

Vision of Elk River —  
Complaint Dismissed 2

NLRB Outreach Opportunities 2

Bannering held not Unlawful Picketing 3

Deferral Updates: More Details Please! 4

Check out our new Staff Members! 5

An Election Experience, continued 6

Region 18 Case Intake Graphs 7-8

# Region 18 HOT DISH

VOLUME IV, ISSUE I

DECEMBER 2010

## From the Director's Chair

As you will discover when you read further in this edition of *Hot Dish*, Region 18 has added three members to the professional staff since the last edition of our newsletter. We welcome Field Examiner **Melissa Benti-volio**, and Field Attorneys **Catherine Homolka** and **Abby Schneider**.

The significant expansion in staff is due to a remarkable increase in the number of cases filed in Region 18, (see graphs on pp. 7 and 8) as well as the retirement of Attorney Marie Simpson. During fiscal year 2009 (October 1, 2008 through September 30, 2009), total intake of ULP charges was 372. However, for FY 2010 (October 1, 2009 through September 30, 2010) the total charges filed were 484, meaning that about 25 per cent more charges were filed in FY 2010 compared to FY 2009.

While the numbers are not as dramatic, representation case filings also increased. In FY 2009 there were a total of 89 representation matters filed, compared to 114 petitions filed in FY 2010, an increase of 20 percent.



A more detailed look at the numbers reveals some interest-

ing results. In spite of the increase in the number of petitions filed, the number of charges filed which the Region categorized as highest priority (Category 3) remained approximately the same with 88 in FY 2009 and 85 in FY 2010. Among the charges given the highest priority are charges where employees are discharged during organizing campaigns and charges that block the processing of petitions. Thus, while the number of petitions and elections went up in FY 2010, the number of charges blocking elections or involving discharges during organizational efforts did not follow this upward trend (although it is important to note that other allegations, such as illegal withdrawals of recognition and unlawful picketing are also given the highest priority).

(Continued on page 4)

## An Election Experience

On October 22, four Region 18 board agents ran an election for employees of nine Jimmy John's restaurant locations. The election garnered a considerable amount of publicity, as it is uncommon for fast food restaurants to organize, and the union of choice was the Industrial Workers of the World (IWW) which has been largely dormant for the last several decades and is most recognized for its radical efforts.

The Region's two new attorneys, Catherine Homolka and Abby Schneider, assisted veteran agents Roger Czaia and David Biggar that day, and below is the new agents' account: a year's worth of election training gained in a single day.

### **Pre-Election Conference:**

**A.S.:** The pre-election conference was held the day before the election, which is atypical. Usu-

ally the pre-election conference is held on-site just prior to the election. Because we had two sites, we brought everyone together at the regional office to work out details ahead of time. We reviewed lists of which employees were assigned to vote at which site, and discussed how we would challenge voters who went to the site at which they were not listed.

(continued on page 6)

Hot Dish Editor:  
Pamela Scott,  
Deputy Regional  
Attorney



*“In the Region’s view, Judge Scully’s conclusion that Respondent’s reasons for layoff were irrational, unjustified, careless and manipulative, warrant an inference that the layoffs were illegally motivated even assuming the absence of animus evidence.”*



## Region’s Complaint Dismissed in *Vision of Elk River*\*

While we prefer to focus on our considerable success in litigating unfair labor practices, Administrative Law Judge Richard Scully recently dismissed a complaint where the Region alleged that Respondent, a company that transports students to schools by bus and provides charter services for school related services, unlawfully laid off five employees. Judge Scully found that the Acting General Counsel established that the five employees engaged in protected activity and that Respondent knew of their activity, but that “...the evidence of union animus on Respondent’s part is too remote to support an inference that it was the motivating decision to the lay off of the alleged discriminatees in 2009,” and therefore, “the General Counsel has not established a prima facie case by showing there was a nexus between Respondent’s union animus and the layoffs...”

