

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT (NLRA) GIVES EMPLOYEES THE RIGHT TO:

FORM, JOIN OR ASSIST A UNION

CHOOSE REPRESENTATIVES TO BARGAIN WITH THEIR EMPLOYER ON THEIR BEHALF

ACT TOGETHER WITH OTHER EMPLOYEES FOR THEIR BENEFIT AND PROTECTION

CHOOSE NOT TO ENGAGE IN ANY OF THESE PROTECTED ACTIVITIES

NLRB Region 14 St. Louis, MO and Subregion 33 Peoria, IL



St. Louis



Peoria

IN DEPTH: CIRCUIT COURT SPLIT ON ENFORCEABILITY OF TWO-MEMBER NLRB DECISIONS

In our last issue we discussed the challenges raised by the D.C. Circuit Court’s decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) that the two-member Board did not have the authority to issue orders or decisions. On September 29, 2009, the Solicitor General of the United States requested the Supreme Court to uphold the Board’s authority. Click [here](#) for the BNA Daily Labor Report’s article on the Solicitor General’s request on behalf of the Board.

Recently, Region 14 Field Attorney, Christal Key, wrote an article summarizing this issue. We thought it would be helpful to share it with you.

Please note that the views and opinions expressed in this article are strictly those of Ms. Key and have not been approved by the National Labor Relations Board or the United States Government.

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The validity of over 400 published and unpublished decisions issued by the two-member National Labor Relations Board since December 31, 2007, have been put into question by conflicting opinions of courts of appeals. On May 1, 2009, the United States Court of Appeals for the District of Columbia Circuit held that the Board, consisting of two sitting members, was not authorized to issue orders or decisions under Section 3(b) of the Act 29 U.S.C. § 153(b). *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), pet. for cert. filed, ___ U.S.L.W. ___ (U.S. Sept. 29, 2009). Conversely, the First, Second, and Seventh Circuits have issued decisions holding that Section 3(b) of the Act does authorize a two-member Board to issue orders and decisions. *Northeastern Land Services v. NLRB*, 560 F.3d 410 (1st Cir. 2009), pet. for cert. filed, ___ U.S.L.W. ___ (U.S. Aug. 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), pet. for cert. filed, ___ U.S.L.W. ___ (U.S. Sept. 11, 2009) (No. 09-328); and *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), pet. for cert. filed, 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457). Since all Board orders are appealable to the D.C. Circuit as well as the circuit where the case originates, all Board orders issued since December 31, 2007, have been put into question.

Section 3(b) of the Act provides, in pertinent part, as follows:

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. . . . [29 U.S.C. § 153(b).]



Pursuant to Section 3(b), the four members of the Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh), delegated all of the Board's powers to a group of three members (Members Liebman, Schaumber, and Kirsanow). When Member Kirsanow's appointment expired, the two remaining members (Members Liebman and Schaumber) continued to exercise the delegated powers they held jointly with Member Kirsanow. The Board maintains that this action is consistent with the express language of Section 3(b) that a vacancy shall not impair the powers of the remaining members and that "two members shall constitute a quorum" of any group of three members to which the Board had delegated its powers.

In its appellate briefs, the Board first points to the plain text of Section 3(b). It points to a formal opinion in which the United States Department of Justice's Office of Legal Counsel concluded that the language of 3(b) provided the Board authority to issue decisions with only two of its five seats filled where the two remaining members constituted a quorum of a three-member group within the meaning of Section 3(b). See *Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (Mar. 4, 2003).

Second, the Board points to a history of the Board's operation and the legislative history of Section 3(b). The Wagner Act of 1935 created a three-member Board and Section 3(b) provided that a vacancy on the Board would not impair the authority of the two remaining members to exercise the powers of the full Board. Thus, during the first 12 years of the Board's existence, it issued hundreds of decisions with only two of its three seats filled. In 1947, when Congress was considering the Taft-Hartley amendments, the House bill would have maintained a three-member Board, two members of which, as before, could have exercised all the Board's powers. The Senate bill would have expanded the Board to seven members, four of whom would be a quorum. That same bill further authorized the larger Board to delegate its powers "to any group of three or more members," two of whom would be a quorum. The Conference Committee accepted the Senate bill's delegation and two-member quorum provisions, but, as a compromise with the House bill, agreed to a Board of five members. The Board argues that Congress' purpose in giving the Board additional members was to allow three-member groups to act in a manner similar to the original three-member Board, but issue more decisions.

