NLRB Region 7

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Regional Director

www.nlrb.gov

Outreach

September 2007
No. 2

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15th Annual Bernard Gottfried Memorial Labor Law Symposium

I thought that I would take this opportunity to let you know of an upcoming event which we feel is very special. On October 24, 2007, Region 7, in partnership with Wayne State University Law School and the Labor and Employment Law Section of the State Bar of Michigan, will present the annual Bernard Gottfried Memorial Labor Law Symposium. As in past years, it will be held at the Spencer M. Partrich Auditorium on the Wayne State campus from 8:15 a.m. to 4:00 p.m.

This year our academic speaker will be Prof. Robert A. McCormick of the Michigan State University College of Law and the luncheon speaker will be Associate General Counsel Barry J. Kearney of the NLRB General Counsel's Division of Advice.

There will be a presentation by an Agency staff member and a management and a union attorney on the subject of who may now be deemed a statutory supervisor in light of the Board's decision in ***Oakwood Healthcare, Inc.***, 348 NLRB No. 37 (2006); ***Croft Metals, Inc.***, 348 NLRB No. 38 (2006), and ***Golden Crest Healthcare Center***, 348 NLRB No. 39 (2006). This will be followed by a panel discussion about the pending Employee Free Choice Act, involving three management and three union attorneys, led by a Region 7 senior attorney. Also scheduled sessions on the subjects of e-mail use in the workplace, secondary boycott activity under Section 8(b)(4)(B) of the National Labor Relations Act, and Section 10(j) injunctions and special remedies.

We believe that the symposium affords the opportunity for NLRB personnel, academics, management and union attorneys, and employer and union representatives to come together to hear, and be heard, about topical labor relations issues. This year's program should spark the same interest and lively dialogue as in past years.

Any questions regarding the symposium should be directed to Robin Dortenzio of Wayne State University at (313) 577-3934, or NLRB Regional Attorney Dennis R. Boren at (313) 226-3230.

Stephen M. Glasser, Regional Director

General Counsel Meisburg Issues Memo 07-08 Outlining Remedies to be Sought in First Contract Bargaining Cases

On May 29, 2007, General Counsel Meisburg issued memo GC 07-08 which outlines remedies to be sought by the General Counsel in first contract bargaining cases. In the memo, General Counsel Meisburg noted that first contract bargaining constitutes a "critical stage of the negotiation process in that it provides the foundation for the parties' further labor management relations." The GC stated that there was a need for additional remedies because merely ordering parties to bargain may not return them to status quo ante. The GC stated that certain remedies should "regularly be sought" in initial bargaining cases. In particular they should be sought when the charged party has committed "high impact violations" such as outright refusals to bargain, refusals to meet at reasonable times, unilateral changes that inject extraneous issues into negotiations, or unlawful discharges of union supporters.

The GC states that additional remedies should be considered by Regions in all appropriate cases. In particular, the Regions should consider requiring bargaining on a prescribed or compressed schedule, periodic reports on bargaining status, a minimum six-month extension of the certification year, or reimbursement of bargaining costs.

In furtherance of consideration of such remedies on a consistent basis by the Regions, the GC has directed that all cases with merit decisions involving first year bargaining or attempts to bargain for an initial contract should be submitted to the Division of Advice. The question is whether the Board will agree to the additional remedies sought by the GC in these cases. Stay tuned.

Revised Charge Forms

OM Memo 07-74, issued on July 13, 2007, announced the issuance of revised forms for filing charges against employers and unions. The forms have been revised so that a single charge against an employer or union can be used for U.S. Postal cases as well as for most other cases. The main change is in the section identifying "Sections of the Act" being violated and there is a reference to the Postal Reorganization Act. Also, the charge against employer form has been revised to remove boilerplate language stating "[b]y the above and other acts, the above named employer has interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act." Board law has found that this boilerplate language is meaningless. See, ***Nickles Bakery of Indiana,*** 296 NLRB 297 (1989)

The new forms are on the Agency's Website.

The Region 7 Detroit office is located on the third floor of the Patrick V. McNamara Federal Building located at the corner of Michigan Ave. and Cass Ave. in downtown Detroit.

