



The Downtowner

June 2009
Volume 3, Issue 2

News from and about Region 21

In This Issue

Page 1

- Regional Perspective
- Board Bits

Page 2

- Nominations to Board
- Liebman - New Chair

Page 3

- Electronic Case Files
- More Board Bits

Page 4

- Paperless Appeal
- Split Rulings on Two-Member Board

Page 5

- O.C. LERA Conference - July 22, 2009
- Answers to Board Bits
- NLRB Outreach

Regional Perspective

By James F. Small, Regional Director

Potential changes to the Act are making their way through the Congressional process. By the next issue of *The Downtowner* we hope to be able to share how the Board and Region 21 will implement whatever changes are made to the Act.

Budgetary funding for the NLRB was finally approved as part of an omnibus bill passed in March 2009. Under the terms of the approved budget, the NLRB will be fully funded for the remainder of this fiscal year. Region 21 will be permitted some very limited hiring authority. The budgetary travel restrictions imposed upon case handling can be softened but won't be eliminated. Institutional parties will continue to be encouraged to travel to the Regional Office to present evidence. Some other cost-saving measures will also be continued. Thank you for your understanding and cooperation in helping us through tough budgetary times.

Region 21 has several pending cases involving the potential application of 10(j) injunctive relief. The outcome of these matters will be detailed in our next issue. At that time, hopefully we will also be able to talk about the disposition of a number of charges and representation petitions associated with some high-profile disputes.

This issue of *The Downtowner* will focus on the Board's e-filing initiative and our move toward an "electronic" case file. Deputy Regional Attorney Neil Warheit provides us with an insightful explanation of these matters. For several years, the Federal Court system has been on a mission to convert from paper to electronic filings, as cases on appeal march toward paperless

legal proceedings. The courts of appeal are moving—forgive the term—judiciously toward full e-filing. The Board's adoption of electronic case files—the same format as the district and bankruptcy courts—will permit easier and more efficient case processing at all levels. This change is sufficiently important that it warrants special coverage in our newsletter.

Our last *Coffee with the Board*, interactive seminar, was well received. We'll arrange other *Coffee* events, should there be legislative changes to the Act. Likewise, should your group desire an individual presentation by a Board agent, please contact ARD Bruce Hill at (213) 894-5210 or Bruce.Hill@nlrb.gov. NLRB presentations can also be arranged by clicking on the "speakers" link on the Agency's website www.nlrb.gov.

Board Bits: Test Your NLRB I.Q.



1. What is E-Docket?
2. Where may applicants for attorney positions with the Board send their applications electronically?
3. What does Phelps Dodge Corporation, in Morenci, Arizona, have to do with the history of Region 21?

Answers on Page 5.

Contact Us

James F. Small
Regional Director
NLRB Region 21

888 S. Figueroa Street
9th Floor
Los Angeles, CA 90017
(213) 894-5204
(866) 667-6572

Region 21 email & website:
NLRBRegion21@nlrb.gov
www.nlrb.gov

Email us for an
electronic version of
The Downtowner

President Obama Intends to Nominate Craig Becker and Mark Pearce to Board

On April 24, 2009, President Barack Obama announced his intention to nominate Craig Becker and Mark Pearce as members of the NLRB.

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 law 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.

Wilma Liebman Designated NLRB Chairman

Reprinted from *All Aboard* (NLRB newsletter)

President Barack Obama designated NLRB Member Wilma B. Liebman as Chairman of the Board on January 20, 2009. She replaces Member Peter C. Schaumber, who had been the Chairman since March 19, 2008. Chairman Liebman is currently serving her third term, which will expire on August 27, 2011. She has served on the Board since November 14, 1997, having first been appointed by President Clinton. Chairman Liebman's 11-plus years on the Board constitutes the third-longest tenure in Board history, exceeded only by John H. Fanning's 25 years and Howard Jenkins, Jr.'s 20 years. Chairman Liebman becomes the second woman to serve as Chairman in the Board's 78-year history. Betty Southard Murphy, who was appointed by President Ford, was the Board's Chairman from February 1975 to

April 1977. There have been 19 NLRB Chairmen. In a statement, Chairman Liebman said:

"I am honored by President Obama's designation to serve as Chairman, and I look forward to continuing my service on the Board with my colleague, Peter Schaumber, and ultimately with a full complement of Board Members. I wish to thank Member Schaumber for his own outstanding service as Chairman. His leadership and collegiality, coupled with the efforts of dedicated agency staff, have enabled the Board to operate productively this past year. The Board's work matters, just as it did when the National Labor Relations Act was passed in 1935. Democracy in the workplace is still basic to a democratic society, and collective bargaining is still basic to a fair economy. The statute we administer is the foundation of America's commitment to human rights recognized around the world."

