



Spring 2010
Issue

Regional Insight

AN OUTREACH NEWSLETTER TO INFORM THE
PUBLIC ABOUT WORKPLACE RIGHTS & ISSUES

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Celebrate With Us!

75th Anniversary

Join Region 25 as we celebrate the NLRB's 75th Anniversary!

On July 5, 1935, President Franklin Roosevelt signed the National Labor Relations Act into law, stating that the law sought to achieve "common justice and economic advance." This is worth remembering, especially during this 75th anniversary year – that the Act was seen as a means of restoring the nation to prosperity.

Did you know that the first-ever NLRB election took place right here in Indiana? That historical election, involving the hosiery workers of Wayne Knitting Mills, was conducted at a fire station in Fort Wayne in 1935. That was just the beginning of how Indiana workers distinguished themselves in the history of the National Labor Relations

Board. For more information about this and other interesting facts and pictures, please visit the Agency's 75th Anniversary Website at <http://www.nlrb.gov/75th>.

Region 25 Regional Director Rik Lineback and many other current and former Board Agents and labor practitioners will be on hand to share more of these stories at its celebration of the NLRB's 75th Anniversary on **Friday, May 14, 2010**.

Please plan to attend the reception from 2:00pm to 4:00pm in the Riley Room of the Indianapolis Marion County Central Library located at 40 East St. Clair St., Indianapolis, IN. Make your reservation now by contacting Marge Hibdon at 317.226.7537 or Margaret.Hibdon@nlrb.gov.

The Newest Board Members: Becker & Pearce

The National Labor Relations Board has not had a full complement of five members since December 16, 2007. On July 9, 2009, the White House sent to the Senate the nominations of Craig Becker, Mark Gaston Pearce, and Brian Hayes to to join the two other sitting members of the Board, Chairman Wilma B. Liebman and Member Peter C. Schaumber. Because of delays in the confirmation process, on March 27, 2010, President Obama announced the recess appointments of attorneys Craig Becker and Mark Gaston Pearce. These recess appointments will expire at the end of the next session of Congress. In the meantime, all

three nominations are in the Senate for confirmation.

Craig Becker has served 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 (story continued on page 2)

The Newest Board Members (story continued from page 1)

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 was a founding partner of the Buffalo, New York law firm of Creighton, Pearce, Johnson & Giroux, where he practiced union side labor and employment law before state and federal courts and agencies. In 2008, he was appointed to the New York State Industrial Board of Appeals, an independent quasi-judicial agency responsible for review of certain rulings and compliance orders of the NY Department of Labor in matters including wage and hour law. Pearce has taught at Cornell University's School of Industrial Labor Relations Extension, and is a Fellow in the College of Labor and Employment Lawyers. Prior to 2002, Pearce practiced union side labor 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.

Brian Hayes currently serves as the Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP). Pre-

viously, Mr. Hayes was in private legal practice for over twenty-five years. His practice was devoted exclusively to representing management clients in all aspects of labor and employment law. He has represented employers in scores of cases before the National Labor Relations Board, the Equal Employment Opportunity Commission, and various state fair employment practice agencies. He has served as chief trial counsel in the full range of employment claims in both state and Federal courts. Mr. Hayes has extensive experience in negotiating labor contracts on behalf of management clients, as well as representing clients in arbitrations, mediations and other forms of alternative dispute resolution. He has argued a number of significant labor cases before the Federal Courts of Appeal; and regularly counseled clients regarding compliance with the full range of state and Federal labor laws including OSHA, FMLA, Title VII and the Fair Labor Standards Act. Before entering private practice, Mr. Hayes clerked for the Chief Administrative Law Judge of the National Labor Relations Board and thereafter served as Counsel to the Chairman of the NLRB. In addition to his private practice, Mr. Hayes was a member of the adjunct faculty at Western New England Law School where he taught classes in Labor Law, Collective-Bargaining, Arbitration and Employment Litigation. He is a member of the Massachusetts and District of Columbia bars, and the American Bar Association and its Labor and Employment Law Section. Mr. Hayes earned his undergraduate degree from Boston College and his law degree from Georgetown University Law Center.



Only union-represented employees have a right to request a union representative during investigatory interviews.

Know Your Workplace Rights!

Weingarten Rights

The right of employees to have union representation at investigatory interviews was announced by the U.S. Supreme Court in *NLRB vs. Weingarten, Inc.*, 420 U.S. 251 (1975). These rights have become known as "Weingarten rights." An Employer commits a violation of Section 8(a)(1) of the Act by refusing to allow an employee to have a union representative present, upon request, during an investigatory interview. These *Weingarten* rights only apply to investigatory interviews; an investigatory interview occurs when a supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his or her conduct. If an employee has a reasonable belief that discipline or other adverse consequences may result from what he or she says during the investigatory interview, the employee has the right to request union representation. Management is not required to inform the employee of his/her *Weingarten* rights; it is the employee's responsibility to know his/her rights and request representation. The employee may not be punished for making such a request for representation. Once a valid request for union representation is made, the Employer must either grant the request or offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. If the Employer denies the request for a union representative and the employee does not wish to continue the interview without a representative, the Employer may continue its investigation without questioning the employee and the employee would forego any benefits that may be derived from participating in the interview.



