

REGION 1 OUTREACH

SPRING 2009

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2009 ANNUAL ROBERT FUCHS CONFERENCE

Attend the October 22, 2009
37th Annual Robert Fuchs
Labor Law Conference

Location: Boston, MA

Time: 12:30 PM - 5:30 PM,
followed by a reception

PRESIDENT OBAMA ANNOUNCES INTENT TO NOMINATE CRAIG BECKER AND MARK PEARCE AS MEMBERS OF THE NLRB

On April 24, 2009, President Obama named Craig Becker and Mark Pearce as nominees for two of the three vacancies on the National Labor Relations Board. Craig Becker currently serves as Associate General Counsel to both the Service Employees International Union

and the AFL-CIO. Mark Gaston Pearce is a founding partner in the Buffalo, New York law firm of Creighton, Pearce, Johnsen & Giroux, where he practices union-side labor and employment law. From 1979-1994, he was an attorney and District Trial Specialist for the NLRB in Buf-



falo, NY. The current Board members are Chairman Wilma B. Liebman and Member Peter C. Schaumber.

FROM REGIONAL DIRECTOR ROSEMARY PYE TRIBUTE TO RETIRING REGIONAL DIRECTORS

Over the past few months, I have represented the other Regional Directors at the retirement parties of three exemplary Regional Directors – Peter Hoffman from Region 34 in Hartford, Gerald Kobell from Region 6 in Pittsburgh, and Helen Marsh of Region 3 in Buffalo. Although not all of you practice in these other Regions, many of you do, and, in any event, I think their legacies, which have had a great influence on me, are inspiring even if you did not know them or handle cases in their Regions.



Peter B. Hoffman and Regional Attorney Jonathan B. Kreisberg

Peter Hoffman headed the Connecticut office from the time it opened in 1979, building the office from the ground up and leading it for 30 years. During that time, he was known for the lead cases he and his staff pursued. Among those cases were two bargaining cases that resulted in two of the largest backpay amounts in the history of the Board – *Colt Industries*, JD-207-89 (1989), in which \$13 million dollars in backpay was awarded to 700 unfair labor practice strikers, and *Honeywell International*, 253 F. 3d 125 (2001), in which \$17.6 million dollars was awarded to 500 employees covered by an effects bargaining agreement, which the predecessor employer had failed to honor. The Region also litigated *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in which the U.S. Supreme Court reversed the Board and the First Circuit to set a new standard for evaluating the rights of non-employees to access private property for the purpose of union organizing. Region 34's *California Saw and Knife Works*, 320 NLRB 224 (1995), arose out of a landmark ruling in *CWA v. Beck*, 487 U.S. 735 (1988), in which the Supreme Court decided that the NLRA does not permit a union, over the objection of dues-paying non-

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How to File a Charge:

Anyone may file an unfair labor practice charge with the NLRB. To do so, a charging party must submit a charge form to any Regional Office. The form must identify the parties to the charge and provide a brief statement of the basis for the charge. The charging party must also sign the charge.

Forms are available for download from the NLRB website (www.nlr.gov). They may also be obtained from an NLRB office. NLRB offices have information officers available to discuss charges in person or by phone, to assist filling out charge forms, and to mail forms.

You must file the charge within 6 months of the unfair labor practice.

When a Charge Is Filed:

The NLRB Regional Office will investigate. The charging party is responsible for promptly presenting evidence in support of the charge. Usually evidence will consist of sworn statements and documentation of key events.

The Region will ask the charged party to present a response to the charge and will further investigate the charge to establish all facts.

After a full investigation, the Region will determine whether or not the charge has merit.

After the Region Makes a Determination:

If a charge has merit, the Region will attempt to settle the matter. Should settlement efforts fail, the Region will issue a complaint and litigate the matter. If the Region determines that a charge has no merit—that the charged party has not violated the Act—it will dismiss the charge after giving the charging party the opportunity to withdraw. The charging party has the right to appeal a dismissal.

