OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 08-06 **May 15, 2008**

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Report of Quality Committee on FY 2007 Quality Reviews

One of my top priorities is that case processing in the Field be conducted consistent with the highest quality standards. Pursuant to this goal, the Field Quality Committee that was formed in FY 2004 continues to assess the quality of casehandling work in the Field and make recommendations based upon its findings. Over the past several years, the committee has provided a number of valuable recommendations to enhance quality and has continued its work during the current fiscal year. See GC Memorandum 07-16, and OM Memoranda 07-84, 06-91, 06-16, 05-57, 05-38 and 04-66.

The committee, composed of 8 Field managers and 2 representatives of the Division of Operations-Management, recently completed a careful review of issues identified in case processing during the FY 2007 quality review process. Based on this review, the Quality Committee prepared a report highlighting deficiencies and recommending some proposed solutions to prevent these issues from recurring. The Report of the Quality Committee on FY 2007 Quality Reviews is attached.

I strongly urge all Regional managers and supervisors to review this Report carefully and to implement the recommendations set forth in the report. The report should be the subject matter of a training session with the professional staff. The committee members are listed on the attached report. They have my sincere thanks for a job well done.

/s/
R.M.

Attachments

cc: NLRBU
Release to the Public

UNITED STATES GOVERNMENT
National Labor Relations Board
Memorandum

DATE: May 15, 2008

TO: Ronald Meisburg, General Counsel
John E. Higgins, Jr., Deputy General Counsel

THRU: Richard A. Siegel, Associate General Counsel
Anne G. Purcell, Deputy Associate General Counsel

FROM: FY 2007 Quality Committee (Rosemary Pye, RD, R-1; Rochelle Kentov, RD, R-12; Martha Kinard, RD, R-16; Robert W. Chester, RD, R-18; Karen Fernbach, RA, R-2; Claude T. Harrell, ARD, R-10; Dorothy D. Wilson, RA, R-26; Richard Wainstein, SA, R-4; James G. Paulsen, AGC, Ops-Mgmt.; and Charles L. Posner, DAGC, Ops-Mgmt.)

SUBJECT: Quality Committee's Report on Common Casehandling Deficiencies Uncovered in the FY 2007 Quality Review Process

One of the top priorities of the General Counsel continues to be high quality case processing. Annually, field case processing is evaluated by the Division of Operations-Management through its review of a sampling of selected case files for each Regional Office. The Quality Committee, a field committee created by the General Counsel, has reviewed and analyzed common problems uncovered during the FY 2007 quality review process. A summary of those problems is included with this report as Attachment A.

The 2007 quality review process revealed that Regions are achieving high quality case processing in unfair labor practice, representation and compliance cases. The Committee applauds Regions for instituting best practices and regular training to achieve this goal. However, the quality review process also again showed a number of recurring problems identified not only in FY 2007 but also in previous fiscal years. This report suggests some best practices and other solutions that may assist Regions in maintaining high quality work.

The Committee's suggestions are set forth in this report and the attachments to this report. In addition, the attachments referred to in the Committee's Reports are posted on the Operations page of *Surfboard* under "Guidance/Training."

The Committee's report on the results of the FY 2007 quality reviews is divided into seven sections. The report begins with a focused discussion of the overall handling of compliance cases because the Committee believes that the problems uncovered by

the quality review warranted special attention. The report then touches briefly on the following four areas: producing high quality affidavits, starting the investigation early, avoiding the absence of documentation in files and preventing unusual but significant problems. Finally, we end our report by applauding the fact that the FY 2007 quality review underscored two areas of casehandling success: the careful consideration of 10(j) issues and the achievement of high quality in the handling of representation cases.

I. Compliance Issues

OM Memorandum 08-47 reaffirmed General Counsel Ronald Meisburg's commitment to compliance as one of his priorities. Particularly when the Region has prevailed in litigation and there is a formal compliance case, that case should receive top priority to provide the hard-won remedy expeditiously. The General Counsel has made a commitment to the Courts to make every effort to expedite compliance case handling.[1] As with representation and 10(j) cases, compliance cases must be given priority.

