

# Democracy at Work

*NLRB Region 9*

Spring 2010 Volume 1, Issue 2



Filled at Last,  
Filled at Last

Source: Daily Labor Report

On March 27, 2010, President Obama announced recess appointments for two of his three July 2009 nominees as members of the National Labor Relations Board: Democrats Craig Becker and Mark Pearce. Becker, a law professor, has been an associate general counsel for the Service Employees International Union since 1990, and an AFL-CIO staff counsel since 2004. Pearce, a partner with Creighton, Pearce, Johnsen & Giroux in Buffalo, N.Y., has represented unions and employees in discrimination cases.

Not included on the list of NLRB recess appointments was the third nominee to the agency, Republican Brian E. Hayes, the labor policy director for the Republicans on the Senate Committee on Health, Education, Labor and Pensions, and a former management attorney.

The Board, which was designed to have 5 members, has been operating with just two members since the start of 2008. The two current Board members, Chairman Wilma Liebman (D) and Member Peter Schaumber (R), have issued close to 600 rulings, but have set aside about 65-70 cases involving novel issue or questions that may overturn precedent pending the president's nominations.

The recess appointments will last until the end of the 2011 congressional session, although during the term of the recess appointments, all three nominations will remain pending in the Senate for confirmation. Both Becker and Pearce are expected to start their new positions the week of April 5.

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From the Desk of...

## *Garey E. Lindsay, Regional Attorney*

One of the most common requests I receive as Regional Attorney is a request from one of the parties to postpone a scheduled hearing in an unfair labor practice proceeding. (Sections 102.16 and 102.24 of the Board's Rules and Regulations set forth the procedural requirements for motions to change a hearing date.) Understandably, an unexpected illness, unforeseen events, or pressing business matters can require you to alter your schedule or plans. Likewise, previously scheduled events such as a court proceeding, a wedding or even a planned vacation can conflict with the scheduled hearing date. Yet as we all know, when there are other parties involved, sometimes altering your schedule or plans is 'easier said than done.'

When the Region issues a complaint and notice of hearing in an unfair labor practice case, we do so with the expectation that because of the

advance notice of the hearing date, the parties will be able to arrange their respective schedules to attend the hearing. However, when it is not possible to attend the hearing on the scheduled date, you can request

that the Region reschedule the hearing. The likelihood that we will grant your request will frequently depend on a variety of factors: (1) the issues to be litigated at the hearing, (2) how far in advance of the hearing date you have made your request, and (3) how much information you have provided concerning the basis for the request. For example, if the Region is considering seeking injunctive relief, we most likely will oppose any postponement request that is more than a few days from the scheduled date. Similarly, if your



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## Videos on Demand!

### NLRB Releases Videos On Website

The National Labor Relations Board has added three videos to its internet site: one providing a guided tour of the agency's website ("Introduction to the NLRB Public Website"), the second explaining how to use the agency's electronic legal research database ("How To Use CiteNet"), and the third presenting, in English and Spanish, a portrayal of the various phases of a representation case, including the organization campaign, the filing of a petition, the election, the pre-election hearing and post-election objection process, as well as a description of the Agency's Information Officer program that explains the various ways the Agency can be contacted.

The "Introduction to the NLRB Public Website" video provides viewers with a guided tour of the Agency's website pointing out many of its user-friendly features. The video explains how to navigate the Agency's website while at the same time explaining to viewers how to avail themselves of the Agency's services to enforce rights under the National Labor Relations Act. The video also explains the Agency's outreach and public information programs.

The "How to Use CiteNet" video explains how to use the Agency's electronic legal research database of Board and court decisions dating from 1992. CiteNet is a free public service offered by the Agency to assist labor law professionals and the public with their legal research needs. CiteNet offers advantages over less specialized databases because it includes only cases where substantive issues have been discussed, and thereby allows users to find cases with strong precedential value. The classification headings used in CiteNet are very

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# Two Member Board: Good Law, Bad Law?