REGION 1 STATISTICS

Unfair Labor Practice Statistics from October 2008 through March 2009	
Number of unfair labor practices filed	407
Percentage of the cases found to be meritorious	40.3
Percentage of meritorious cases settled prior to hearing	98.7
Number of times the Region prevailed in the three tried cases for which decisions have been received.	3
Representation Statistics from October 2008 through April 2009	
Cases Filed	58
Election Agreements	44
Regional Director's Decisions	5
Median Days from Filing to Election	39

REPRESENTATION CASE NEWS

In the largest Boston area hospital elections held in some time, the petitioning labor unions won representation in four different collective-bargaining units at St. Elizabeth's Hospital. SEIU 1199

secured representation in three units, composed of business office employees, service and maintenance employees, and technical employees, and the Area Trades Council became rep-

resentative of a skilled trades unit. A total of 838 employees are employed in the bargaining units at issue.



NLRB HELPING FCC PREPARE THE PUBLIC FOR TRANSITION TO DIGITAL TELEVISION

In an effort to aid the Federal Communications Commission (FCC) to educate the public regarding the conversion to digital television, the NLRB has agreed to display posters in its reception areas and place in reception areas information materials to the public regarding the national transition to digital television that is

scheduled to take place on June 12, 2009.

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 (DTV) transition by visiting the DTV Website of the Federal Communications Commission at

<http://www.dtv.gov/>.

RECENT CIRCUIT COURT LITIGATION

D.C. Circuit Rules FEDEX Home Delivery Drivers Are Independent Contractors

In a published 50-page opinion that issued April 21, 2009, a divided panel of the District of Columbia Circuit (Judges Brown and Williams, Judge Garland dissenting in part) granted the Company's petition for review, vacated the Board's technical 8(a)(5) order, and denied the Board's cross-application for enforcement. In rejecting the Board's finding that the Company's drivers at two Massachusetts locations were statutory employees entitled to the Act's protection, not independent contractors, the panel majority wrote that "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." After reviewing the factors on both sides of the question, and rejecting the Regional Director's ultimate conclusion, the panel majority held that "the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity," including "[t]he ability to operate multiple routes, hire additional drivers . . . and helpers, and to sell routes without permission..."

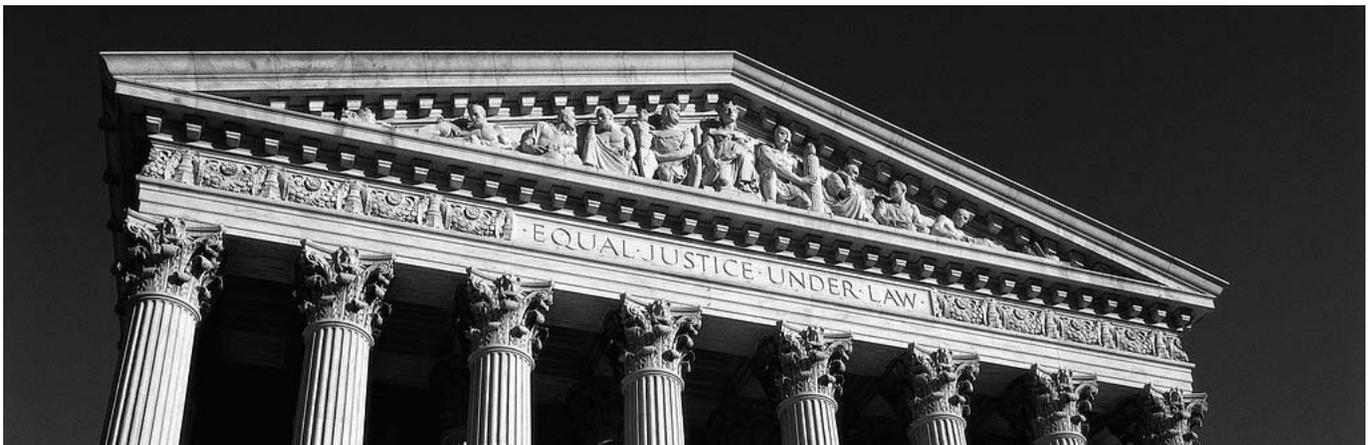
In dissent, Judge Garland "detect[ed] no such evolution" of the common-law agency test to the point where one factor—the opportunities and risks inherent in entrepreneurialism—"has become the focus of the test." Rather, the well-established multi-factor test remains the governing principle in Judge Garland's view, and, under that test, the Regional Director's finding of employee status should be enforced because it was a reasonable choice between two fairly conflicting views of the evidence. Judge Garland would have remanded the case for further proceedings, however, to permit the Company to introduce system-wide evidence concerning the number of route sales and the amount of profit, if any, on any such sale.