Recent Board cases -- specifically *Oil Capitol Sheet Metal*,[2] *St. George Warehouse*,[3] and *Grosvenor Resort*[4]-- will add to the considerable work of the compliance staff. In most Regions, the staff members overseeing compliance handle both informal settlement agreements and formal compliance cases. In addition, compliance team members often assist staff members in using tools such as PACER, AUTOTRACK, and social security search methods in noncompliance cases. Similarly, compliance team members may assist other staff members with backpay computations for cases prior to the compliance stage. Although beyond the scope of this report, challenging issues involving remedies for undocumented workers have added to the workload in some Regions.

To improve the expeditious handling of compliance cases, while maintaining high quality, the Committee offers the following suggestions: A. Increase the number of people expert in compliance work; B. Delegate some of the work now performed by compliance staff members to other members of the staff; and C. Take advantage of improved methods and procedures for performing compliance work.

A. Increase the number of people expert in compliance work.

1. **Develop compliance experts.** It takes some time and concentration to develop expertise in compliance. In some Regions, this expertise may be developed by having a compliance team that includes at least one attorney,

---

[1] OM 08-47, fn. 2 describes the General Counsel's commitments to the U.S. Court of Appeals for the First Circuit to improve compliance procedures to avoid lengthy delays in case processing. These measures are detailed below at C5.
[2] 349 NLRB No. 118 (May 31, 2007).
[3] 351 NLRB No. 42 (Sept. 30, 2007).
[4] Grosvenor Orlando Associates, LTD, a/b/a The Grosvenor Resort, 350 NLRB No. 86 (Sept. 11, 2007).

one field examiner, the compliance officer, and the compliance assistant who are supervised by one supervisor. This approach develops the expertise of everyone on the team and allows most compliance cases to be handled by the team. It also avoids the complications of dual supervision or supervision by someone less expert in compliance. In other Regions, especially smaller ones, separate compliance teams may not be feasible. In those Regions, the desired expertise may be developed by a conscious effort to train and involve multiple people in compliance work. With a cadre of compliance experts in a Region, it is less likely that a sudden increase in workload or an absence of a team member will interrupt the case processing. We recognize that this may be a difficult objective to achieve given Regions' conflicting priorities and limited resources, but all Regions should make their best efforts to develop back-up capabilities in compliance.

2. **Cross train supervisors on compliance.** A second supervisor should be cross trained in compliance. Again, this helps prevent an interruption for any reason.

3. **Involve managers in supervising compliance.** Either the Regional Attorney or the Assistant to the Regional Director should be responsible for overseeing compliance. As with cross-training of supervisors, such involvement ensures that quality oversight will not be interrupted.

4. **Train additional attorneys to do compliance litigation**. This training includes the taking of depositions, which are often necessary to investigate claims of inability to pay or derivative liability. Even if a case does not ultimately go to hearing, working through the issues provides excellent training in compliance and in litigation skills.

5. **Develop the responsibilities of the Compliance Assistant**. Compliance assistants are full members of the compliance team. As such, the compliance assistant should become fully trained on the use of PACER, AUTOTRACK, and other investigative tools. He or she will provide another resource for agents who do not regularly handle compliance cases, thereby freeing up the other members of the compliance team to work on the more difficult compliance cases. Further, the assistant can be trained to perform simple backpay calculations and potentially work with other professionals who need assistance in this area. Regions might also consider using other support staff employees to perform these tasks.

6. **Adapt to the structure and size of different Regions.** Although it can be very difficult for small Regions to handle multiple priorities, they share the same consideration present in larger Regions that expertise cannot rest exclusively in one or two people who may not be able to sustain the work. Similarly, Regions with Resident Offices or Subregions must have adequate expertise in each office or a method of providing support and oversight.