The Region filed exceptions to Judge Scully’s dismissal of the complaint. While the exceptions contend that in fact the evidence of union animus is not too remote, perhaps the most interesting contention is that evi-

dence of unlawful motivation should be inferred because Respondent’s reasons for the layoffs of the five employees are pretextual. Judge Scully made clear in his decision that he agreed with General Counsel that Respondent’s explanation for selecting who was laid off “was irrational and unjustifiable in many respects, and was applied in a careless and manipulative manner to target specific employees.”

In the Region’s view, Judge Scully’s conclusions that Respondent’s reasons for lay off were irrational, unjustified, careless and manipulative, warrant an inference that the layoffs were illegally motivated even assuming the absence of animus evidence. See, for example, *ABC Industrial Laundry*, 355 NLRB No. 17 (2010); *United Rental, Inc.*, 350 NLRB 951 (2007). Attorney Florence Brammer represented the Acting General Counsel at the hearing and filed the exceptions to Judge Scully’s decision. The decision is reported on the Agency’s website as *Vision of Elk River*, 18-CA-19200.

Region 18 attorneys  
David Biggar and Catherine

Homolka recently tried a case on behalf of the Acting General Counsel in Iowa, where the facts are very similar to *Vision of Elk River, Inc.* The complaint alleges that four employees were unlawfully discharged, two of them because of their support for a union. With regard to the two discharged because of their support for a union, complaint issued in spite of the lack of evidence of animus evidence and minimal evidence of employer knowledge of their union activities, on the bases that the employees were leading and open supporters of the union and that the employer’s reasons for discharge were demonstrably false. Assuming the administrative law judge who heard the case agrees that the employer’s reasons for the two discharges are pretextual, the judge will be faced with the same issue as Judge Scully – whether to infer an unlawful motive where an employer’s reasons for the discharges are demonstrably false. In addition, however, we are asking the administrative law judge to infer employer knowledge of the two employees’ union activities in view of the demonstrably false reasons given for discharge.

## NLRB Outreach Opportunities

Under Acting General Counsel Lafe Solomon, the Agency is continuing its efforts to reach community groups with information about the NLRB. Members of the Region’s staff are available to make presentations before any interested group such as students taking history, law or

civics classes, staffs of legal services or other civil rights agencies, or any other groups with a particular interest in the nation’s labor laws.

Typical topics that speakers might address are as follows: what the NLRA covers and protects, how the regional

office investigates and attempts to resolve unfair labor practice cases, and how the representation process works.

To arrange for a speaker for your group and to discuss possible topics, please call Deputy Regional Attorney Pamela Scott at (612) 348-1788.

# Bannering held not Unlawful Picketing

By Marlin Osthus, Regional Director

In a long-awaited decision, on August 27, 2010, the Board concluded that a union does not violate Section 8(b)(4)(ii)(B) of the Act when it displays a large stationary banner announcing a labor dispute when that banner seeks to persuade customers not to patronize the employer being bannered, even though the employer being bannered is a "secondary" employer (that is an employer that does not itself have a labor dispute with the union).

Before explaining the Board's rationale, it may be helpful to explain the facts of one case investigated by Region 18, in order to give the Board's decision some context. In the Region 18 case, the carpenters' union had a dispute with a drywall contractor. The drywall contractor was hired by a general contractor to install drywall and perform carpentry work at a dental clinic that was being remodeled. In response to the drywall contractor performing carpentry work and drywall installation, the union bannered the remodeled clinic (once the clinic opened), as well as a different clinic owned by the same dentist, and also bannered near the dentist's home. In all three cases the banner was on public property. The banners were about 4 feet by 15 feet and stated: "SHAME ON (NAME OF DENTIST)" in large letters, and "labor dispute" in small letters along the side. Of course, the union did not have a labor dispute with the dentist; rather its dispute was with the drywall contractor. Because the Board had a number of cases before it involving similar facts, the Region held this case in abeyance waiting to see how the Board would rule in the cases involving banners that were already before it.