Northeast Land Services Enforced by First Circuit

On March 13, 2009, the First Circuit decided *Northeastern Land Services*, 560 F.3d 36. The Court enforced the substantive Board order (352 NLRB 744 (2008)), holding that the employer had unlawfully discharged an employee pursuant to an overbroad confidentiality rule. The decision upheld the Board's analysis set forth in *Lutheran Heritage*, 343 NLRB 646 (2004). That case makes clear that mere maintenance of a

rule that "would reasonably tend to chill employees in their exercise of Section 7 rights" is unlawful. Evidence of actual chill is not required. The Board employs a two-step framework to analyze whether rules violate Section 8(a)(1). If the rule explicitly restricts Section 7 activity, it is unlawful; otherwise, a rule will be found unlawful if 1) employees would reasonably construe the language to prohibit Section 7 activity, 2) the rule was promulgated in response to Section 7 activity, or 3) the rule has been applied to restrict the exercise of Section 7 rights. The Court further endorsed the Board's determination that discipline pursuant to an unlawful rule is ipso facto unlawful.

In addition, the panel found that the NLRB had a quorum sufficient to issue the decision. Since January 2008, the Board has operated with only two Members, with three vacancies. In anticipation of the expiration of the terms of three Board members, a four member Board delegated the Board's authority to a three-member panel. The two remaining members – Schaumber and Liebman – have decided cases for over a year, acting as a quorum of the three member panel. Cases are pending on this issue in other circuit courts, but the First Circuit is the first to speak on the issue.



E-GOVERNMENT INITIATIVES

Like other Federal Agencies and Courts, the National Labor Relations Board is in the processing of converting its records filing and management system to an all-electronic format. We are now conducting field tests of the new “NxGen” case management system, and expect deployment during the next two years. Once implemented, we expect significantly more case-handling information to be immediately accessible to the public,

increased transparency of Agency operations, and significantly enhanced efficiency in the Agency’s internal operations.

As part of the transition to electronic case files, the Agency is already encouraging the electronic filing of documents. Documents can be electronically filed through the Agency’s public web site (www.nlr.gov) once a user has registered with the site. Access to this utility

is in the site’s E-Gov section, under the “E-File” tab. At the present time, original charge forms, representation case petition forms, and petitions for Advisory opinions may not be E-filed. The web site has a list of documents that may be filed electronically with Regional Offices, the General Counsel’s Office of Appeals, the Administrative Law Judges, and the Executive Secretary of the Board.

NEW E-FILING POLICIES

- ▶ The Board and the General Counsel will now accept electronic filings up to 11:59 p.m. local time at the receiving office on the due date.
- ▶ The Board and the General Counsel will now require parties who e-file documents to serve the documents on other parties to the case by e-mail whenever possible.
- ▶ The Board and the General Counsel will no longer require parties to provide physical copies of long documents that they file electronically.

By accepting documents filed electronically up to 11:59 p.m., the Board expects fewer late filings. When e-filing under the new extended deadline, users should be aware that a technical failure by the Board’s e-filing system may excuse a late filing, but user-end problems will not. Examples of user-end problems include trouble with telephone lines, the user’s Internet service provider, hardware and software, users failing to understand or follow e-filing instructions, or rejection of the transmission because the document contains a virus. E-filers are encouraged to file early and follow the e-filing instructions on the Board’s website carefully to ensure timely receipt of the e-filed documents.

The e-filing deadline change does not affect documents filed by other means, such as by U.S. mail, personal service, or fax. Documents filed by these non-electronic means will continue to be subject to the Board’s present rule, which sets the deadline for filing at the close of business of the receiving office on the due date (or post-marked the day prior). For the Board and General Counsel offices in Washington, D.C., the close of business is 5:00 p.m. Eastern Time. Practitioners should refer to Appendix A to Part 102 of the Board’s Rules and Regulations for the closing times of all other Agency offices.

