

National Labor  
Relations Board  
**Region 17**



Shiva Pershing and Grand Kansas City

# Kansas City Strip

News from and about Region 17

Volume 2, Issue 1

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### Significant Issues Awaiting Decision by a Full Board

While Board Members Liebman and Schaumber successfully decided most of the cases that came before them for consideration, they were unable to reach agreement in several cases which are awaiting decision by a full board. In interviews with BNA, Members Liebman and Schaumber identified several significant cases awaiting decision by a full board, including the following:

- *Dana Corp.*, Cases 7-CA-46965 and 7-CB-14083, whether an employer violated Section 8(a)(2) and a union violated Section 8(b)(1)(A) and (2) by entering into a neutrality/card-check agreement that discusses conditions for a potential bargaining contract;
- *Gilisa Dairy Products*, Case 17-RC-12584, whether a rival union can seek a representation election after an employer voluntarily recognized another union and entered into a bargaining contract but never posted a *Dana* notice informing employees of the recognition and of their right to file a decertification petition within 45 days or to support a representation petition filed by a rival union;
- *International Association of Machinists Local 2777 (L-3 Communications Vertex Aerospace LLC)*, Case 15-CB-5169, whether a union violates its duty of fair representation by requiring nonmembers to renew their *Beck* objections annually;
- *Lancaster Symphony Orchestra*, Case 4-RC-21311, whether musicians are independent contractors not covered by the NLRA;
- *Sheet Metal Workers Local 15 (Galencare, Inc., d/b/a Brandon Regional Medical Center)*, Case 12-CC-1258(R), on remand from the D.C. Circuit, whether a union violated NLRA Section 8(b)(4)(ii)(B) by displaying a 16-foot-tall balloon rat or by holding a leaflet chest-high like a placard; and
- *Wal-Mart Stores Inc.*, Case 12-CA-20986, whether an employer can prohibit union hand-billing outside store entrances but allow charities and social service organizations to engage in solicitation in the same areas.

Liebman and Schaumber are also awaiting a full board to decide whether to pursue rulemaking and issue a rule that would allow a union and an employer to file a joint representation petition, called an "RJ petition," where the parties would consent to an election to be held within 28 days of the filing of the petition. Additionally, under the proposed rule, there would be no requirement to show that at least 30 percent of the workers in the proposed unit want an election, all pre-election issues would be decided by the regional director with no appeal rights to the board, and unfair labor practice charges filed during the pendency of the petition would not block the election or the counting of ballots.

## Circuit Courts Divide on Authority of Two-Member Board

In a case of first impression, the U.S. Court of Appeals for the First Circuit issued a decision on March 13, 2009 upholding the authority of the current two-member National Labor Relations Board to issue decisions. The court held that the Board's December 28, 2007 "delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text" of Section 3(b) of the National Labor Relations Act. *Northeastern Land Services Ltd. d/b/a NLS Group v. National Labor Relations Board*, No. 08-1878 (1<sup>st</sup> Cir.) On May 1, 2009 two additional circuits courts issued decisions on this issue, with the Seventh Circuit in *New Process Steel LP v. National Labor Relations Board*, No. 08-3517 (7<sup>th</sup> Cir.) agreeing with the March decision by the First Circuit, and the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. National Labor Relations Board*, No. 08-1214 (DC Cir.) rejecting the legal authority of the two-member Board to issue decisions. Cases challenging the authority of the two-member Board are pending in seven additional circuit courts.

When fully constituted the Board has five members. However, since January 1, 2008 the Board has operated with only two members because no appointments have been made to replace members whose terms have expired. On December 28, 2007 the four Board members then holding office delegated the Board's powers to a three-member panel in anticipation of the imminent expiration of the terms of two of the four Board members. The delegation of the Board's powers to a three-member group was designed to permit the remaining two members to constitute a quorum and to continue to make and issue decisions and orders in unfair labor practice and representation cases. Since January 1, 2008, the two-member Board has issued over 400 decisions.

In ruling that decisions of the two-member quorum were valid, the First Circuit rejected the argument that although the National Labor Relations Act permits two-member decisions as a quorum of a properly constituted panel of three members, the two-member quorum was no longer valid when there was a vacancy on the panel of three members. The First Circuit also said its position was consistent with the conclusion reached by the Justice Department's Office of Legal Counsel in a March 2003 memorandum to the NLRB which stated "In our view, if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of the two members remained". Similarly the Seventh Circuit held in its May 1, 2009, decision in *New Process Steel LP* that the plain meaning of Section 3(b) gives the Board "the power to delegate its authority to a group of three members" and that the section permits the Board "to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board had delegated its authority to a group of three members".

In contrast to the First and Seventh Circuits, the D.C. Circuit emphasized that Section 3(b) of the National Labor Relations Act provides that three members shall "at all times" constitute a quorum and held that although the Board "may delegate its powers to a three-member group, and this delegatee group may act with two members", the requirement of at least three members on the overall Board must be met. In writing for the D.C. Circuit, Judge David B. Sentelle suggested that Congress or the Board, after it regains three members, could "minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel's previous decisions, including the case before us".