Third, the Board argues that the NLRA was designed to avoid "industrial strife," 29 U.S.C. § 151, and an interpretation of Section 3(b) that allows the Board to continue functioning with two members gives effect both to the plain language of the Act and its purpose. Finally, the Board argues that concluding that the two remaining members of a three-member group have the authority to exercise properly delegated powers is consistent with established principles of both administrative law and the common law of public entities.

The D.C. Circuit, in rejecting the Board's arguments, acknowledged that the issue before them presented a close question and that neither the Office of Legal Counsel's interpretation nor the Board's desire to continue to function was entirely indefensible. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, supra at 476. The D.C. Circuit, however, ruled that while a third member of the Board can delegate authority to the two members, that delegation cannot survive the loss of a quorum on the Board itself. *Id.* at 472. In reaching its decision, the D.C. Circuit stated, "The quorum provision clearly requires that a quorum of the Board is, 'at all times,' three members." 29 U.S.C. § 153(b)." *Id.* at 473. The D.C. Circuit further found that the Board's interpretation of the statute was contrary to basic tenets of corporate and agency law. An agent's delegated authority ceases at the resignation or termination of the delegating authority. *Id.* citing William Meade Fletcher, *Fletcher Cyclopedia of Law of Corporations* § 504; see *Emerson v. Fisher*, 246 F.642, 648 (1st Cir. 1918).

In the latest decision regarding the two-person Board issue, the Second Circuit joined the First and Seventh Circuits holding that the two-member Board has the authority to issue decisions. *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. June 17, 2009). However, the Second Circuit based its decision on a different rationale than the First and Seventh Circuits. The First and Seventh Circuits ruled that the unambiguous plain text of Section 3(b) granted two members authority to issue decisions. *Northeastern Land Services v. NLRB*, supra at 41-42; *New Process Steel v. NLRB*, supra at 845-846. Conversely, the Second Circuit found that the plain text was ambiguous but deferred to the Board's interpretation of the Act. *Snell Island SNF LLC v. NLRB* supra at 420. The Second Circuit held that, because the Board's interpretation of the statute was reasonable, it was required to defer to the Agency's interpretation because the Agency is charged with administering the Act. *Id.* at 423-424, citing *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Numerous cases raising the two-member Board issue are currently pending before all eleven circuits. The Ninth Circuit is likely to uphold the authority of the two-member Board. In *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), the Ninth Circuit held that Section 3(b) authorized a three-member group to issue a decision even after one of the three members resigned. While the *Photo-Sonics* court held that the issue was not legally determinative, it stated that even if the resigning member had not participated in the decision, "the decision would nonetheless be valid because a 'quorum' of two panel members supported the decision". *Id.* at 123. The conflict within the circuits creates a likelihood that the Supreme Court will accept *New Process Steel's* May 22, 2009 Petition for Writ of Certiorari of the Seventh Circuit's decision. Should the Supreme Court take up the issue, the Second Circuit's reasoning is persuasive that even if the language of Section 3(b) is ambiguous, the Agency's interpretation is entitled to deference. Furthermore, the D.C. Circuit's reliance on agency and corporation doctrines makes that decision particularly vulnerable. As the Board's attorneys have argued in their briefs filed after the *Laurel Baye* decision, "agency" in a corporate context is defined as the fiduciary relationship that arises when one person, "the principal," manifests authority to another person, "an agent". There, the agent acts on the principal's behalf and subject to the principal's control. It is therefore logical that the agent's authority ceases when the principal is terminated. However, Section 3(b)'s delegation of institutional powers to a three-member group does not create a fiduciary relationship and does not involve the three-member group acting on behalf of or under the control of the Board. Rather, all Board members are jointly delegated the Board's institutional powers and are empowered to exercise them, not as Board agents, but as the Board itself. Thus, the weight of authority, along with the rationale provided by the three circuit courts which have upheld the two-member Board's authority, support the Board's interpretation of Section 3(b).