B. Assign some of the work now performed by compliance staff members to other members of the staff.

1. **Use the general knowledge of staff members to assist compliance efforts.** Certain types of compliance assignments require knowledge and investigatory techniques that are generally familiar to Board agents. Such topics include alter ego, single employer, successor, and individual liability. Investigations of these issues can be assigned to one Board agent while someone else focuses on other allegations or aspects of the compliance investigation.

2. **Train staff members to use search tools.** Other employees, including support staff employees, may be trained to use PACER, AUTOTRACK, etc.

3. **Increase expertise in calculating backpay.** All Board agents should be trained to do backpay calculations. Members of the compliance team should only be helping to compute backpay in the most difficult cases.

C. Take advantage of improved methods and procedures for performing compliance work.

1. **Involve all professionals in the early investigation of compliance issues.** As *St. George Warehouse,* 351 NLRB No. 42 (2007), places the ultimate burden on the General Counsel to establish mitigation efforts by our discriminatees and *Grosvenor Resort*, 350 NLRB No. 86 (2007), further requires these discriminatees to begin their search for work within two weeks of their discharge or risk tolling backpay, the Regions should gather preliminary backpay information early during the investigation rather than leave this issue for the compliance team to handle during the compliance phase of the case. To protect the efficacy of the Board's backpay remedy, it is a best practice to investigate backpay issues as soon as possible. By raising these issues early and collecting this data at the initial stage of the investigation, the Region is taking a proactive approach that will ultimately protect the viability of the Board's backpay orders when they reach the compliance stage. Please review OM 08-54, "*Grosvenor Orlando Associates, LTD*, 350 NLRB No. 86," for instructions regarding the processing of cases in light of *Grosvenor*.

2. **Consider consolidating the complaint and the compliance specification**. Whenever the backpay period is fixed, it is expeditious to litigate the backpay with the case on the merits.

3. **Seek Interregional Assistance when necessary**. A Region should promptly seek help from Operations when the Region's workload precludes the timely processing of compliance work.

4. **Set a plan of action for each case and update it at least monthly**. At the beginning of each month, the supervisor and compliance officer and any others who should be involved – other team members, the supervising manager, and the supervisor who is cross training – should review all pending cases and set a plan of action.

5. **Look for ways around obstacles and delays**. In accord with OM Memorandum 08-47, fn. 2, to reduce delays in compliance proceedings: institute a review of open compliance cases, increase the use of investigatory subpoenas in compliance cases, and file Motions for Partial Summary Judgment in compliance cases with the Administrative Law Judge, rather than the Board.

6. **Avoid delays that exacerbate problems**. In addition to the practical impact on the public of a delay in providing a remedy, the case becomes more difficult for the staff. For example, the backpay situation becomes more complex, alter egos or successors spring up, assets are siphoned off, bankruptcy is declared, or the incumbent union loses its majority status for reasons that may or may not be the product of taint.

7. **Evaluate cases realistically**. Sometimes there is no likelihood of a meaningful recovery. The Region should take into account the realistic outcome and conserve its resources. In such cases, the Region may check with the Contempt Litigation and Compliance Branch to see if they can advise the Region of any other avenues of attack. The inquiry can start with a phone call and does not require a formal submission. With the concurrence of the Contempt Branch, the Region's recommendation to close any court order case short of full compliance is likely to win quick approval in Operations. If a case shows up repeatedly on the overage case list, there should be a discussion about how it should be handled, what resources should be sufficient, and whether the case should be closed administratively.

8. **Take advantage of appropriate training modules and other Agency training resources**:

    a. The relevant training modules are: Module 3: Bankruptcy Concepts and Issues; Module 4: Bankruptcy Litigation and Practice Tips; and Module 18: Preparing for and Litigating Compliance Cases. A module on settlements is now being developed. It is also valuable to have Regional compliance experts train the full staff.

b. The Contempt Litigation and Compliance Branch and DAGC Beth Tursell in Operations can also provide expert speakers for the Regions. Training Tuesdays often feature compliance topics.