National Labor Relations Board Chairman Wilma B. Liebman stated that the D.C. Circuit decision was "a disappointment, especially in light of favorable decisions of two other courts of appeals". She also stated that the Board's delegation of its authority was based "on a reasonable interpretation of the law and on a desire to keep the Board's important work from coming to a complete halt for an indefinite period". She expressed the expectation that given President Obama's recent nomination of Craig Becker and Mark Pearce to positions as Board Members, the Board "will soon have an indisputable quorum and will be out from under the current legal cloud".

## E-Filing Go ahead, do it the easy way

Soon Region 17 will see the advent of electronic case files. In coming months, we will begin the process of maintaining case files electronically. The transition has begun. When a petition or charge is docketed, an electronic case file is created.

*Although petitions, charges and voluntary recognition notifications cannot yet be filed electronically, most other documents can.* When you send documents electronically, you save copy and handling time as well as delivery charges. Once we get the hang of this, we'll wonder how we managed all the paper shuffling.

The Agency strongly urges all parties to submit documents and other materials to Regional Offices through the e-filing section of our website: [www.nlr.gov](http://www.nlr.gov). We still take paper but are trying to begin the transition to the new system.

Through the e-filing section on our website, you can file documents electronically with Region 17 in Kansas City, with the Tulsa Resident Office, as well as with the Office of Appeals and the Division of Judges.

### Documents that can be filed electronically include:

- Position Statements
- Notices of Appearance
- Requests of an Extension of Time for documents to be filed with a  
Regional Director or a Hearing Officer
- Requests for Postponement of a Hearing to the Regional Director or a Hearing  
Officer
- Excelsior Lists
- Observer Designations
- Requests to Proceed
- Withdrawal Requests
- Disclaimers of Interest
- Election Objections and Evidence in Support
- Briefs
- Exceptions and Briefs in Support
- Answers
- Motions
- Petitions to Revoke Subpoenas
- Responses to Motions

**ELECTRONIC FILINGS MUST BE TIMELY.** Date-sensitive electronic filings must be submitted through the Agency website so that transmission is received by 11:59 p.m. local time in the office where it is due. (This e-filing deadline change does not alter the deadline for physically filed documents such as mail, personal service, or fax which remains receipt of the document by close of business.) Failure to timely file or serve a document will not be excused if the website is off-line or unavailable. E-filed documents should be served on the other parties by e-mail whenever possible. If service by e-mail is not possible, a party may notify another party by telephone of the substance of the e-filed document and serve a copy of the document upon that party no later than the next day by personal service, overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission. The Board and the General Counsel no longer require parties to provide hard copies of long documents filed electronically.

If you have questions, consult the e-filing section of our website [www.nlr.gov](http://www.nlr.gov) or call our office and ask an information officer.

Go ahead, make it easy on yourself. Push "send" and make it so.

**REGION 17 STAFF****Kansas City**

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Jane Stewart — CATS Program Analyst

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Brett Huckell — Field Examiner

Amy Novara — Field Examiner

Regina Tyler — Case Processing Assistant

**The Treasury Offset Program -- TOP**

The Region recently obtained compliance with the Board Order in Zarcon, Inc., Cases 17-CA-20899 and 17-CA-21289 which provided for the payment of over \$50,000 to 12 discriminatees. In several instances the backpay received by individual discriminatees in Zarcon was reduced by amounts the individuals owed to other governmental agencies. The amounts deducted or offset from Zarcon discriminatees' backpay checks were forwarded to the other governmental agencies to which the individuals owed money. The other governmental agencies receiving monies offset from Zarcon discriminatees' backpay checks included the Missouri Family Support Division and the Veterans Administration Medical Center.

Offsets to NLRB backpay awards are tracked and coordinated through the United States Treasury Offset Program (TOP), a centralized offset program that is administered by the Treasury Department's Financial Management Services (FMS) and Debt Management Services (DMS). The purpose of the TOP program is to collect delinquent debts owed to federal agencies and states, including past-due child support. The program was created pursuant to The Debt Collection Improvement Act of 1996, and with certain exceptions, requires all unsatisfied judgment claims owed to agencies of the United States government to be submitted to the Treasury Offset Program (TOP) within 180 days of entry of the judgment liquidating the debt. The Treasury Department's Financial Management Services (FMS) disburses federal payments, such as federal tax refunds for the Internal Revenue Service, for agencies making federal payments (known as "payment agencies"). Creditor agencies submit delinquent debts to FMS for collection and inclusion in TOP. Payment agencies prepare and certify payment vouchers to the FMS and to disbursing officials at other federal agencies that are non-Treasury disbursed, such as the Department of Defense. The payment vouchers contain information about the payment including the recipient's name and Tax Identification Number (TIN). Before a federal payment is disbursed, the payment information is compared to the delinquent debtor database maintained by FMS. If the payee's name and TIN match the name and TIN of the debtor, the disbursing official offsets the payment, in whole or in part, to satisfy the debt to the extent legally allowed. When a respondent employer pays its backpay obligation by making out a check directly to the NLRB rather than making the check out to the individual discriminatee, the funds may be forwarded to the NLRB's finance branch for deposit in the NLRB's U.S. Treasury escrow account. Funds deposited in the Treasury by the NLRB are subject to the TOP program if the individual owed money by the NLRB also owes money to another Federal or state agency that has registered the debt through TOP.