UNITE HERE/SEIU DISPUTE

Numerous petitions and charges raising issues related to the dispute between UNITE HERE, Workers United and/or Service Employees International Union (SEIU) are pending before the Agency. The current dispute involves the decision of some of the constituent parts of UNITE HERE, including some local unions and some regional district councils, to disaffiliate from UNITE HERE and to affiliate with the SEIU. As part of the effort to affiliate with the SEIU, these former constituent parts of UNITE HERE have formed a new organization, Workers United. UNITE HERE has challenged the validity of the attempted disaffiliation effort claiming that it is not allowed under the UNITE HERE Constitution. As a result of this dispute, it appears that many employers have received letters both from UNITE HERE and from Workers United, or one of its constituent locals or regional councils, claiming to be the entity that represents the employer's employees. In the face of these competing claims, employers have taken a variety of actions. Some have ceased remitting dues to either side until the internal union dispute is resolved. Others have taken actions that are alleged in pending charges as unilateral changes. Some of the employers have filed RM petitions claiming that the conflicting claims raise a "question concerning representation" (QCR) warranting a representation election. For more information on the Agency's case handling instructions on this issue, please read [Operations Memos OM 09-68](#) and [OM 09-81](#).

Region 14 has cases pending involving this dispute that have not been finalized as of this publication. We will update you on the status of those cases in the future.

On July 9, 2009, the White House announced that it had sent to the Senate the nominations of Craig Becker, Mark Gaston Pearce, and Brian Hayes to be members of the National Labor Relations Board. If confirmed by the Senate, the Board would have a full complement of five members for the first time since December 16, 2007. The sitting members are Chairman Wilma B. Liebman and Member Peter C. Schaumber. Craig Becker and Mark Gaston Pearce are the nominations for the two vacant Democratic seats on the Board; and Brian Hayes is nominated to fill the vacant Republican seat. The nominations are pending. Click [here](#) to see the full NLRB announcement.



**WE WANT TO HEAR
FROM YOU!**

We would like to know if this Newsletter is helpful and informative. We would also like to know if there are certain topics, issues, Board decisions, or Regional practices that you would like to see discussed in future editions. If so, please contact Region 14 Outreach Coordinators [Lynette Zuch](#) or [Cindy Flynn](#) at (314) 539-7770 or Subregion 33 Outreach Coordinator [Melissa Olivero](#) at (309) 671-7080. Your feedback will be greatly appreciated and carefully considered. You may also contact the Outreach Coordinators if you would like to be added or deleted from our mailing list. If you can suggest any other media sources for informing the public about NLRB issues and procedures, please let us know!

NLRB RELEASES TWO VIDEOS ON ITS WEBSITE

In its continuing effort to enhance the public's ability to transact business with the Agency, the National Labor Relations Board now features two new videos on the site www.nlr.gov: "Introduction to the NLRB Public Website" and "How to Use CiteNet," the Agency's electronic legal research database. The "[Introduction to the NLRB Public Website](#)" video provides viewers with a brief guided tour of the Agency's website, highlighting many of its user-friendly features. The video explains how to navigate the website most effectively, while at the same time educating viewers on how to avail themselves of the Agency's services in enforcing their rights under the National Labor Relations Act. The video demonstrates how to find published decisions and administrative memoranda, how

to ask questions via the website or to speak to a person, as well as how to use E-Gov, the Agency's on-line services such as E-Docket, E-Filing, online forms, and E-FOIA requests. The video also describes the Agency's outreach and public information programs. The "[How to Use CiteNet](#)" video educates viewers on 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 three search methods: headings, digests, and cases. In many instances, CiteNet will provide a direct link to the decision itself. Each video will take approximately 20 minutes to complete. We hope these new tools will provide you with useful services.

Outreach Corner

This section will highlight Outreach events Region 14 and Subregion 33 Staff participated in during the last quarter

- **August 3, 2009** Managerial Staff spoke to approximately 35 students, teachers and administrators at Hickey College about NLRB law and procedures.
- **August 25, 2009** Field Staff spoke to approximately 30 labor organization representatives and community residents at a Union Difference meeting about recent developments in case law.
- **September 23, 2009** Field Staff attended a Labor and Employment Relations Association (LERA) program on The Generational Divide: Challenges and Opportunities in the Workplace.
- **September 30, 2009** Supervisory and Field Staff spoke to approximately 40 labor organization representatives of the Interunion Wet Dry Corn Milling Council about recent developments in case law and presenting cases to the Board.