The Board will now require that service of e-filed docu-

ments on other parties to a proceeding be effectuated by e-mail whenever possible. This will eliminate the cost and inconvenience of the Board’s prior expedited service requirements for e-filed documents. If service by e-mail is not possible, the e-filing party must call the other party to notify them of the substance of the e-filed document and then serve a copy of the document, no later than the next day, by personal service, by overnight delivery service, or, with permission of the party receiving the document, by facsimile transmission. These changes apply to the Board, Offices of the General Counsel (including Regional Offices), and the Division of Judges.



By eliminating the requirement that e-filers also must submit physical copies of long documents, the Board hopes to encourage e-filing by reducing the parties’ costs and inconvenience.

The new e-filing policy and conditions are found in the instructions for e-filing with the Board’s Office of the Executive Secretary, the General Counsel’s Offices in Washington, the Regional Offices, and the Division of Judges on the Board’s website at <http://mynlr.gov/efile>. In addition, e-filing frequently asked questions can be found at <http://mynlr.gov/efilingfaq>.

TRIBUTE TO RETIRING REGIONAL DIRECTORS, CONTINUED

(Continued from page 1)

member employees, to expend funds collected under a union-security agreement on activities unrelated to collective-bargaining, contract administration, or grievance adjustment (representational activities). In the Region 34 case, the Board set the standard for evaluating if *Beck* rights have been violated. To constitute a violation of an individual's *Beck* rights, a union must be found to have violated the duty of fair representation by acting in an arbitrary, discriminatory, or bad-faith manner. In an impressive capstone to his career, Peter resolved the *Foxwoods Resort Casino* case, in which the United Auto Workers were certified as the representative of 2600 licensed poker, table game, and dual rate dealers at the Foxwoods Resort Casino, ending the employer's challenge to the Board's jurisdiction over a casino owned by an Indian tribe and on the tribe's reservation.

Apart from Peter's success in these and so many other cases, Peter was known for his commitment to the consistently strong and scholarly enforcement of the law. He is also a generous-spirited, ebullient person, who was well known and liked by the labor relations community and his regional staff. As a supervisor in Hartford from its opening until I left to become Chief Counsel to Board Member Marshall Babson in 1986, I regarded him as my model of a Regional Director. Since then, he has been my mentor and friend.

Gerald Kobell, the Regional Director in Pittsburgh, like Peter, retired after more than 40 years with the Agency and 22 years as the Regional Director. Peter and Gerry had both started in Pittsburgh and shared their devotion to scholarship and strong enforcement of the law. Although I did not work for Gerry as I did for Peter, I did work closely with him on several Board committees, and he is among the Regional Directors I most admired. Gerry is best known for his superior skill in settling cases. As one of the other speakers at his retirement party stated, "If you go to trial in Pittsburgh, it is because you did not want to settle."

Helen Marsh retired after 34 years with the Agency and five years as Regional Director of the Buffalo office. While she did not have the tenure of Peter and Gerry, she did an outstanding job in Buffalo of leading the staff in doing the highest quality work. She was also very effective in the Board's efforts to reach out to the community. Prior to becoming the Regional Director in Buffalo, she had served as a Deputy Assistant General Counsel in Operations, where her duties included making sure that Region 1 did an effective job. I valued her help and friendship in that role and in her later work as Regional Director.

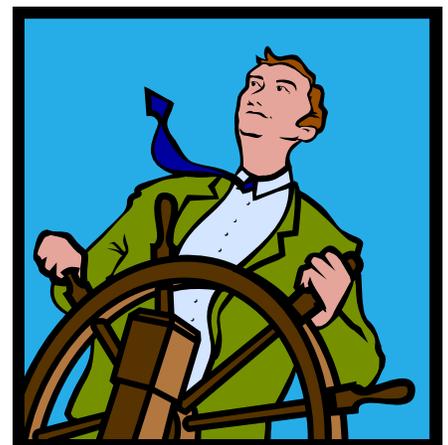
All three Regional Directors exercised leadership and integrity throughout their careers with the Agency. Their examples of the joy and satisfaction of public service will continue to inspire me and all who know them.