## ***Authority of Two-Member Board To Be Decided by U.S. Supreme Court***

For over two years, the National Labor Relations Board has been functioning with only two members, as three vacancies have remained unfilled. The validity of over 550 published and unpublished decisions by this two-member Board has been put into question by conflicting opinions of various courts of appeals. In November 2009, the Supreme Court granted a petition for certiorari in *New Process Steel LP v. NLRB*, U.S., No. 08-1457, to examine whether Section 3(b) of the Act authorizes a two-member board to act.

Section 3(b) provides that “the Board

is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. ... A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.” On December 20, 2007, the board’s four members -- Wilma Liebman, Peter Schaumber, Peter Kirsanow, and Dennis Walsh – unanimously delegated all of the board’s powers to a three-member group (Liebman, Schaumber and Krisanow), so that when Kirsanow’s and Walsh’s terms expired on December 31, 2007, the remaining two members would have a quorum.

Since then, six courts of appeals have addressed the issue of whether a Board order issued by these two members is valid.

Five circuits (First, Second, Fourth, Seventh and Tenth Circuits) have upheld the authority of the two-member Board, while only one – the D.C. Circuit – has taken the opposite view.



*Member Schaumber  
and Chairman Liebman*

The Supreme Court heard oral argument on March 23, 2010 and a decision is expected by late June 2010.

## Region 9 News

### Complaints Issued

**September 30, 2009** In APL Logistics Warehouse Management Services, Inc., Case 9-CA-45040, a complaint issued alleging that the Employer violated Section 8(a)(1) of the Act when it threatened to require an employee to reimburse it for a wage overpayment unless the employee withdrew a grievance. The charge was withdrawn after the parties amicably settled the dispute.

**October 22, 2009** In Local Union No. 71 International Brotherhood of Electrical Workers (Capital Electric Line Builders, Inc. and R.B. Jergens Contractors, Inc.), Case 9-CD-499, a Section 10(k) hearing was held regarding the parties’ dispute over the assignment of installation of highway traffic control signals.

**October 29, 2009** In International Brotherhood of Electrical Workers Local 71 (Hydecker-Wheatlake), Cases 9-CB-12186, 12187, 12189, 12190, and 12192, a complaint issued alleging that the Union failed and refused to refer employees to jobs pursuant to the Union’s referral rules and policies in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act. Several of the Charging Parties and Respondent have since entered into an informal settlement, approved by the Regional Director.

**November 17, 2009** In Stage Hands Union Local 17 (West Breck Corp.), Case 9-CB-12215, a complaint issued alleging that the Union removed an employee from its exclusive hiring hall referral list and refused to refer that individual for employment, and prohibited non-member employees from contesting their removal from the hiring hall referral list before the Union’s Executive Board, in violation of Section 8(b)(1)(A) and 8(b)(2) of the Act. On about January 20, 2010, the Regional Director approved a request to withdraw the charge based on a settlement by which the employee was reinstated and awarded back pay.

**November 23, 2009** In The Hennegan Company, Case 9-CA-45153, a complaint issued alleging that the Employer failed to bargain with the Union when it discontinued its practice of permitting one unit employee per department, per shift to leave its Florence, Kentucky facility on paid time to purchase food for unit employees in violation of Section 8(a)(1) and (5) of the Act. On February 10, 2010, the parties entered into a settlement agreement by which the Employer agreed to post a notice at its facility.

**November 25, 2009** In Sportservice, Inc. doing business at Great American Ballpark, Case 9-CA-45165, a complaint issued alleging that the Employer ceased paying the Union agency service fees equal to regular monthly dues deducted from wages of unit employees, after a disaffiliation of Workers United from UNITE HERE, thereby failing and refusing to bargain collectively in violation of Section 8(a)(1) and (5) of the Act and within the meaning of Section 8(d). After a hearing on March 22, 2010, an administrative law judge issued a decision finding merit to all

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# Region 9 News *continued from page 3*

allegations in the complaint.

**December 30, 2009** In Aramark Sports, LLC, Case 9-CA-45095, it was alleged that the Employer failed and refused to execute a complete agreement on terms and conditions of employment of a unit to be incorporated in a collective bargaining agreement in violation of Section 8(a)(1) and (5) and within the meaning of Section 8(d) of the Act. On about February 3, 2010, the charge was withdrawn because the parties amicably settled and agreed to resolve the issues in dispute in the charge.