In its decision, the Board concluded that the peaceful, stationary display of a banner on a public sidewalk, where there is no contention of other threats to the secondary employers, is not proscribed by the Act. The Board found nothing in the legislative history of the Act suggesting that Congress intended to prohibit this type of activity; it found that displaying banners is not the same as picketing (which is regulated by the Act); and it noted that there was no evidence that the union was trying to convince employees of the secondary employers to cease performing their jobs. Rather, the use of the banners was meant to appeal to the public to cease patronizing the secondary employers. Finally the Board noted that its conclusion that a stationary banner does not violate Section 8(b)(4)(ii)(B) of the Act is supported, and perhaps mandated, by constitutional concerns that these types of banners are forms of protected speech.

Board Members Wilma Liebman, Craig Becker and Mark Gaston Pearce joined in the decision. Board Members Brian E. Hayes and Peter C. Schaumber (whose term has since expired) dissented. The decision is reported at *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159.



***"In its decision, the Board concluded that the peaceful, stationary display of a banner...is not proscribed by the Act."***

*Seasons Greetings  
From Region 18!*



# Deferral Updates: More Details Please!

By Jennifer Hadsall, Des Moines Resident Officer

If you are a party to a deferred case, you should be familiar with the status update letter that arrives in your mailbox every 90 days from the NLRB. Now, I ask, have you become so familiar with this letter that you've stopped reading it or have you found yourself submitting a quick response lacking any substantive detail? If so, you've probably received a phone call or e-mail follow up from me, Resident Officer Jennifer Hadsall. While I certainly enjoy getting a chance to talk to all of you, I would greatly appreciate more detailed updates. In that regard, here a few unacceptable responses: "The matter has been resolved" or "The grievance is still being processed." Instead of these general responses, the following details should be provided:

The current step of the grievance process the grievance is at. The date this last step occurred. The next step in the process and when that is expected to occur.

If the underlying grievance has been arbitrated, please forward to us a copy of the arbitration award.

If the dispute has been settled, or otherwise withdrawn from the grievance procedure, please inform us of the basis of the resolution, or the reason that the matter was withdrawn. With regard to settlements, the details of the settlement should be provided, including the amount of any monetary remedy.



If the dispute is no longer active, the charging party should submit either a withdrawal request or its position as to why this case should not be dismissed. Please note that stating the matter has been resolved is not a request to withdraw. Simply add a statement that you are fully satisfied with the resolution as a remedy to the pending unfair labor practice and request that the NLRB charge be withdrawn.

I would like to thank all of you for your timely responses to our deferral status update requests. In addition to responding to our requests, please be aware that we encourage you to inform us of resolutions at the time they occur and likewise, encourage you to let us know if there is any delay in grievance processing for which the Region should consider revoking deferral.

## From the Director's Chair, continued from p. 1

The area where Region 18 saw the most significant increase in filings is category 2 charges. These charges involve, for example, allegations of bad faith or surface bargaining, unilateral changes (where there is no contract in place), unlawful declarations of impasse, interference with union organizing efforts where there is no allegation of unlawful discharge, and union failure to fairly represent employees. Category 2 allegations were filed in 241 charges in FY 2009, compared to 334 charges in FY 2010. While some of this increase is due to about 30 charges filed in connection with recent negotiations between the Minnesota Nurses Association and unionized hospitals in the Minneapolis/St. Paul metropolitan area, even taking those cases out of the calculations, the number of Category 2 charges increased significantly.

One final statistic that might interest you – with regard to all elections held in FY 2009, unions won 36.3% of them, compared to 50% in FY 2010.