SPEAKERS AVAILABLE

Under General Counsel Ronald Meisburg, the Agency is making a special effort to reach community groups with information about the NLRB. Members of the Region's staff are available to make presentations before any group, such as classroom groups, and the staff of a legal services clinic or a service agency, as well as those members of the public that they serve, to describe what the Act's protections cover, how the Region investigates and resolves unfair labor practice charges, or any NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please do not hesitate to telephone Deputy Regional Attorney Scott Burson (617) 565-6704; or Field Attorney Lucy Reyes (617) 565-6778.

Varios miembros de la Región 1 están disponibles para hacer presentaciones a cualquier grupo acerca de nuestro trabajo o de otro tópico de interés acerca de la Junta Nacional de Relaciones del Trabajo. Estas presentaciones pueden hacerse en español.



How to File a Representation Petition:

Filing NLRB representation petitions can be simple and convenient. An NLRB Information Officer can assist you in completing a petition form. Our contact information is on page one. If you complete the petition yourself, keep in mind these helpful tips:

- Prepare your petition on our website at: www.nlr.gov (filing instructions detailed).
- Know the job titles used by the Employer and the employee shift schedules.
- Provide the Region with authorization/membership cards (or other proof of interest) signed and dated by at least 30 percent of the employees in the petitioned-for unit.
- Be prepared for a hearing by knowing: (1) the employer's operations; (2) the community of interests of various employee job categories; and (3) who the "supervisors" are. Hearings are typically held 10 days from date of filing.
- Be prepared for the election to be conducted within 42 days from the date of filing.
- Always call the assigned Board agent with questions or concerns.

SAVE THE DATES

36th Annual Workshop for Public Sector Labor Relations Specialists

Date: May 2, 2009

Sponsor: Boston Bar Association

Time: 9:00 A.M. – 12:30 P.M.

Location: Langdell Hall, North Classroom, Harvard University, Cambridge, MA

American Recovery and Reinvestment Act: What Does It Mean for Massachusetts Jobs?

Date: Thursday, May 7, 2009

Sponsor: Labor and Employment Relations Association – Boston Chapter

Time: 5:30 – 8:00 P.M.

Location: IBEW Local 103 Hall, 285 Freeport Avenue, Dorchester, MA

NLRB: Recent Developments, Including Circuit Court Decisions

Date: Thursday, May 14, 2009

Sponsor: Massachusetts Bar Association, Labor & Employment Law Section

Time: Noon – 1:00 p.m.

Location: 20 West Street, Boston, MA

Annual Labor & Employment Conference

Date: Tuesday, June 2, 2009

Sponsor: Massachusetts Bar Association Labor & Employment Law Section

Time: 9:00 A.M. – 4:00 P.M.

Location: The Colonnade Boston Hotel, 120 Huntington Ave., Boston, MA



Workplace Bullying

Date: June 17, 2009

Sponsors: Massachusetts Bar Association Section/Division Individual Rights and Responsibilities and Labor and Employment; American Arbitration Association, Labor and Employment Relations Association, Boston Chapter

Time: Noon – 1:30 P.M.

Location: 20 West Street, Boston, MA

37th Annual Robert Fuchs Labor Law Conference

Date: Thursday, October 22, 2009

Sponsors: Region 1, National Labor Relations Board, Region I, Department of Labor,

Time: 12:30 – 5:30 P.M. (Reception following)

Location: Boston, MA

NLRB

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USEFUL INFORMATION

Learn More

The NLRB website, www.nlr.gov, contains a great deal of additional information about the protections of the Act, Board policies and procedures, and contact information for the nearest Regional Office.

Contact the Region

There is always an information officer available at an NLRB Regional Office to answer general inquiries or to discuss a specific workplace problem or question.

The information officer can offer information about the Act and advice as to whether it appears to be appropriate to file an unfair labor practice charge. If filing a charge does appear to be appropriate, the information officer can assist in completing the charge form.

The information officer may be reached by telephone at 1-617-565-6700

Puede comunicarse con un oficial de información que hable español llamando al 1-617-565-6700.