Chairman Liebman began her legal career as an NLRB staff attorney in 1974, and then served on the legal staff of two labor unions: the International

Brotherhood of Teamsters from 1980 to 1989, and the International Union of Bricklayers and Allied Craftsmen from 1990 to 1993. From 1994 to 1997, Chairman Liebman served at the Federal Mediation and Conciliation Service, first as Special Assistant to the Director and then as Deputy Director.

A native of Philadelphia, Chairman Liebman holds a B.A. from Barnard College and a J.D. from The George Washington University Law Center.

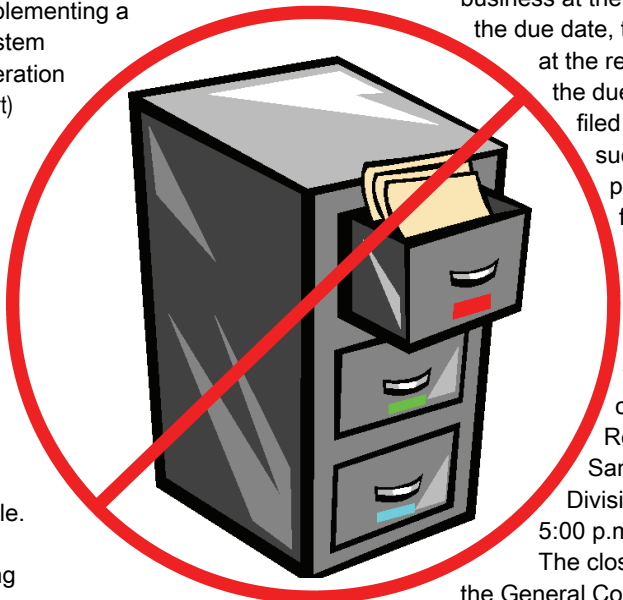


Wilma B. Liebman

The Electronic Case File

By Neil Warheit
Deputy Regional Attorney

All NLRB regional offices are mandated to begin maintaining electronic case files. The day of the “paper” file is rapidly coming to a close. The Agency as a whole is implementing a new software system called Next Generation (“NxGen” for short) that permits all case information to be kept electronically—from the filing of the case until the closure of the case. We are asking for your help in our transition to the electronic case file. You can help by electronically filing documents with us.



We are encouraging everyone, particularly our regular practitioners, to electronically submit approved documents. The list of approved documents can be found on the Agency’s website, www.nlr.gov, under the E-Gov tab, E-Filing option in the pull-down menu. Unfair labor practice charges and petitions still may **not** be filed electronically. Additional information can also be found in OM 09-34, available on the Agency’s website. As part of our transition to the electronic case file, all documents submitted in a case will eventually be scanned and stored electronically. Initially receiving documents in an electronic form will save considerable Agency resources. Thus, every document electronically submitted is a document that doesn’t have to be scanned.

Answers to complaints and compliance specifications may now be filed electronically. If the filed document is a pdf document containing the required signature, then no paper copy needs to be sent to the Regional office. If the electronic version of the answer is not in pdf format with the required signature, then the E-Filing rules require that the answer—with required signature—be sent to the Regional office by traditional means within 3 days after the electronic filings.

Since November 2006, more than 12,000 documents have been electronically filed with the Agency. Recent

changes by the Board regarding deadlines, paper copies, and the length of the documents will make E-Filing easier.

The deadline for the electronic filing of documents has been extended from the close of business at the receiving office on the due date, to before midnight at the receiving office on the due date. Documents filed by other means, such as U.S. mail, personal service or facsimile, will continue to be due at the close of business at the receiving office on the due date. The close of business in Region 21 and the San Francisco

Division of Judges is 5:00 p.m., Pacific Time.