Finally, effective June 21, 2010, President Obama appointed Lafe E. Solomon as Acting General Counsel. Acting General Counsel



Solomon has had a long career with the Agency, most recently as the Director of the Board's Office of Representation Appeals. His appointment is for 210 days, and can be extended, but will end whenever a permanent General Counsel is nominated and confirmed by the Senate. Acting General Counsel Solomon has announced his intention to enhance the enforcement and remedies of the National Labor Relations Act, and has already issued a memorandum on streamlined procedures for processing Section 10(j) injunctive relief in cases involving discharges during union organizing campaigns. You can access the memorandum (GC 10-07 dated September 30, 2010) on the Agency's website, which is located at [www.nlr.gov](http://www.nlr.gov).

*We're on the Web!*

[www.nlr.gov](http://www.nlr.gov)





## Check out our new staff members!

**Melissa Bentivolio** comes to Region 18 Minneapolis from metro-Detroit, Michigan. Melissa received her undergraduate degree from Western Michigan University in Kalamazoo, Michigan majoring in Human Resource Management with a minor in Business Administration. Melissa earned a fellowship scholarship and went on to receive her Master's Degree from the University of Minnesota in Minneapolis, Minnesota in 2010. During graduate school, Melissa completed a six month internship as a Field Examiner Co-op with Region 18 in 2009. The area of labor relations, collective bargaining and labor law has always fascinated Melissa. Reading and learning about labor relations in the U.S. is something she enjoys both for work and leisure. Fortunately, Melissa's passion for labor relations transferred in to a career at the Board.

Outside of work Melissa enjoys reading, exercising, running on the trails, and playing with her new puppy. Since coming to Minnesota, Melissa has taken up snowboarding and is looking forward to another winter where she can practice her new-found interest. Melissa also looks forward to going ice fishing for the first time this winter with fellow new employees Cathy Homolka and Abby Schneider.

**Catherine Homolka** earned her undergraduate degree at Marquette University in Milwaukee, Wisconsin, where she studied Political Science and English. She completed her law degree at the Indiana University Maurer School of Law in Bloomington, Indiana.

While in law school, Cathy interned at the National Labor Relations Board and the Equal Employment Opportunity Commission and gained invaluable experience at both agencies. She was also a summer associate at Ice Miller's Indianapolis office, where she had the opportunity to give a presentation on the Genetic Information Nondiscrimination Act (GINA). In addition to these internships, while in law school, she served as a Notes and Comments Editor on the law review and participated in IU's Moot Court Competition.

Outside of work, Cathy enjoys working out, especially running. Her goal for the near future is to run a marathon. In addition to running, she likes to read, cook, and volunteer in the community. At Marquette, she was active in WYSE (Women and Youth Supporting Each Other), and in law school, she was involved in Big Brothers/Big Sisters. She looks forward to getting involved in the community here as well.

**Abby Schneider** comes to Region 18 from St. Louis, Missouri, where she completed Washington University's JD/MBA program in May of this year. Originally from St. Louis, Abby studied Social Policy and Business Institutions at Northwestern University in Evanston, Illinois. After completing a year-long fellowship at Georgetown University, Abby returned to St. Louis to attend law school.

While in law school, Abby worked as a student attorney in the Interdisciplinary Environmental Clinic and served as the alumni liaison for the Women's Law Caucus. She was elected to the budget committee for the Student Bar Association and served as a student representative on the law school's faculty hiring committee. In business school, Abby worked as a student consultant in the Taylor Community Consulting Program, founded the JD/MBA Association, and was selected to represent her class as its commencement speaker. Abby spent her summers working for a St. Louis labor and employment firm, and in the compliance and legal departments at Edward Jones.

In her free time, Abby plays the flute, and loves to travel. She has spent time abroad in Argentina and Ukraine on service learning trips. She also enjoys writing and reporting. She is eagerly anticipating the ice fishing trip with Melissa and Cathy.



Field Examiner Melissa Bentivolio



Field Attorney Cathy Homolka



Field Attorney Abby Schneider

Cathy and I had not been involved in the election agreement, but we had heard the buzz the election was generating and had seen the articles in the paper. Tension was obvious between the Employer and Union at the pre-election conference, and it built suspense for what we were going to see the next day.