Visitors to the McNamara Building must enter the building from the Michigan Avenue entrance.

The Detroit office is open from 8:15 a.m. to 4:45 p.m. Monday through Friday.
Telephone (313) 226-3200
Fax (313) 226-2090

The Grand Rapids resident office handles cases on the west side of the lower peninsula of Michigan.

The resident office is located on the third floor of the building located at 82 Ionia, the corner of Ionia St. and Fountain St. in downtown Grand Rapids.

It is open from 8:15 a.m. to 4:45 p.m. Monday through Friday.
Telephone (616) 456-2679
Fax (616) 456-2596

The Resident Officer at the Grand Rapids office is Chet Byerly.

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Section 10(b) of the National Labor Relations Act allows a charging party six months to file a timely charge with the NLRB. If you intend to file a charge with the NLRB, your charge must be filed and served on the charged party within six months of the date of the alleged unfair labor practice.

NLRB's Website Rated One of the Best in the Federal Government

The National Security Archive (NSA), a non-governmental research institute and library located at George Washington University, evaluated websites of 158 government agencies and recognized the NLRB's website (www.nlrb.gov) as one of the five best in the Federal government. The NSA rated the Board's website as an "E-Star" describing it as: "Excellent navigation scheme—Site is well organized and very easy to follow—Good guidance—Electronic reading room with a lot of available information."

The Board launched its new interactive website with more document collections in November 2006. An improved navigational structure makes it easier for users on the website to find information. The website has a searchable database of case information and Board decisions are easily accessed. The website also provides users with access to Board decisions, administrative law judge decisions, certain General Counsel, Operations Management and Advice memos, the NLRB rules and regulations, and the unfair labor practice, representation case and compliance manuals. The website also allows for users to transact business online with the Agency more easily. An important enhancement is "My NLRB," a new feature which uses portal technology and allows users who E-file forms to establish their own accounts in order for the system to automatically fill in data fields on E-filing forms.

Speakers Available

Members of the Region's staff are available to make presentations before any employer or union group, classroom group, legal services clinic or service agency, and labor relations association, to describe the Act's protections, how the Region investigates and resolves unfair labor practice charges, processes representation petitions, or any NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please do not hesitate to telephone Regional Outreach Coordinator Patrick Labadie at (313) 226-3213.

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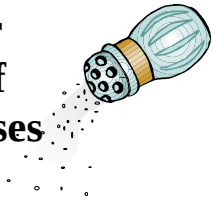
Board Shifts the Burden for Establishing the Duration of Backpay Period in Salting Cases



Amy Roemer, Supervisory Attorney

In ***Oil Capitol Sheet Metal, Inc.***, 349 NLRB No. 118, a split National Labor Relations Board (Chairman Battista, Board Members Schaumber, Kirsanow, with Members Liebman and Walsh dissenting) established a new procedure for determining a remedy for failure to hire in salting cases.

In these cases, a union sends members to apply for employment with a nonunion employer, to obtain employment and to organize the employer's employees. The job applicants are commonly referred to as "salts". Under the law, if the employer discharges or refuses to hire the salt because of his or her union affiliation or activity, the employer's conduct is unlawful. It is well established that salts are protected employees under the National Labor Relations Act (NLRA). ***NLRB v. Town & Country Electric, Inc.*** 516 U.S. 85 (1995).

In ***Oil Capitol*** the Board found unanimously that the employer violated Section 8(a)(1) and (3) of the NLRA by refusing to hire a salt. The Board split, however, over the remedy.

Before this decision, the remedy for an unlawful discharge or refusal to hire in salting cases included the employer's payment of backpay to the employee for the period from the date of the unlawful act until the employer made a valid offer of reinstatement, or hired the individual in the case of an unlawful refusal to hire. The Board applied a presumption that, if hired, the salt would have stayed on the job for an indefinite period. If the job was a construction job, the Board relied on an additional presumption that the employer would have transferred the employee to its other jobsites when the job from which he was discharged, or for which he was refused employment, was completed.