c. DAGC Beth Tursell has drafted a useful outline covering the essentials of calculating backpay, a copy of which is on the Operations page of *Surfboard* at Compliance Toolbox. This comprehensive outline ensures the collection of all legitimate backpay and prevents the backpay settlement from unraveling by omissions. It is also a very clear tool for Board agents to consider the full scope of backpay.

d. The Compliance Toolbox contains an easy program for calculating interest. This material is located on the Operations page of *Surfboard* at Compliance Toolbox. There is also a more complex program, Bacpay26, for calculating backpay that may require more expert help.

e. OM Memorandum 08-29 (CH), Case Handling Instructions for Cases involving *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (May 31, 2007), is now available, and other memoranda on *St. George* and *Grosvenor* are being planned.

II. Producing High Quality Affidavits

The FY 2007 Quality Review revealed a number of cases where affidavits failed to contain sufficient detail or certain basic information necessary to decide the merits of the allegations.

Although time constraints may sometimes cause these errors, other possible reasons for such deficiencies include a failure by the investigating agent, prior to beginning the affidavit, to talk with the witness in order to get a sense of the witness' story, or the agent's recording of a witness' story without probing for more information.

To avoid these problems, Board agents must exercise a healthy sense of curiosity while taking affidavits and must ask follow up questions to fill in gaps, elicit necessary details and ensure the elements of the violations alleged in the charge have been covered. These questions are particularly critical if a witness' recitation of events is vague, confusing, seems improbable or contains conflicting statements. Board agents must remember to include the who, what, when, where and why information for all important conversations and events. Both agents and their supervisors should review affidavits well before cases are due to be reported so that any omissions may be promptly addressed. Moreover, in all cases, agents should strive to obtain statements from other witnesses present to ensure a full and complete investigation of the facts.

To assist agents during the taking of affidavits, the Committee has prepared updated checklists to identify those details and elements needed in our most common

8(a)(1), 8(a)(3), 8(a)(5) and 8(b)(1)(A) cases.[5] These checklists are included with this report as Attachments B, C, D and E and are posted on the Operations page of *Surfboard* under "Guidance/Training."

III. Starting the Investigation Early

The quality reviews revealed instances when the investigation was not started promptly. In addition, there were instances when the charged party was given an unreasonably short deadline to respond to the issues raised by the charge and to submit evidence. Instances like these may give the public the false impression that we are favoring one side, that we do not hold ourselves to high standards of due process, or that we are not concerned with processing our cases in an expeditious, high quality manner.

Impact Analysis establishes time goals for completion of our cases. However, regardless of the time goals set by Impact Analysis or whether a case is considered overage under Impact Analysis, investigations must afford the parties a reasonable opportunity to present evidence. Under Section 10052.3 of the Casehandling Manual, contact with the charging party, or the charging party's representative, is to be made at the earliest possible date consistent with other casehandling priorities. Under CHM Section 10052.5, early contact is also to be made with the charged party, or its representative. If early contact is made, sufficient details regarding the charged party's position can be sought to enable the Board agent to examine the charging party regarding the charged party's position. In addition, early contact with the charged party frequently leads to a prompt resolution of the charge, which is beneficial to all parties and the public interest.

Early contact with the charging party and charged party also allows the Board agent to develop a strategy for completion of the investigation, including the identification of specific allegations and issues, the theory of the case, areas of inquiry, areas of legal research, a list of witnesses to contact, including third-party witnesses, if appropriate, a list of documents to obtain, approaches to reluctant witnesses, appropriate remedies, including consideration of 10(j) relief, and a schedule for completing these tasks.

IV. Avoiding the Absence of Documentation in Files

There continued to be a number of issues revealed in the quality review process related to the absence of documentation in the files. It remains imperative for agents to document the files so that each file is self-contained. Such documentation should make

---

[5] These checklists are intended as an aid to identify some key areas to cover in an affidavit and are *not* a comprehensive list of questions or issues. Other areas to include in the affidavit will be determined by legal research and by responses to the items in the checklist.

it easy for any reviewer of the file to be able to understand how the process evolved and moved from Step A to Step B and on through Step Z of the process.