ABA Celebrates 75 years of the NLRB

On the evening of Friday, November 6, 2009, the American Bar Association Section of Labor and Employment Law held a celebration cocktail party and dinner in honor of the 75th Anniversary of the Wagner Act (NLRA). The elegantly decorated courtyard of the Smithsonian's National Portrait Gallery was the setting, and there were many distinguished speakers and guests. Board Members and General Counsel past and present were on hand, as well as many representatives of NLRB regional offices (including Region 25's Regional Director Rik Lineback). Many members of the labor and management bars throughout the country were also on hand. The gallery was adorned, quite appropriately, with New Deal artwork. This, combined with the subdued lighting, beautiful decorations, and, most importantly, the inspirational speakers, made for a most memorable evening.

There were several interesting speakers. Welcoming remarks were delivered by Nora L. Macey, Chair of the ABA Section of Labor and Employment Law; Carolyn B. Lamm, President of the American Bar Association; and General Counsel Ronald Meisburg. After Board Member Peter Schaumber introduced the guests, Chairman Wilma Liebman presided over the event. The dinner featured three guest speakers: Hon. Hilda

Solis, U. S. Secretary of Labor and former member of the U.S. House of Representatives; Hon. Ray Marshall, Professor Emeritus at the Lyndon B. Johnson School of Public Affairs, Austin TX, and former U. S. Secretary of Labor; and Peter J. Hurtgen, former NLRB Chairman and Senior Partner of Morgan, Lewis, and Bockius LLP, Los Angeles.

Film clips of various events in labor-management history, including a clip of President Franklin Delano Roosevelt signing the Wagner Act, entertained the guests while dinner was served.

This was truly an unforgettable evening marking one of the most significant events of the 20th century and was just the start of a series of similar events throughout the country. For information regarding Region 25's celebration of the NLRB's 75th Anniversary, please see the related article on page one of this newsletter.



Visit www.nlr.gov/75th for more information, photos, and trivia about the NLRB's history

Are Two-Member Board Decisions Binding?

For over two years the five-member National Labor Relations Board consisted of only two members. During that time, the two-member Board issued approximately 600 decisions in which they could reach agreement. The employer in *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009), and various other respondents questioned whether such decisions are binding without the Board consisting of at least a quorum of three members. The Supreme Court granted certiorari in *New Process Steel*, which originated in Region 25, and heard oral arguments on March 23, 2010.

In *New Process Steel*, the two-member Board held that the employer unlawfully ceased recognizing the

union and rescinded the parties' initial contract. *New Process Steel* took these actions after learning that the majority of unit members had not voted to ratify the contract, even though the union had informed the employer that the contract was ratified by the union's established process which did not require ratification by a majority of the unit members. *New Process Steel* appealed the decision to the Seventh Circuit, in part, on the theory that the two-member Board does not have the legal authority to issue decisions. The Seventh Circuit found that the two-member Board had the legal authority to issue decisions in which both members concurred, but the federal appellate courts have split on this issue. That split prompted the Supreme Court's review, and its decision is expected in the fall.



The Regional Attorney's Corner By Dick Simon

When an employer files a bankruptcy petition does that mean that the NLRB will be unable to collect backpay that the employer may owe to its employees pursuant to a Board Order or a settlement agreement? The short answer to this question is no – the NLRB can file a proof of claim for such backpay in a bankruptcy proceeding and seek recovery on its backpay claim. Over the years, Region 25 has been quite successful in obtaining a recovery on backpay claims it has filed in bankruptcy proceedings. In fact, Region 25 has received in excess of \$5 million in payments on its bankruptcy claims. In this article I want to briefly explain to you why the NLRB becomes involved in bankruptcy proceedings and what types of pleadings the NLRB can file in order to protect its interests in such a case.

The Bankruptcy Code (Title 11, U.S.C.) is a Federal statute that permits an employer, whether a corporation, partnership, or sole proprietorship, to file a petition for bankruptcy. The possible venues for the filing of a bankruptcy case include where a company principally does business, where a company retains its principal assets, or where a company has its domicile or is incorporated.