In ***Oil Capitol*** the Board majority declined to continue to apply those presumptions, asserting that they are inconsistent with the reality of salting. According to the majority, the reality is that salts, when hired, stay on the job only until they have succeeded in the organizing effort or when such efforts are going nowhere. Typically, the union then directs the salt to leave the job to seek employment with another employer and begin organizing anew. Although the Board recognized that this is not always the case, nonetheless, the union is in a better position to explain its intentions regarding the employment status of the salt, and the burden to establish the duration of the backpay period should be on the union, through the General Counsel.

Learn More:

The NLRB website, www.nlrb.gov, contains a great deal of information about the provisions of the Act, Board policies and procedures, and how to contact the nearest Regional Office.

Contact the Region:

There is always an information officer available at an NLRB office or by telephone to answer general inquiries or to discuss a specific workplace problem or question. The information officer can provide information about the Act and discuss whether it appears to be appropriate to file an unfair labor practice charge. However, the information officer may not offer legal advice and the decision as to whether to file a charge rests with the individual. If filing a charge does appear to be appropriate, the information officer can assist in completing the charge form.

The information officer at Region 7 may be reached by telephone at: 313.226.3200

Investigative Subpoenas

Dennis Boren, Regional Attorney

While labor organizations and employers that appear before the Region on a regular or frequent basis may be familiar with investigative subpoenas, it is not unusual to learn that employers, labor organizations, and their representatives who have more limited exposure to the Agency are not familiar with their use. As the issuance of investigative subpoenas occurs on a relatively infrequent basis, this article will provide a general overview that hopefully will provide some guidance to those who have not had any experience as well as to those individuals who have dealt with the Region on a limited basis relative to this issue.

During certain investigations involving representation and unfair labor practice cases, resort to subpoenas will be necessary in order to ascertain the evidence on which to base an administrative decision on the merits. Upon a Regional determination that it is necessary to issue an investigative subpoena, the Board agent assigned to the case will request a subpoena from the Regional Director. The application must be in writing and contain a statement of the scope of the information or documents sought and their relevance. As a point of clarification, there is no right to an investigative subpoena to parties other than the General Counsel.

Section 11(1) of the Act provides the authority to issue subpoenas and grants, in part, the "Board, or its agent … the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or question." Memorandum GC 00-02 gives the Regions full discretion to issue investigative subpoenas ad testificandum and duces tecum to charged parties and third-party witnesses[1], subject to limited clearance.[2]

Uses of Investigative Subpoenas

- Representation cases: Investigative subpoenas may be issued by the Regional Director regarding jurisdiction issues or by the hearing officer in a pre-election hearing.
- Pre-complaint situations: Pursuant to memorandum GC 00-02 Regional Directors are authorized to issue investigative subpoenas duces tecum as well as ad testificandum to charged parties and third party witnesses whenever the evidence sought would materially aid in the determination of a charge allegation and whenever such evidence cannot be obtained by reasonable voluntary means. An investigative subpoena may properly seek evidence regarding all issues under investigation including potential defenses.
- Post-complaint situations: Investigative subpoenas may be issued to determine that assets will be available to obtain compliance with an eventual remedial order, and to achieve compliance with a Board order. In addition, subpoenas ad testificandum may compel testimony by affidavit, by oral testimony under oath before a court reporter or by response to written interrogatories.

In conclusion, although the Region always encourages parties and third-party witnesses to cooperate in providing evidence in investigations, there are certain situations when parties and third-party witnesses are unwilling or fail to do so. In those situations, it is the Region's position that the issuance of investigative subpoenas is a viable option to obtain the evidence in order to make an appropriate decision.

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[1] The General Counsel has the right to issue subpoenas duces tecum and ad testificandum investigative subpoenas to a third party not alleged to have violated the Act. ***Link v. NLRB***, 330 F.2d 437 (4th Cir. 1964)

[2] Clearance is required only where the Region wishes to issue the subpoena post-complaint or where a serious claim of privilege is likely to be raised.

Filing a charge with the Region

How is it done?

Raymond Kassab, Assistant to the Regional Director

So you want to file a charge with the National Labor Relations Board. No problem. Filing a charge with the NLRB is quick and easy.