**C.H.:** There had been an article in the Minneapolis Star Tribune and the New York Times, and the phones were ringing off the hook the day before the election – so much so that we had to refer all calls to the Public Relations spokesperson in Washington, D.C. It was interesting to learn about how to handle the press (answer: keep them out of the election site!) and also to learn about confidentiality limits. When a petition is filed, it's public information. We didn't know that before.

### **Election Logistics:**

**C.H. and A.S.:** The next day, we split up to meet Dave Biggar and Roger Czaia at the two election sites. (Did you think they were letting us handle this on our own? No way!) We set up the election rooms and worked through some information in our election kits.

**A.S.:** We put a sign outside the room so it would be clear where the election was being held, and set up a table for us and the observers to sit at, where we had a clear view of people as they came in the room. Spending the day with the observers was interesting. The observers were all Jimmy John's employees, and there was one present for the Union and one for the Employer at each site. I wasn't quite sure how to relate to the observers – it seemed like there was a delicate balance between being friendly and professional.

**C.H.:** We made sure we had a good view of the voting booth and the ballot box. We gave the observers the list of eligible voters and talked to them about their job: they were to initial next to the name of every person who came to vote. Then we would hand each person a ballot and tell them to go to the booth and put an X in the box of their choice and then drop it in the ballot box. We had two polling places, each with two three-hour shifts. If a voter went to the place where s/he wasn't listed, we had to challenge the ballot: put the vote in a sealed envelope and set it aside. When we met later to tally the votes, we went through and compared the voter lists to make sure that those people had not voted at both locations.

**C.H. and A.S.:** We all convened in the office at lunchtime, during the break between the voting shifts. We compared experiences, and we discovered that we had both been giving the *exact same* speech to each voter when we handed them their ballots. It was reassuring – we knew then that when we switched sites in the afternoon it wouldn't be too different.

**A.S.:** I did the first shift with Dave at the slower site, and was glad to get to compare it to the busier site later in the day. The slow site left a lot of down time between voters, but at the other site, whenever one person arrived, it seemed like five people arrived. There was a lot more energy at that site, but it was also harder work: you had to be careful to make sure that each person was checked off the list before they got a ballot, and discourage people from having conversations in the room.

**C.H.:** In the morning I was at the busier site with Roger, and a press guy tried to walk in with his camera rolling! I thought we had been clear with everyone about not allowing press in the election site, but we had to shoo him away really fast.

### **The Count:**

**A.S.:** After the election was over, a huge crowd, probably 50 people, gathered to watch us count the votes. I was surprised by how many people had come to watch. The room was packed, and the senior board agents asked Cathy and me to count the votes... it was stressful!

**C.H.:** I tallied the "yes" votes, and Abby tallied the "no" votes. The attorney for Jimmy John's watched my tally sheet to make sure I was correctly counting all the votes, and an employee who supported the union watched Abby tally hers.

**A.S.:** It seemed like the person watching my tally sheet was holding her breath the whole time! You could definitely feel the tension in the room, and everyone was listening to each single ballot. When I got to 50 "no" votes, I said so, and Dave recounted the stack and rubber banded them. Not even twenty seconds later, Cathy said she was at 50 "yes" votes. I think that was the first time we all realized how close the count was. From that point on, everyone was completely silent and even more tense than before.

**C.H.** I felt the same way! As I listened to the agents announce each vote, I honestly didn't know which side was leading. It seemed like there would be a lot of "no" votes in a row, but then the same amount of "yes" votes would follow! We had our backs to the crowd, which helped us focus.