The Supreme Court, in the *Nathanson* case, concluded that the Board is a creditor of a debtor in a bankruptcy case with respect to unpaid backpay awards. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). See also *Tucson Yellow Cab v. NLRB*, 27 B.R. 621, 623 (Bankr. 9th Cir. 1983); *NLRB v. Killoren*, 122 F.2d 609, 613 (8th Cir. 1941). The Board is the only entity that has a right to file claims for backpay and the Board is also the sole authority to liquidate the amount of its backpay claims.

In processing cases in which a charged party or respondent has filed a bankruptcy petition, Region 25 as well as other Regional Offices timely file appropriate pleadings and other documents with bankruptcy courts in order to protect the Agency's interests in the bankruptcy proceeding. The types of pleadings and documents that a Region might file in a bankruptcy case include a proof of claim, a notice of appearance, a notice of pendency of unfair labor practice proceeding, objections to disclosure statements and plans of reor-

ganization, objections to a debtor receiving a discharge in bankruptcy, objections to the sale of the debtor's assets, a response to an objection to the Agency's proof of claim, and a response to any attempt to enjoin the NLRB from further processing an unfair labor practice or representation case because of the filing of a bankruptcy petition.



The Agency's claim may be classified, in whole or in part, as a secured claim, an unsecured claim with priority, or as an unsecured claim without priority. The claim is a secured claim if the Agency has a recorded lien against the debtor's property. The claim is otherwise an unsecured claim which may or may not have priority under Bankruptcy Code section 507. The most common types of priority claims are claims for (1) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an employee within 180 days before the date of the filing of the bankruptcy petition, and (2) claims for unpaid contributions to employee benefit plans arising from services rendered by the employee within 180 days of the filing of the petition. The maximum amount per employee that is allowable under these two priorities combined together is presently \$11,725 in bankruptcy cases filed on and after April 1, 2010.

In order to protect its interests in a bankruptcy case, the NLRB needs to become aware that a particular employer that has or may have backpay liability in a Board proceeding has filed a bankruptcy petition. If you are involved in a case before the NLRB and you become aware that the employer involved in the case has filed a bankruptcy petition, please let the Regional Office that is handling the case know that such a bankruptcy petition has been filed so the Region can take appropriate action in the bankruptcy case and thereby protect the Agency's interests in the case.



NLRB Speakers are Available for Your Group

Interested in having a representative of the Regional Office address your group?

Members of the Regional Office staff are available to make presentations before any group, including classroom groups, legal services clinics or service agency staffs, as well as those members of the public that they serve. Speakers are available to cover a variety of topics, including presentations describing what the Act's protections cover, how the Region investigates unfair labor practice charges, the NLRB's representation case procedures, or any other NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please contact the Assistant to the Regional Director Patricia Nachand at (317) 226-7404 or Supervisory Field Examiner Mary Jane Mitchell at (317) 226-7406. You may also request a speaker through a link on the NLRB's Web site: http://www.nlr.gov/about_us/speakers.aspx



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** Please contact the Region if you wish to be added to or deleted from our newsletter distribution list.

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. The NLRA extends rights to most private sector employees, to their employers, and to unions/labor organizations. The NLRA protects workers who form, join, support or assist unions, also known as labor organizations, and protects groups of workers (two or more employees) who engage in protected concerted activities without a union concerning their wages or working conditions. The Act protects non-union and union employees against employer and union discrimination based on union-related activities or other protected concerted activities.

Employees, who wish to pursue workplace organization issues or allegations of unfair labor practices may seek assistance from the nearest regional NLRB office. Employers and Unions who wish to pursue allegations of unfair labor practices may do the same. The Agency has 51 regional, sub-regional, or resident offices to serve the public.



From the Desk of the Regional Director

The past is never dead, it is not even past.

~ William Faulkner

If you want to make enemies, try to change something.

~ Woodrow Wilson



**Regional Director,
Rik Lineback**

This year we at the NLRB are celebrating the 75th Anniversary of the passage of the Wagner Act. And you may have thought that the only real highlight of 1935 was the birth of The King on January 8. In fact, nearly 6 months after Elvis' birth in Tupelo, Mississippi, President Roosevelt signed into law a new national labor policy. The National Labor Relations Act created the NLRB as an independent agency dedicated to upholding employees' rights to form and join unions. The legislation endorsed the principles

of exclusive representation and majority rule covering most workers in industries whose operations affected interstate commerce. We hope you can come join us on May 14th for our 75th Anniversary celebration as more fully described in these pages. This edition also contains a report on the ABA Celebration dinner at the National Portrait Gallery, the Regional Attorney's take on bankruptcy, articles on *Weingarten* rights, and an introduction to the new Board Members. We also cover the challenge to the authority of the 2-Member Board currently being considered by the Supreme Court. The case is *New Process Steel*, and involves a Butler, Indiana, facility located in the northeastern part of Region 25.

Please enjoy our newsletter, and I hope to see you on May 14.

Cordially,

Rik Lineback