a union organizer. It began when, in response to a Tulsa, Oklahoma newspaper advertisement seeking experienced sheet metal workers, Michael Couch, an organizer for Sheet Metal Workers Local 270, donned a union shirt and union ball cap and went to the Company's office, where he attempted to submit an application for employment. Ultimately, the Company suspended its interview with Couch, whom it knew to be a union organizer, and refused to hire him. Sheet Metal Workers Local 270 filed an unfair labor practice charge, Region 17 issued a complaint, and the case was heard by an Administrative Law Judge, who held that the Company's refusal to hire Couch was unlawful. In reaching his decision, the Judge found that the Company had definite plans to hire at the time that Couch applied; that Couch was an experienced journeyman sheet metal worker with qualifications that met or exceeded those sought by the Company; and that the Company's antiunion sentiments contributed to its refusal to hire Couch. The Judge specifically rejected the Company's assertion that it refused to hire Couch because of his "combative and confrontational behavior" during the application process, and he ordered the Company to make Couch whole by paying him backpay and by offering him employment if the evidence established that Couch would have been assigned to any of the Company's current projects.

Reviewing the Judge's decision, the Board adopted the Judge's conclusion that the Company's refusal to hire Couch violated Section 8(a)(3) of the National Labor Relations Act. Nevertheless, the Board expressed reservation about whether Couch and other union organizers should be entitled to a presumption of continuous employment for purposes of calculating their backpay and determining whether they were entitled to job offers. The Board noted that a backpay remedy must be "sufficiently tailored" to address the "actual consequences" of the alleged unfair labor practices. The Board explained that, although a presumption of continuous employment is reasonable in an ordinary case because "most job applicants seek employment of an indefinite duration," the same considerations do not apply when the discriminatee is a union organizer. "Unlike other applicants for employment...salts often do not seek employment for an indefinite duration...many salts remain or intend to remain with the targeted employer only until the union's defined objectives are achieved or abandoned." The Board noted that, whereas in the ordinary case the employer would be in the best position to offer evidence concerning the duration of the discriminatee's employment, in a salting case "evidence as to how long the salt would have worked for the salted employer in the absence of discrimination is not exclusively, or even primarily, related to matters within the control of that employer." Thus, the



Prime Cuts:

Anyone may file an unfair labor practice charge with the NLRB by submitting a charge form to the Regional Office. The form must identify the parties to the charge as well as include a brief statement of the basis of the charge. The charging party must also sign and date the charge. In order to be timely, charges must be filed within 6 months from the date of the alleged violation.

Charge forms are available for download from the NLRB website at www.nlrb.gov. Forms may also be obtained from any NLRB office. NLRB offices have information officers available to discuss charges or representation petitions in person and by phone, and to assist with the filing of these forms.

Let it be E: Filing Electronically with the NLRB

Some things can be filed electronically, some can not. Charges and petitions can not be filed electronically, but must be filed by traditional means – by mail or other delivery service, by fax (with a hard copy to follow by mail), or in person. Petitions to the Board for Advisory Opinions must be filed by traditional means. Lengthy documents should also be filed by traditional means. Most other items to be filed in the Regional Office can be sent by e-mail.

NLRB Field Offices use Microsoft Word format, but when documents are filed with the Board, the preferred format is PDF. Documents sent electronically must be virus free, and must be complete. They must include a statement of service and they must be timely filed. Electronic filers beware: if you attempt electronic filing on the day of your deadline and for any reason the document is not received, the document has not been filed.

At this point, Board decisions issue through traditional means—from Regional Offices, from the Judges, from the Board, etc.

Where to send it

When you send items to the Board electronically, bear in mind that some items go to the Regional Office, some to the General Counsel's Office of Appeals, some to the Division of Judges, and some to the Board via the Executive Secretary. Charges and Petitions go to the Regional Office, as does information during the investigation of charges and the processing of petitions. After the dismissal of a charge, the ap-

peal goes to the General Counsel's Office of Appeals in Washington. From the opening of an unfair labor practice hearing on, motions and briefs are directed to the Judge via the Division of Judges in San Francisco, Washington, or New York. If you are unsure, contact the attorney in the Region assigned to the case. After the decision of the Administrative Law Judge, exceptions go to the Board via the Executive Secretary's Office. In representation cases, after the petition is filed until after the election, materials should be sent to the agent assigned to the case. After a decision by the Regional Director, Exceptions are taken to the Board's Office of Representation Appeals. If you have questions about where to send something, contact the Board agent assigned to the case, or call the Regional Office and ask the Information Officer.

Items for Regional Offices may be filed with the Regional Office through the Board web site or may be sent directly to the e-mail address of a Board agent. Given the speed and convenience of e-mail, Board agents welcome information submitted electronically during investigations and the processing of petitions. The Board agent will be pleased to give you his or her e-mail address, just ask.

In filing items with the Board via the Executive Secretary, there are length and size limitations. Items 15 pages or less, including attachments, may be filed electronically without the copies normally required. Documents longer than 15 pages but smaller than 10 MB

may be filed electronically but copies must be sent to the office of the Executive Secretary by traditional means within 3 business days. Documents that are more than 10 MB in size may not be filed electronically. The rules regarding electronic filing can be found on the Board's web site.

Documents to be filed electronically with the Board or the Office of Appeals can be filed through the Board web site. www.nlr.gov, then through "My NLRB".

There is a separate location for requests for an extension of time from the Office of Appeals. To access this area, you need the case number and the access code, which is included in the dismissal letter.