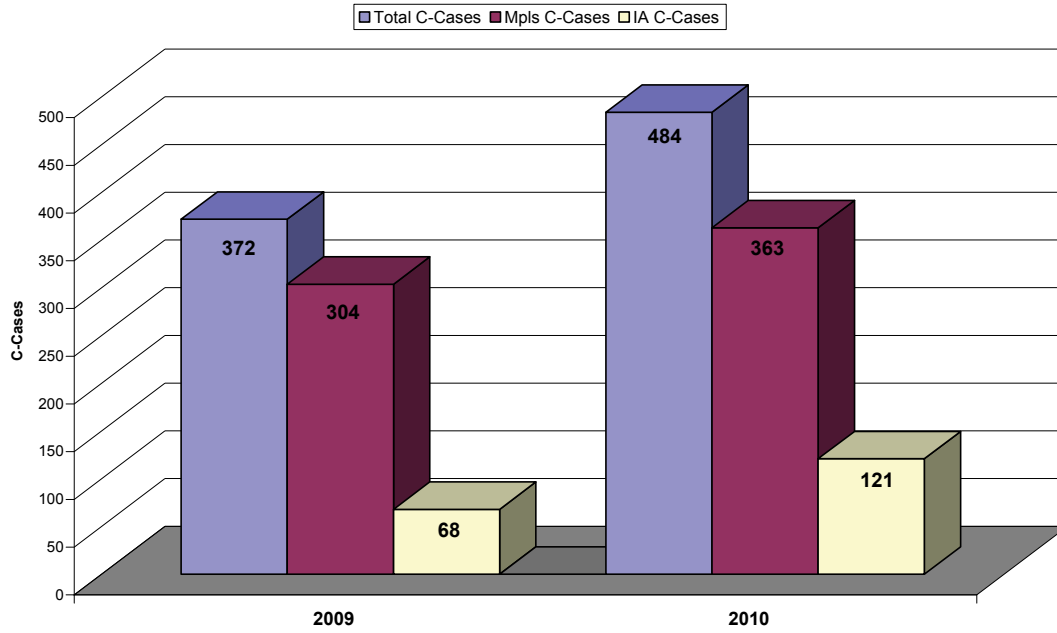
**A.S.:** It ended up being a very close vote: 87 to 85, in favor of the employer. The union organizers asked us to recount all of the ballots. We did, but came up with the same number.

**C.H.:** And, there were two challenged ballots! We learned that day that the union must have at least one more vote than the employer. A tie is decided in favor of the employer, so even if the challenged ballots had both been for the union, the outcome would have been the same.

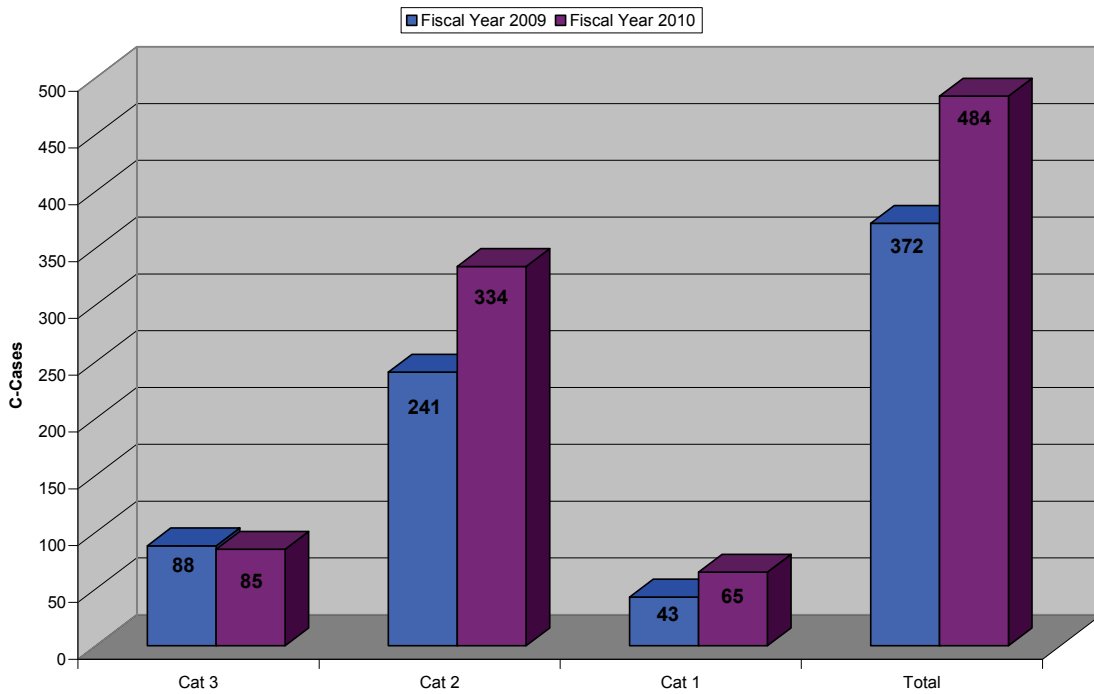
**A.S.:** As you can see, our first election was both exciting and a great learning experience for both of us. However, we had no idea that the entire process was only beginning and the election was just the first step. A week after the election, objections were filed.