The close of business for the General Counsel and Board offices in Washington, D.C. is 5:00 p.m. Eastern Time. The 15-page limit for E-Filings has been eliminated. Electronically filed documents can now be as large as 20 megabytes. In addition, changes have been made regarding the service of electronically filed documents.

When a document is electronically filed with a Regional office, the Division of Judges or the Board, and service is required on the other party, the other party should be served electronically, if possible.

If a party does not have the ability to receive e-mail, then that party should be notified by telephone of the substance of the transmitted document. A copy of the document should be served on the party no later than the next day by personal service, overnight delivery service or, with the permission of the party, by facsimile transmission. These changes are embodied in the Board’s revised Rules, Sections 102.114(a) and (i).

The Agency is also revising the manner in which decisions are distributed to the parties. In April 2009, the Agency began issuing Administrative Law Judge Decisions electronically to registered parties. Registration can be accomplished on the Board’s website under the E-Gov tab. Further enhancements to the service of Board documents are envisioned for the future.

More Board Bits: Test Your NLRB I.Q.



4. Who is the “newest” Region 21 field attorney?

5. Who was the first Region 21 Regional Director to serve as a Board Member?

Answers on Page 5.

NLRB Makes First Decision in a Paperless Administrative Appeals Case

On February 12, 2009, National Labor Relations Board General Counsel Ronald Meisburg announced that he had made his first decision in an Office of Appeals case based on a paperless record through the Agency's new electronic case management system, Next Generation or "NxGen." The Office of Appeals, the Agency office in charge of reviewing cases in which a Regional Director has refused to issue complaint, began processing all of its appeals within the new system late in 2008. It closed more than 2,100 appeals during FY 2008. Currently, Regions 9 (Cincinnati, OH) and 10 (Atlanta, GA) are operating as pilot regions for NxGen. The paperless case decided by General Counsel Meisburg

arose in one of these regional offices. Over the next 2 years, the NxGen system will expand agency-wide, allowing the Agency to provide more efficient service to the public.

In describing his experience with reviewing the documents on NxGen, General Counsel Meisburg stated that he viewed both the regional office and appeal case documents on-line and the system worked well. "I understand that for now there is a lot of work in the pilot regions converting the regional office investigatory file to electronic format. Over time, we will begin requiring the parties to submit case materials and memoranda in electronic format so that the conversion burden will be virtually eliminated or greatly reduced. This will save both time and money for the Agency since these files would no longer need to be mailed to headquarters offices, teleworking will not require transporting bulky files, elements of the case will be available to

investigators as they complete their investigations, and Agency operations will become more transparent and accessible overall. I want to thank all of those who have been involved in the NxGen program, both in headquarters and in the field, for their tireless efforts in implementing this important piece of technology for our Agency."

NxGen has numerous built-in security measures for materials placed in it. In order to further protect the materials, only certain offices of the Agency are permitted to view the electronic case file depending on what stage it is in.

The inaugural case presented to the General Counsel dealt with an appeal of the Regional Director's determination to accept a settlement agreement where one of the parties felt the settlement was inadequate. The Office of Appeals presented the case electronically and after careful review, the appeal was denied.

Circuit Courts are Split on the Authority of the Two-Member Board

On May 1, 2009, two circuits weighed in on the authority of the two-member Board—as a legitimate quorum of a three-member group—to issue decisions.

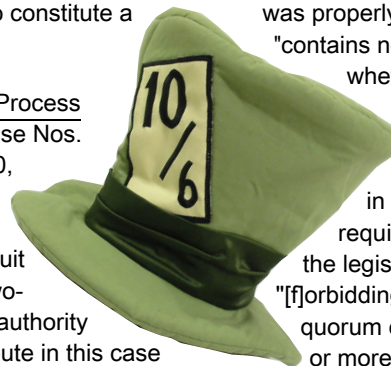
In the first, Laurel Baye Healthcare of Lake Lanier (Board Case No. 10-CA-35958, published at 352 NLRB 179 (2008)), the District of Columbia Circuit determined "that the [two-member] Board was not properly constituted, and . . . did not have the authority to issue the order before [it]." The Court focused on the text of Section 3(b) of the Act, which provides, among other things, that "three members of the Board shall, at all times, constitute a quorum of the Board." It thus held: "The Board's ability to legally transact business exists only when three or more members are on the Board. Considering the language of the vacancy and Board quorum provisions in tandem, it is clear that the vacancy provision allows the Board to function with

at most two vacancies." Therefore, it "grant[ed] the petition of Laurel Baye Healthcare and order[ed] that the decision of the NLRB be vacated, and the case remanded for further proceedings before the Board at such time as it may once again consist of sufficient members to constitute a quorum."