In addition to providing an offset or reduction in backpay awards received pursuant to a Board Order, TOP can provide a method to obtain compliance with Board Ordered monetary awards, i.e. provide a source of payment for backpay awards to discriminatees. Pursuant to an "administrative offset" provided for in TOP, the Board may, in effect, garnish amounts owed to respondents by other governmental agencies, such as where a respondent has provided goods or services to another agency or department of the Federal Government. In addition, the "Federal income tax refund offset" provided for in TOP permits, in effect, the garnishment of income tax refunds owed to individual and corporate respondents against whom the Board has unsatisfied backpay claims.

The NLRB's use of TOP is jointly coordinated and administered by the Contempt Litigation and Compliance Branch and the agency's Finance Branch. Several NLRB Operations-Management Memoranda, including OM 00-05 and OM 05-47, concern TOP and are accessible on the NLRB's internet site: [www.NLRB.gov](http://www.NLRB.gov)

## 24<sup>th</sup> Annual Mid-America Labor/Management Conference at Lake of the Ozarks

*You can never know too much or too many*

Several members of the staff of Region 17 will be hosting workshops during the 24<sup>th</sup> Annual Mid-America Labor/Management Conference to be held July 5-8, 2009 at the Lodge of the Four Seasons, Lake Ozark, Missouri. This conference is held annually to strengthen and enhance labor-management relations by bringing together representatives from both groups in a collegial setting to participate in workshops designed to address topical labor related issues. Representatives from various labor related agencies, academicians, labor organizations, and private sector labor relations professionals will be hosting conference sessions. These topics, registration and additional information are contained in a brochure available at [www.malmc.org](http://www.malmc.org). The Missouri Bar Association has approved 18.6 CLE hours, including 3.6 hours ethics credit, for conference attendees. Missouri Governor Jay Nixon has been invited as a keynote speaker to open the conference. Region 17 is excited to be included in this important labor/management event and hopes that our presentations will enhance the labor relations knowledge of its participants and strengthen the interpersonal ties that are so important to effective labor management relations.

### Becker and Pearce To Be Nominated as Board Members

President Obama has announced his intent to nominate Craig Becker and Mark Pierce to positions as Board Members of the National Labor Relations Board.

**Craig Becker** currently serves as Associate General Counsel to both the Service Employees International Union and the American Federation of Labor & Congress of Industrial Organizations. He graduated summa cum laude from Yale College in 1978 and received his J.D. in 1981 from Yale Law School where he was an Editor of the Yale Law Journal. After law school he clerked for the Honorable Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit. For the past 27 years, he has practiced and taught labor law. He was a Professor of Law at the UCLA School of Law between 1989 and 1994 and has also taught at the University of Chicago and Georgetown Law Schools. He has published numerous articles on labor and employment law in scholarly journals, including the Harvard Law Review and Chicago Law Review, and has argued labor and employment cases in virtually every federal court of appeals and before the United States Supreme Court.

**Mark Gaston Pearce** has been a labor lawyer for his entire career. He is one of the founding partners of the Buffalo, New York law firm of Creighton, Pearce, Johnsen & Giroux where he practices union side labor and employment law before state and federal courts and agencies including the N.Y.S. Public Employment Relations Board, Equal Employment Opportunity Commission, the U.S. Department of Labor, and the National Labor Relations Board. Pearce in 2008 was appointed by the NYS Governor to serve as a Board Member on the New York State Industrial Board of Appeals, an independent quasi-judicial agency responsible for review of certain rulings and compliance orders of the NYS Department of Labor in matters including wage and hour law. Pearce has taught several courses in the labor studies program at Cornell University's School of Industrial Labor Relations Extension. He is a Fellow in the College of Labor and Employment Lawyers. Prior to 2002, Pearce practiced union side labor law and employment law at Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP. From 1979 to 1994, he was an attorney and District Trial Specialist for the NLRB in Buffalo, NY. Pearce received his J.D. from State University of New York, and his B.A. from Cornell University.

### *Immediate Work Search Essential*

Discriminatees should begin their search for work within two weeks of their termination (or the refusal to hire); otherwise, back pay will begin only after the search for work begins.

*Grosvenor Resort  
350 NLRB 1197 (2007).*

### **Kansas City Strip Board of Editors**

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llame (913) 967-3000

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The information officer will discuss  
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