**C.H.:** It really made us realize how difficult (and emotional!) an organizing campaign can be, for both sides. It was a fascinating experience for us and one we'll never forget.

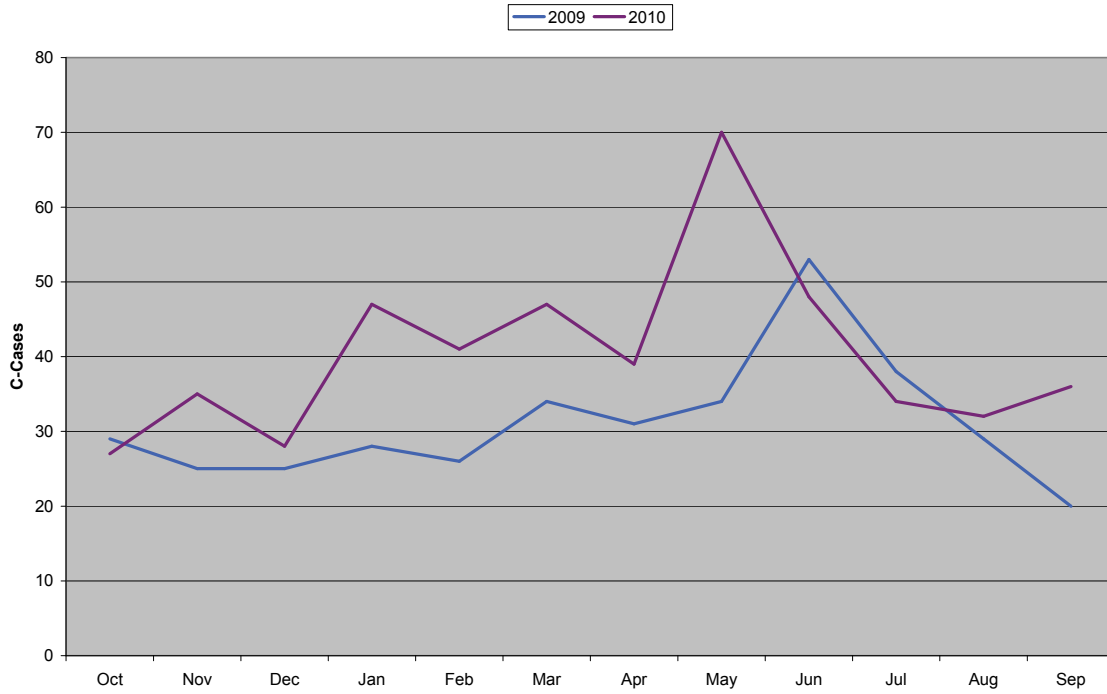
Region 18 C-Case Intake for Fiscal Years 2009 and 2010



C-Case Intake by Category for Fiscal Years 2009 and 2010



C-Case Intake for Fiscal Years 2009 and 2010



R-Case Intake for Fiscal Years 2009 and 2010