In the second, New Process Steel, L.P. (Board Case Nos. 25-CA-30632, -30470, published at 353 NLRB Nos. 13 and 25), the Seventh Circuit concluded that the two-member Board "had authority to hear the labor dispute in this case and to issue orders regarding the unfair labor practices" it found. Unlike the D.C. Circuit in Laurel Baye, the Seventh Circuit focused on "the plain meaning of the text" of Section 3(b) and found that Section 3(b) "accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed 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 has delegated its authority to a group of three members." The Court also concluded that, provided the three-member panel was properly constituted, Section 3(b) "contains no requirement about whether a vacant Board member needs to have heard evidence or participated in a decision in order for the quorum requirement to apply." Indeed, the legislative history suggests that "[f]orbid[ding] the NLRB to sit with a quorum of two when there are two or more vacancies on the Board would frustrate the purposes of the act, not further it." It thus reached—and enforced—the Board's unfair labor practice findings.

The first court of appeals decision to approve the authority of the two-member Board was by the First Circuit on March 13, 2009, in Northeastern Land Services, Ltd.



Save the Date

27th Annual OCLERA Labor & Employment Law Conference

"Still The Best in the West!"

July 22, 2009 – Anaheim, California

NLRB Regions 21 and 31, in conjunction with O.C. LERA (Orange County Labor and Employment Relations Association, formerly OCIRRA) and FMCS (Federal Mediation and Conciliation Service) proudly present the 27th Annual Labor and Employment Law Conference. This Conference is designed to provide information about the NLRB and its decisions and procedures, as well as up-to-date information on current employment law issues. This ever-informative program is useful to attorneys representing labor or management, union officials, human resources personnel, arbitrators, mediators, students, and members of the academic community. Come hear our experts explain the labor and employment developments in the past turbulent year, predict what may lie ahead, and suggest how to prepare yourself, your clients, and your organizations. Featured this year will be a tribute to the 50th anniversary of the California Department of Fair Employment and Housing and a luncheon address by its Director, the Honorable Phyllis Cheng. MCLE credits are available. For more information, please e-mail OCLERA Executive Vice President Ami Silverman at ami.silverman@nlrb.gov.



Public Service Announcement from the FCC

On June 12, 2009, all full-power broadcast television stations in the United States will stop broadcasting on analog airwaves and begin broadcasting only in digital. Digital broadcasting will allow stations to offer improved picture and sound quality and additional channels. **Find out more about whether or not you will be impacted by the digital TV (DTV) transition by visiting the DTV Website of the Federal Communications Commission at <http://www.dtv.gov/>.**



Answers to Board Bits

1. *With E-Docket, parties may register to receive decisions on cases electronically. Go to www.nlrb.gov, click on the E-Gov tab, and you will be presented with a drop-down series of tabs. Select E-Docket at the top of the list, and you will be taken to the page to see what decisions were issued electronically that day.*
2. *Applicants for attorney positions with the Board may email their applications to field.jobs@nlrb.gov.*
3. *Phelps Dodge Corporation is the Employer in Case 21-RC-1, filed on September 5, 1947, by Local 679, Plumbers and Pipefitters.*
4. *Isael Hermsillo, a bilingual field attorney from Region 5, Baltimore, has accepted a transfer to Region 21 and will be arriving this summer.*
5. *Region 21 Regional Director Ralph Kennedy served on the Board from December 14, 1970, through July 31, 1975. Region 21 Regional Director Wilfred "Bud" Johansen also served on the Board from May 28, 1985, through June 15, 1989.*

Contributors to this issue:

- James Small
- Bruce Hill
- Neil Warheit
- John Hatem, *editor*

NLRB Speakers are Available for Your Group

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

Region 21 agents 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 Assistant to the Regional Director Bruce Hill at (213) 894-5210. You may also request a speaker on the NLRB's Web site: http://www.nlrb.gov/about_us/speakers.aspx.

NLRB
updates
and Tips