Our Staff is ready and willing to appear at your events! If you are interested in having someone from Region 14 or Subregion 33 speak to your group, please contact Region 14 Outreach Coordinators [Lynette Zuch](#) or [Cindy Flynn](#) at (314) 539-7770 or Subregion 33 Outreach Coordinator [Melissa Olivero](#) at (309) 671-7080.

NEW!!!

Ask the Director

If you have a question or topic that you would like Regional Director Ralph Tremain to address, please email us at [Region 14](#), call us at 314-539-7770, or write to Region 14, 1222 Spruce Street, Room 8.302, St. Louis, MO 63103. Mr. Tremain will respond to topics that are of interest to the general readership in the next Newsletter. For any questions of an individualized nature, Mr. Tremain will make every effort to respond to you directly in a timely manner.

Region 14 Decisions Issued this Quarter

- In *Thoele Asphalt Paving, Inc.*, 354 NLRB No. 69 (August 27, 2009), the Board granted the General Counsel's motion for Default Judgment and ordered Respondent to restore the employees' medical insurance benefits and reimburse the employees for any loss of benefits or expenses ensuing from the Respondent's failure to provide medical insurance.
- In *ABB, Inc.*, Case 14-CA-29219/JD(ATL)-17-09 (September 1, 2009), Judge William Cates ruled that Respondent unilaterally changed a job description without bargaining with the Union in violation of Section 8(a)(1) and (5) of the Act.
- In *International Union of Operating Engineers, Local 513, AFL-CIO (Ozark Constructors, LLC, A Fred Weber-ASI Joint Venture)*, Case 14-CB-10424/JD-41-09 (September 4, 2009), Judge Michael Rosas ruled that Respondent violated Section 8(b)(1)(A) of the Act by filing an internal union charge against an employee and fining him \$2500 because, in compliance with the collective-bargaining agreement and safety policies in effect, he reported a safety violation by an employee to the employer, conduct which is protected concerted activity under Section 7 of the Act.

Complaints Issued In Region 14 This Quarter

July 31, 2009 In American Postal Workers Union, Southern Illinois Area Local (United States Postal Service), Case 14-CB-10451, and American Postal Workers Union, AFL-CIO (United States Postal Service), Case 14-CB-10465, the Unions are alleged to have arbitrarily allocated a liquidated award of a grievance to affected bargaining unit employees in violation of Section 8(b)(1)(A) of the Act.

August 26, 2009 In Eagle Ray Electric Company, Case 14-CA-29785, the Employer is alleged to have failed and refused to bargain with the certified collective-bargaining representative concerning the cessation of its operations and layoffs of employees in violation of Section 8(a)(5) and (1) of the Act.

August 28, 2009 In Thoele Asphalt Paving, Cases 14-CA-29761, 14-CA-29816 and 14-CA-29412, the Employer is alleged to have made unlawful statements to employees; disciplined, made onerous work assignments to, and terminated employees; required an employee to sign a document accepting financial liability for damages to a Company vehicle; failed to provide the designated collective-bargaining representative with requested information; and repudiated a collective-bargaining agreement in violation of Sections 8(a)(5), (3) and (1). Case 14-CA-29412 had previously been deferred to the parties' grievance and arbitration machinery, but was revoked due to the Employer's alleged failure to abide by the grievance procedure.

August 31, 2009 In Jonathon Keith Gordon d/b/a Engineered Construction Services, Inc., Case 14-CA-29739, the Employer is alleged to have failed to reinstate employees engaged in a strike who had made an unconditional offer of return to their former or substantially equivalent positions of employment in violation of Section 8(a)(1) of the Act.

September 9, 2009 In Cotton Babies, Inc., Cases 14-CA-29789 and 14-CA-29790, the Employer is alleged to have maintained and unlawfully enforced provisions of an Employee Manual, made unlawful statements to employees, and required employees to read, sign and abide by an Employee Manual, and discharged and employee in violation of Section 8(a)(1) of the Act.

Region 14 Wrap-up

topics related to Region 14.
This section will highlight
topics related to Region 14.