The first step is to obtain the appropriate charge form. Use Form NLRB-501 for filing a charge against an employer. Use Form NLRB-508 for filing a charge against a labor organization or its agents. Charge forms can be obtained from the Detroit Regional Office, (313) 226-3200, the Grand Rapids Resident Office, (616) 456-2679, or the Agency's Website, www.nlrb.gov. (Click on "How do I file a charge against an employer or union?" then click on "NLRB Form 501" or "NLRB Form 508.")

For the most part, filling out the charge form is self-explanatory. The troublesome areas are correctly citing the appropriate section of the Act that you are alleging has been violated (Part "h" on the CA form and Part "e" on the CB form) and the body of the charge (Part 2).

Charges filed with the NLRB are premised on violation of employee rights guaranteed in Section 7 of the Act:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities …

CHARGES AGAINST EMPLOYERS

Section 8(a)(1) of the Act makes it unlawful for an employer to interfere with restrain or coerce employees in the exercise of their Section 7 rights. Examples of Section 8(a)(1) charge allegations include:

> On or about (date), the Employer coercively interrogated employees concerning their sympathies for and activities on behalf of (union).
>
> On or about (date), the Employer engaged in surveillance of its employees' union activities.
>
> On or about (date), the Employer threatened employees with plant closure to dissuade them from supporting (union).
>
> On or about (date), the Employer discharged William Smith for engaging in activities with other employees for mutual aid or protection on matters concerning terms and conditions of employment.

Section 8(a)(2) of the Act makes it unlawful for an employer to dominate or interfere with the formation or administration of a labor organization. Examples of Section 8(a)(2) charge allegations include:

> On or about (date) the Employer granted recognition to (union) when that labor organization did not represent an uncoerced majority of the Employer's employees.
>
> On or about (date) the Employer established, and since that date has dominated the operations of, (union).

Section 8(a)(3) makes it unlawful for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization. Examples of Section 8(a)(3) charge allegations include:

> On or about (date), the Employer discharged Mary Jones in retaliation for her activities on behalf of (union).
>
> On or about (date), the Employer denied pay raises to Robert Brown, Linda White and Charles White in retaliation for their activities on behalf or (union).

(Continued on next page)

Filing a charge with the Region (Continued)

Section 8(a)(4) makes it unlawful for an employer to discharge or otherwise discriminate against employees because they have given testimony under the Act. Examples of Section 8(a)(4) charge allegations include:

On or about (date), the Employer suspended Patricia Carpenter for filing a charge and giving testimony in Case 7-CA-66666.

On or about (date), the Employer refused to recall Brian Adams from layoff because he testified at the hearing in Case 7-RC-30000.

Section 8(a)(5) makes it unlawful for an employer to refuse to bargain collectively with representatives of its employees. Examples of Section 8(a)(5) charge allegations include:

Since on or about (date), the Employer has refused to provide necessary and relevant information to (union).

On or about (date), the Employer unilaterally changed health insurance carriers.

On or about (date), the Employer closed its facility and relocated bargaining unit work without notice to, or bargaining with, (union) with respect to its decisions or their effects on bargaining unit employees.

CHARGES AGAINST LABOR ORGANIZATION OR ITS AGENTS

Section 8(b (1)(A) makes it unlawful for a labor organization to restrain or coerce employees in the exercise of their Section 7 rights. Examples of Section 8(b)(1)(A) charge allegations include:

Since (date) the Union has breached it duty of fair representation to James Washington by refusing to file and process a discharge grievance on his behalf because of his internal union political activities.

On (date) the Union fined David Lee for filing and giving testimony in Case 7-CB-20000.

On (date) the Union engaged in mass picketing at (location).

Section 8(b)(2) makes it unlawful for a labor organization to cause or attempt to cause an Employer to discriminate against an employee in violation of Section 8(a)(3). Examples of Section 8(b)(2) charge allegations include:

Since about (date) the Union, in the operation of an exclusive hiring hall, has failed and refused to refer Bill Harris to a job with (Employer) because of his lack of membership in the Union.

On (date) the Union caused (Employer) to remove Harry Jones from his position so that the steward could bump into the job.