**December 30, 2009** In OPW Fueling Components, Cases 9-CA-45101 and 9-CA-45103, it was alleged that, after employees engaged in a strike and the Union made an unconditional offer for employees to return to their former or substantially equivalent positions of employment, by failing to fill job vacancies, filling job vacancies with newly hired employees, and the Employer failed and refused to reinstate employees under such conditions in violation of Section 8(a)(1) and (3) of the Act. **March 1, 2010** The complaint was amended to include an additional allegation regarding the Employer's failure and refusal to reinstate employees in violation of Section 8(a)(1) and (3) of the Act.

## Decisions Made

**Board Decision:** In American Benefit Corp., 354 NLRB No. 129 (January 8, 2010), the Board affirmed the ALJD that Respondent violated Section 8(a)(5) of the Act by unilaterally transferring bargaining unit work to offsite temporary employees without notifying the Union or allowing it an opportunity to bargain, and by refusing to provide and delaying to provide information requested by the Union due to this unilateral action.

**ALJ Decision:** In Classic Fire Protection, Case JD-13-10, Judge Eric Fine held, in part, that after the General Counsel demonstrated evidence of timing, knowledge, and animus that seven employees were terminated for union activities, the Employer's reasons put forth for discharging these employees was pretextual, finding the employees were discharged because of their union activity. Judge Fine also held in part, that union animus was the overriding reason for the Employer's refusal to hire at least some of the union referred applicants.

**Regional Director Decision:** In Full Sail Partners, LLC, Case 9-RC-18256, the Regional Director issued a decision finding that the Employer's certified opticians are not supervisors as defined in Section 2(11) of the Act, nor are they managerial employees, and thus should be included in the bargaining unit.



## Certification of Representatives

Of 20 certifications issued during the period September 1, 2009 to March 1, 2010, the following were certifications of representatives:

First Transit, Inc., 9-RC-18252: Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO, September 2, 2009

Full Sail Partners, LLC, 9-RC-18256: United Food and Commercial Workers International Union, Local 1059, October 9, 2009

Coastal International Security, Inc., 9-RC-18257: International Union, Security, Police and Fire Professionals of America (SPFPA), October 13, 2009

Loomis Armored US, Inc., 9-RC-18262: International Guards Union of America, Region 10, November 17, 2009

Media General Operations, Inc., 9-RD-02194: International Brotherhood of Electrical Workers, Local Union No. 71, December 18, 2009

American Electric Power Co., Inc., 9-RC-18266: International Brotherhood of Electrical Workers, Local 1466, AFL-CIO, unit inclusion, January 6, 2010

Sigma Capitol, Inc., 9-RC-18270: Sheet Metal Workers' International Association, Local Union #24, January 15, 2010

LeSaint Logistics, LLC, 9-RC-18275: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, February 11, 2010

postponement request is made just a few days before the scheduled hearing without any explanation or justification for the late request, the Region again is likely to oppose the request. Finally, if the request fails to provide the reasons for needing a postponement, the Region will not agree to the request in the absence of additional information.

While the following suggestions will not guarantee that the Region will agree to your postponement request, they will definitely help your effort to secure a postponement:

- \* Submit your postponement request as soon as you determine you have an unavoidable conflict with the hearing date. Do not delay in making your postponement request. The sooner you submit your postponement request, the more likely the Region can reschedule the hearing to another date.
- \* Explain or describe the nature of your conflict with the scheduled hearing date. In addition, explain why there is no other reasonable alternative but to reschedule the hearing. For example, if you have another matter that was previously scheduled, provide as much detail as possible about the other matter and why it cannot be rescheduled.
- \* Solicit from all other parties their respective positions regarding your postponement request. If known, set forth in your request the other parties' positions regarding your request.
- \* Obtain from all other parties three or more agreed upon alternative dates to begin the hearing should it be rescheduled. Set forth those dates in your request. The closer these alternative dates are to the original scheduled hearing date, the greater the likelihood the Region will grant and not oppose your request.
- \* In most instances, propose consecutive dates for the rescheduled hearing. For example, if you are aware that the hearing is scheduled for two consecutive days (Monday and Tuesday) then your request should reflect your availability for consecutive days.
- \* Lastly, serve all parties with a copy of your postponement request and include a statement of service with your request.