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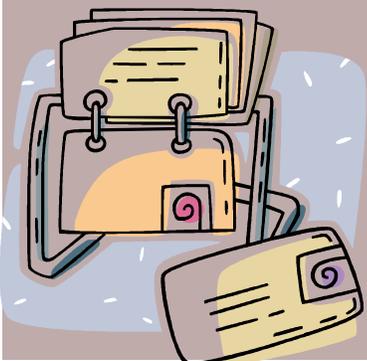
(314) 539-7794

Hours:

Monday through Friday

8:00 a.m. to

4:30 p.m.



Subregion 33 Decisions Issued this Quarter

- In our first issue, we reported on the Board's decision in [Quebecor World Mt. Morris II, LLC, 353 NLRB No. 1 \(September 8, 2008\)](#), where it was concluded the Union clearly and unmistakably waived its right to bargain over the implementation of a performance improvement plan. Subsequently, the Union filed a petition with the 7th Circuit to review the Board's decision. The Court upheld the Board's finding that Respondent did not violate Section 8(a)(5) because the parties orally agreed during negotiations for a successor collective-bargaining agreement to extend the expiring collective-bargaining agreement and its management-rights clause. The 7th Circuit's decision can be accessed by clicking [Case 08-4045](#).
- In [Gunite Corporation, Case 33-CA-15554/JD\(ATL\)-20-09 August 20, 2009](#), Judge George Carson II ruled that Respondent violated Section 8(a)(1) and (3) of the Act by conditioning the end of a lock out of its employees on the Local Union only signing a collective-bargaining agreement instead of the joint representative, the Local and the International Union, signing the collective-bargaining agreement; violated Section 8(a)(1) and (2) of the Act by signing a collective-bargaining agreement with a labor organization that was not the exclusive collective-bargaining representative of employees in the appropriate unit; and violated Section 8(a)(1) and (5) the Act by failing and refusing to recognize and bargain with the joint exclusive collective-bargaining representative of the employees in the appropriate unit.

How did it Play in Peoria?

In a "play" on words of the city's motto dating back to Vaudevillian days, this section will highlight topics related to Subregion 33.



Peoria, IL

Complaints Issued In Subregion 33 This Quarter

August 31, 2009

- In Barrington Peoria LLC d/b/a WHOI-TV, Case 33-CA-15807, the Employer is alleged to be have failed to bargain with the Union by refusing to provide the Union with requested information in violation of Section 8(a)(5) and (1) of the Act.
- In Khotol Services Corporation, Case 33-15817, the Employer is alleged to be have failed to bargain with the Union by refusing to provide the Union with requested information in violation of Section 8(a)(5) and (1) of the Act.
- In Quad City Die Casting Company and/or Patrick Cavanaugh Of High Ridge Partners, Successor/Alter Ego of Quad City Die Casting Company, Case 33-CA-15840, the Employer is alleged to have failed to recognize and bargain with the Union by unilaterally terminating various contractual benefits in violation of Section 8(a)(5) and (1) of the Act.
- In United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC and Local Union 193-G (PPG Industries, Inc.), Case 33-CB-4317, the Union is alleged to have failed to bargain with the Employer for a successor collective-bargaining agreement in violation of Section 8(b)(3) of the Act.

National Labor
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Hours:

Monday through Friday

8:30 a.m. to 5:00 p.m.



*National Labor Relations Board
Region 14 St. Louis, MO
and
Subregion 33 Peoria, IL
Quarterly Outreach Newsletter*

“The purpose of the [National Labor Relations Act] is to define an environment within which labor and management can resolve their differences.”

Former NLRB Chairman

Robert J. Battista

May 20, 2005

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

www.NLRB.gov

The Basics

The National Labor Relations Board (NLRB), charged with enforcing the NLRA, has two principal functions: 1) to determine through secret ballot elections whether employees wish to be represented by a union in dealing with their employers, called representation cases, and 2) to prevent and remedy unlawful acts by either employers or unions, called unfair labor practice cases. The Agency does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections that are filed with the NLRB in one of its 51 Regional, Subregional, or Resident Offices. Region 14 covers the geographical area of Eastern Missouri and Southern Illinois. Subregion 33 covers the Northern half of Illinois (except for the Chicago area) and some of Iowa. If you have questions about a workplace problem, please call an NLRB Information Officer in the Office that covers the area where your employer is located. Information Officers are available by phone or by walking into Regional Offices during business hours. Our [website](#) is extensive and user-friendly, and it can give you additional information about filing charges and petitions with the NLRB and other workplace questions.