FOIA

Freedom of Information Act (FOIA) requests to a Region must be submitted by traditional (non-electronic) means. FOIA requests from the Board can be submitted online, through the Board web site (www.nlr.gov), and then through My NLRB or E-File. Remember that FOIA requests must contain a commitment to pay for the costs incurred in responding to the request. By law, non-commercial scientific institutions and news media requesters are charged only when materials requested exceed 100 pages. Non-commercial requesters are charged only for searches and photocopying that take longer than two hours and for copies after the first 100 pages. Commercial requesters are charged for search time and photocopying. A commitment must be made in the FOIA request to



Prime Cuts:

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 affidavit and documentation of key events.

The Region will ask the charged party to present its evidence in response to the charge, and will further investigate the charge to establish all relevant facts.

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

Oil Capitol Cont.

Board held that, in cases involving union organizers, a presumption of continuous employment is inappropriate and that the burden of producing evidence with respect to the duration of the backpay period rests with the General Counsel, who must present "affirmative evidence" to establish that the backpay claim is reasonably based.

As *Oil Capitol* recently issued, the Board has yet to offer further guidance on how it will evaluate whether claimed backpay for union organizers is reasonable. It stands to reason that one potential result will be that backpay periods for union organizers will be reduced.

As set forth in the Board's decision, the impact of *Oil Capitol* will vary based on the facts of each case. The Board will evaluate such factors as the organizer's personal circumstances, a union's contemporaneous organizing policies and plans for the targeted employer, and any agreements between the union and the organizer to determine whether the duration of the claimed backpay period is reasonable.

Whether one agrees with the Board's decision, it clearly marks a departure from past precedent and forces Regional Offices to reevaluate how they investigate refusal-to-hire allegations

involving union organizers. Although the Board's decision might fail to definitively answer how long a union organizer would have worked absent an employer's discriminatory conduct, it certainly changes the way in which we think about the question.



Prime Cuts:

Region 17 maintains a Public Information program to assist with questions about the National Labor Relations Act. Under this program, an Information Officer is available from 8:15am to 4:45pm, Monday through Friday at (913)967-3000.

The Information Officer is available to explain what the NLRB does and does not do; help prepare unfair labor practice charges or representation petitions; and refer individuals to other Federal or State agencies, where appropriate.

E-Filing cont.

pay required search and copying fees.

Forms

For your convenience, Board forms can be found online, on the Board web site. This includes charges, petitions, withdrawal requests, notices of appearance, notices of appeal, and commerce questionnaires. To file a charge or petition, though, it is best to call the Regional Office and have an Information Officer assist you in filling out the form unless you are familiar with drafting charges and petitions.

Press enter

So other than for charges and petitions, electronic filing is generally an option for filing short docu-

ments with the Regional Office and with other Board offices. Questions that arise can be answered by the Board agent handling the case, by a

Regional Information Officer, or by someone else in the office where the document is to be filed. Happy filing.



General Counsel Meisburg to Visit Kansas City

On October 24, 2007, General Counsel Ronald Meisburg will present "What's Up at the NLRB in Washington" at the Labor and Employment Luncheon, Hyatt Regency Crown Center.

The event will also include a discussion by area labor practitioners Terry Kilroy and Joe Moreland on "The Pros and Cons of the Employee Free Choice Act."

The event will begin at Noon and last until 1:30. One hour of CLE credit is



available to those in attendance.

The event is sponsored by the University of Missouri School of Law, the University of Missouri - Kansas City School of Law, and Shughart Thomson & Kilroy P.C.

Ronald Meisburg was nominated by President Bush in July 2005 and confirmed by the Senate on August 3, 2006 to serve as General Counsel of the National Labor Relations Board for a term of 4 years.



Prime Cuts:

The National Labor Relations Board does not typically handle cases involving solely:

- unpaid wages
- failure to pay overtime
- sexual harassment
- age discrimination
- Worker's Compensation claims
- race discrimination

Regional Director D. Michael McConnell Retires

On August 3, 2007, D. Michael McConnell retired from his position as Regional Director, and ended his distinguished career with the Board.

Mr. McConnell began his career with the Board on November 13, 1977, as a Field Examiner. Prior to his appointment as Regional Director, Mr. McConnell served in the capacity of Supervisory Field Examiner from 1997 through 2001, and as Assistant to the Regional



Director from 2001 through 2003.

Mr. McConnell's plans for retirement include spending more time with his lovely wife Pam (who is also a former Region 17 employee), traveling, and perfecting his golf game.

The Region wishes Mike the best as he embarks on this new phase of his life. His fair-mindedness and tireless determination will be greatly missed.

Wilma Carson Receives Top Honor

Region 17 employee Wilma Carson was recently named the NLRB's Administrative Professional of the Year for 2007 in recognition of her excellent service to the Agency.

Wilma began her career with the Board in July of 1991 as a team secretary. In November of 2004, she was promoted to the position of Secretary to the Regional Director.



Wilma is the mother of two; Brooke and Maurio. Brooke is studying for her Doctorate in Psychology at the University of Indianapolis. Maurio is currently a Freshman at Longview College.

In her spare time Wilma is actively involved in the Red Hat Society.

The Region congratulates Wilma on this significant award.

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The NATIONAL LABOR RELATIONS BOARD is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, the primary law governing relations between unions and employers in the private sector. The statute guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activity with or without a union, or to refrain from all such activity.

NLRB Speakers Available

Regional staff members are available to speak at your event. Contact either of the Regional Outreach Coordinators for details.

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Add Yourself to our Mailing List

If you are interested in receiving your own copy of the Kansas City Strip, or our other Outreach materials, please contact either of our Regional Outreach coordinators.

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