## **UNIQUE OUTREACH EVENT**

Two of Region 9's senior agents recently had the opportunity to participate in a unique outreach event. Professor Richard A. Bales of Northern Kentucky University's Salmon P. Chase College of Law teaches a labor law class designed to provide students with "hands-on" experience. His students file a representation petition with the Regional Office, vote in an election, and, in the event the "union" receives a majority of votes, engage in negotiations over classroom "working conditions". This past Fall semester, James E. Murphy, Jr., the son of a retired NLRB supervisory attorney and a second year law student in Professor Bale's class, filed a petition in Labor Law, Inc., Case 9-RC-00124, together with the requisite showing of interest. After some negotia-

tions, the parties entered into a Stipulated Election Agreement and Field Examiner Albert Tomasi, accompanied by Deputy Regional Attorney Carol Shore, were assigned to conduct the mock election. Students volunteered to serve as observers and the "voters" were instructed on maintaining laboratory conditions and how to vote a secret ballot. The election went off without a hitch and a Tally of Ballots was issued to the parties following the count. The "union" received a significant majority of the votes cast. The Board Agents then answered students' questions about NLRB operations and told a few "war stories" before packing up the election booth and departing from campus.

# PCA: Practical Common-sense Answers

If you have been around Board agents long enough you may have heard the letters PCA bandied about. Ever wonder what it means? Even if you know what it means (protected concerted activity) ever wonder what it's good for? Well, PCA is the cornerstone of the NLRA, the premise upon which Union activity, i.e., concerted activity, is protected.

In general, to find an employee's activity to be "concerted," the Board requires that the activity be engaged in with or on the authority of other employees, and not solely by and on behalf of the individual employee himself. PCA requires some linkage to group action and includes employees seeking to initiate, to induce, or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Meyers Industries*, 268 NLRB 493 (1984); *Meyers Industries*, 281 NLRB 882 (1986)

Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, 1) the employer knew of the concerted nature of the employee's activity, 2) the concerted activity was protected by the Act, and 3) the adverse employment action was motivated by the employee's

***The National Labor Relations Act gives employees the right to join or form unions, or to refrain from doing so, and gives employees the right to work together (concertedly) to improve their wages and/or working conditions.***

discharged for engaging in PCA. Dr. McCallum was one of several doctors working pursuant to individual employment contracts with the Employer. When the doctors' contracts were up for renewal, the Employer proposed to pay them only for hours spent with patients at the Chillicothe clinic, not for hours spent treating patients at Adena Hospital, as was the past practice. Dr. McCallum, on behalf of herself and other doctors, repeatedly expressed to the Employer their dissatisfaction with this change in their compensation. Ultimately, Dr. McCallum and at least one other doctor withdrew their hospital privileges at Adena Hospital, prompting the Employer to terminate Dr. McCallum. She was not given any reason other than that "things just weren't working out."

The Employer knew that Dr.

that conduct. The ALJ also determined that Dr. McCallum did not lose the protection of the Act by making "disrespectful comments," because her conduct did not come close to that which would forfeit the Act's protection. Her "disrespectful" conduct occurred in meetings held to discuss the terms and conditions of the doctors' employment, while her "comments" pertained to these conditions and did not rise to the level of "an outburst." Merely speaking loudly or raising one's voice while engaging in PCA generally will not deprive employees of the Act's protection. *Alton H. Piester, LLC*, 353 NLRB No. 33, slip op. @6 (2008); *Firch Baking Co.*, 232 NLRB 772 (1977). See generally, *Atlantic Steel Co.*, 245 NLRB 814-816-817 (1979).

The remedy for terminating Dr. McCallum in violation of Section 8(a)(1) of the Act? To make her whole. The Board ordered the Employer to offer Dr. McCallum full reinstatement to her former job, or to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. In addition, the Employer was required to post a notice to its employees and to remove from its files all references to the unlawful discharge and to notify Dr. McCallum, in writing, that this has been done and that her discharge wouldn't be used against her in any way.

The lesson learned? Even if you do not have union representation, if you have a complaint at work that is of concern to other employees, you too may be protected by the NLRA.