Attachment A highlights the file documentation issues identified during the quality review process. Many of these issues involve missing documents and failures to prepare documents to explain what was done and why. Throughout the investigation, the Board agent is to maintain a current record in the case file of the agent's contacts and activities. CHM Section 10054. This requirement to maintain a current record of contacts and activities applies equally to representation case matters.

V. Preventing Unusual But Significant Problems

The FY 2007 quality review process revealed three unusual instances of casehandling problems that, when they occur, create a negative impression of the Board's expertise in the processing of C and R cases. In one instance, a Region approved a withdrawal of a charge based on a non-Board settlement while the case was pending before the Board on review of exceptions to an ALJ decision. When the Board subsequently ruled on the exceptions, the Region had to request that the Board vacate its decision on the basis that the matter had already been resolved by the parties. In R cases, there was an instance in the FY 2007 quality reviews in which a Region issued a Certification of Representative and a Notice of Bargaining Obligation even though a majority of the valid ballots had not been cast for representation. In another case reviewed, a hearing officer incorrectly recommended that a Certification of Results be issued even though a majority of ballots had been cast in favor of representation. Although these mistakes were isolated, the Quality Committee believes that it is important to highlight these concerns to all Regions. Systems should be in place to ensure that withdrawals are approved by a Director only when the authority to approve the withdrawal rests with the Director. Similarly, since the certification process is the final step in the processing of a representation case, Regions should have appropriate layers of review in place to ensure that the certification that is recommended and/or issued accurately reflects the results of the secret ballot election. The Committee hopes that by highlighting these mistakes, all Regions will take a moment to review their systems to ensure that these types of isolated mistakes do not occur.

VI. Careful Consideration of 10(j) Issues

The FY 2007 quality reviews process demonstrated that Regions are carefully considering the need for 10(j) relief at agendas and are documenting the Regions' analysis of the appropriateness of 10(j) relief in agenda minutes and other decisional documents. Significantly, the quality review process for FY 2007 identified only a very few instances in which Regions failed to obtain "just and proper" evidence or did not adequately consider the need for 10(j) relief in appropriate cases. We applaud Regions for ensuring that "just and proper" evidence is regularly obtained during the investigation of potential 10(j) cases and for carefully considering the need for 10(j) relief at agendas and documenting the Regions' analysis of the appropriateness of 10(j) relief in agenda minutes and other decisional documents. The Committee continues to recommend that

all Regions undertake periodic refresher training for experienced staff as well as conducting 10(j) training for newly hired Board agents. The *PowerPoint* presentations utilized in the FY 2008 National 10(j) Videoconference Training conducted by Assistant General Counsels Judy Katz and Jim Paulsen provide an excellent vehicle for refresher training for experienced Board agents. Also two 10(j) training modules (Modules 20 and 21), which may be utilized to train new Board agents, are available on *Surfboard* at the following link: http://nlrbnet.nlrb.gov/EmpDev/ProfessionalDevelopmentProgram.htm

VII. Achievement of High Quality in the Handling of Representation Cases

The quality review process for FY 2007 revealed many successes and overall high quality in the processing of representation case matters. While there were some continuing issues, primarily with respect to documentation matters and issues identified in the "Preventing Unusual But Significant Problems" section of this report, the overall quality was very strong. Our review revealed very high case processing quality in the Regions, an achievement for which all Regions should be justifiably proud.

Conclusion

The Committee hopes this analysis of FY 2007 quality reviews will assist in fostering high quality case processing in the field. The Committee recommends that this memo be the subject of a professional training session in all Regional Offices. A PowerPoint presentation that may be used for that training will be posted under "Guidance/Training" on the Operations page of *Surfboard*.

Attachments:

Attachment A Summary of FY 2007 Quality Reviews
Attachment B CHECKLIST for 8(a)(1) Allegations
Attachment C CHECKLIST for 8(a)(3) Allegations
Attachment D CHECKLIST for 8(a)(5) Allegations
Attachment E CHECKLIST for 8(b)(1)(A) Allegations