Section 8(b)(3) makes it unlawful for a labor organization to refuse to bargain collectively with an employer. Examples of Section 8(b)(3) charge allegations include:

Since about (date) the Union has refused to provide necessary and relevant information to (Employer).

Since about (date) the Union has refused to meet with the Employer at reasonable times and reasonable places for the purpose of negotiating a successor collective bargaining agreement.

Examples of Section 8(b)(1)(B), 8(b)(5), 8(b)(6), 8(b)(7), 8(e) and 8(g) allegations have not been provided because such charges are infrequently filed. Examples of Section 8(b)(4) allegations have not been provided because these charges are rather complex and best discussed with an NLRB supervisor prior to filing.

(See ***Helpful Hints When Filing a Charge*** in the sidebar on Page 8)

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The Federal Debt Collection Procedures Act and the NLRB

Erikson Karmol, Supervisory Attorney

The Federal government enacted a statute, The Federal Debt Collection Procedures Act ("FDCPA"), 28 U.S.C. §§3001 through 3205 in pertinent part in order to assist in the collection of debts owed to the United States. The FDCPA is generally the exclusive civil collection procedure for the United States and it preempts any inconsistent state laws §3001 (a), (b), and (d). The FDCPA provides a plethora of tools to assist agencies such as the National Labor Relations Board (NLRB) in the collection of these debts. However, in most circumstances the courts will not grant the NLRB's FDCPA action unless a money judgment is obtained prior to filing. Some examples of the FDCPA post-judgment remedies are judgment liens §3201, executions §3103, and garnishments §3205.

The exception to this general rule is when the NLRB can show that it has fear that without pre-judgment relief its money judgment when obtained will be unenforceable. Meeting the burden to successfully obtain the FDCPA prejudgment remedy requires the NLRB to plead the specific grounds for such a remedy (see §3101(b)) and submit an affidavit in support. The FDCPA requires that the affidavit filed with the application shall "establish[ ] with particularity to the court's satisfaction facts supporting the probable validity of the claim for a debt and the right of the United States to recover what is demanded in the application." §3101(c). Some examples of the FDCPA pre-judgment remedies are protective orders §3013, attachments §3102, receiverships §3103, garnishments §3104, and sequestrations §3105. Regardless, of the FDCPA action taken, the NLRB is also entitled to seek a surcharge of 10% of the amount of the debt §3011.

Region 7 has successfully used the FDCPA in numerous cases as a tool to preserve the assets of the charged party/respondent for satisfaction of its money judgments. Region 7's most common use of the FDCPA is for pre-judgment and post-judgment garnishments. In essence, a garnishment is a tool used to compel third parties who have possession or control of assets of a charged party/respondent to turn those assets over to the NLRB rather than to the charged party/respondent.

In order to assist and facilitate Region 7's prompt and effective use of the FDCPA, it is imperative that the charging party keep the NLRB apprised of any changes with the charged party/respondent that might compromise the NLRB's satisfaction of a money judgment. Some examples of critical changes include, but are not limited to, a substantial sale of real or personal property, change in ownership, bankruptcy and closure.

Helpful Hints When Filing a Charge:

- Remember to sign the charge.
- Section 10(b) of the Act provides for a six month statute of limitations. To be timely, a charge must be filed with a Board office and served on the charged party within six months of the date of the alleged violation.
- In the body of the charge, you should identify only those employees whom you allege have been discriminated against and may be entitled to a reinstatement or back pay remedy. That is, employees who are unlawfully discharged, suspended or denied a pay increase should be named, but not employees who have been threatened, interrogated, or surveilled.
- Witnesses who are not alleged discriminatees should not be identified in the charge.
- Documents should not be attached to the charge.
- There is no need to file a separate charge for each alleged violation. Multiple related allegations should be contained on the same charge form.
- If possible, confine the charge allegations to the space provided in Part 2 of the form.

Remember, assistance is only a telephone call away. Call (313) 226-3200 or (616) 456-2679 and ask to speak with an information officer. Assistance is available Monday through Friday, 8:15 A.M. to 4:45 P.M.