***The Board has long held, where the Union is seeking to enforce its collective bargaining rights, that "employees who attempt to enforce the provisions of a collective bargaining agreement are engaged in protected, concerted activity." U.S. Postal Service, 332 NLRB 340, 343 (2000), enf. 25 Fed. Appx. 41 (2<sup>nd</sup> Cir. 2001).***

PCA. *Meyers I & Meyers II* supra.

In a recent Region 9 case, *Family Healthcare Inc.*, 354 NLRB No. 29 (2009), the Region, the Administrative Law Judge (ALJ) and the Board all found that the discriminatee, Dr. Kristine McCallum, was

McCallum was working in concert with other doctors but alleged that she had made "disrespectful comments" that challenged management's leadership. The ALJ found that Dr. McCallum's challenge to the new contract was PCA and that she would not have been terminated but for

## Videos on Demand continued from page 2

specific, which facilitates finding cases that are on point. In many cases, CiteNet provides a direct link to the case itself.

The "Representation Case" video is designed to inform the public, including potential voters, employers, and unions about the role of the Agency in conducting elections. The video uses narrators and actors in vignettes to chronologically depict an organizing campaign, the filing of a petition, and an election. The Agency's Office of Employee Development distributed DVD copies of the video to regional offices for distribution to employers, employer associations, labor organizations, and other entities in the connection with regional outreach activities. In addition, the video is posted as a streaming video on the Agency's internet website.



## Comments or Questions??

In addition to the topics we may choose to feature, we would like to invite your comments and suggestions concerning specific items of interest, regional policies, practices or procedures that you would like to see discussed, or whether you would prefer a Spanish version, an electronic format or to be deleted from

our mailing list altogether. We can make it happen and your comments would be greatly appreciated. Please contact Deputy Regional Attorney Deborah Jacobson at [deborah.jacobson@nlrb.gov](mailto:deborah.jacobson@nlrb.gov) or by phone at 513-684-3651.

## Speakers Available!



Members of the Region's staff are available to make presentations before any unions, employer organizations, social service organizations, high school or college classes and others to describe the Act's protections, how the Region investigates and decides unfair labor practice cases and processes representation petitions, and other NLRB topics of interest.

If you are interested in having a member of the staff speak to your group, please contact Assistant to the Regional Director Laura Atkinson by e-mail at [laura.atkinson@nlrb.gov](mailto:laura.atkinson@nlrb.gov) or by phone at 513-684-3625.



## Proposed Rule Will Require Contractors to Notify Employees of Rights under NLRA

On August 3, 2009, the Department of Labor's Office of Labor-Management Standards proposed regulations to implement Executive Order 13496, which was signed by President Obama on January 30, 2009. See Notification of Employee Rights Under Federal Labor Laws, 74 Fed. Reg. 38,488

(2009) (to be codified at 29 C.F.R. pt. 471) (proposed August 3, 2009).

Executive Order 13496 requires nonexempt Federal departments and agencies to include within their Government contracts provisions that require contractors and subcon-

tractors with whom they do business to post notices informing their employees of their rights under Federal labor laws, including the National Labor Relations Act. Executive Order 13496 states that Federal Government interests and industrial peace are best achieved when workers are well informed of their rights under Federal labor laws.



**ESTAMOS A SU SERVICIO**

Para asistencia de someter una carga o petición  
Llame la oficial de información en oficina regional a  
(513) 684-3686.

La oficial de información discutirá su situación y le ayudará si  
desea Someter una carga o petición. Información esta dis-  
puesta a usted mientras las horas de servicio - lunes a viernes,  
8:30 a.m. to 5:00 p.m, o 24/7 [www.nlr.gov](http://www.nlr.gov)

\* \* \*

**WE ARE AT YOUR SERVICE**

For assistance in filing a charge or a petition, call the Re-  
gional Office at (513) 684-3686 and ask for the information  
officer.

The information officer will discuss your situation and  
assist you in filling out a charge or petition.

Information is available during office hours, Monday through  
Friday, 8:30 a.m. to 5:00 p.m. or 24/7 at [www.nlr.gov](http://www.nlr.gov)

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