



# Labor Relations Week<sup>TM</sup>

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24 LRW 571

## **NLRB**

### **Becker, Pearce Sworn in as Members, Creating 3-1 Democratic Majority on NLRB**

Former union attorneys Craig Becker (D) and Mark G. Pearce (D) have been sworn into office to begin their recess appointments as members of the National Labor Relations Board, ending a 27-month period in which the five-member board operated with just two members and creating a Democratic majority on the board for the first time since December 2001.

Becker was sworn in April 5 by NLRB General Counsel Ronald Meisburg (R), and Pearce was sworn in April 7 by NLRB Chair Wilma B. Liebman (D). The two new members are participating in a series of orientation meetings and will meet with their staff attorneys and the other two board members, Liebman and Member Peter C. Schaumber (R), the agency's Office of Public Affairs said April 7. The appointments will expire when the Senate ends its 2011 session.

Shortly after the Senate began its Easter recess, President Obama announced recess appointments for Becker and Pearce (24 LRW 481, 4/1/10) but not his third NLRB nominee—Brian E. Hayes (R), a former management attorney who currently is the labor policy director for the Republicans on the Senate Health, Education, Labor, and Pensions Committee.

### **Partisan Versus Bipartisan Action**

A bipartisan agreement to treat the three nominees as a package fell apart when business groups and then Republicans expressed strong opposition to Becker. Senate Democrats failed to muster 60 votes for a cloture motion to end debate on his nomination, with two Democrats voting against the motion (24 LRW 241, 2/18/10). The three nominations remain pending.

"Historically, the Senate has always confirmed NLRB nominees on a bipartisan basis," Jim Manley, a spokesman for Senate Majority Leader Harry Reid (D-Nev.), told BNA April 7. "While Sen. Reid is disappointed we haven't been able to confirm the slate of NLRB nominees to date, he will continue to press colleagues on both sides of the aisle to confirm the package of NLRB nominees as soon as possible."

The day the recess appointments were made, Senate Minority Leader Mitch McConnell (R-Ky.) criticized the appointment of Becker as "choosing a partisan path despite bipartisan opposition" and said the failure to recess appoint Hayes was "a purely partisan move that will make a traditionally bipartisan labor board an unbalanced agenda-driven panel."

All 41 Republican senators had signed a letter urging Obama not to recess appoint Becker, and a group of 132 House Democrats asked the president to recess appoint Becker and Pearce. Business groups lobbied against recess appointments while unions lobbied for them.

Becker was an associate general counsel for the Service Employees International Union since 1990, and an AFL-CIO staff counsel since 2004. He has taught law school courses, and has

written many scholarly articles on labor and employment issues. Becker named as his chief counsel longtime NLRB attorney Peter W. Winkler, who previously served as chief counsel for former board members Dennis P. Walsh (D), R. Alexander Acosta (R), and Meisburg, and was deputy assistant general counsel in the NLRB Division of Enforcement Litigation's Appellate Court Branch.

Pearce was a partner with Creighton, Pearce, Johnsen and Giroux in Buffalo, N.Y., and represented unions and employees in labor and discrimination cases. He named as his chief counsel Kent Y. Hirozawa, who represented unions as a partner with Gladstein, Reif and Meginniss in New York and has written frequently on labor law issues.

The pro-union rights group American Rights at Work said April 7 that 71 labor law professors have now signed on to a letter to the president, originally signed by 16 scholars and sent the day of the recess appointments, thanking him for appointing Becker and Pearce. The letter states that the two new members "will bring their wealth of experience as legal scholars and labor law practitioners to serve with fairness and integrity."

The National Right to Work Legal Defense Foundation has filed motions with the board asking Becker to recuse himself in 11 pending cases involving SEIU or one of its affiliates. The foundation argued that Becker helped orchestrate legal strategies for SEIU affiliates across the country and that "his published writings indicate an extreme level of hostility against the Foundation and its legal arguments."

### **Two-Member Board Issued 595 Rulings**

Liebman and Schaumber issued a total of 595 rulings during the period of the two-member board, according to NLRB. The two members set aside approximately 65-70 cases involving novel issues or questions about whether to overturn precedent. There are 257 cases currently pending before the board.

"Member Schaumber and I welcome our new colleagues and look forward to working with them," Liebman said. She also took the "opportunity to praise my long-term colleague Member Schaumber for his willingness to engage during this challenging period, and to credit him with our success in deciding so many cases under these unusual circumstances."

The parties have complied with most of the two-member rulings, but about 80 rulings have been challenged in federal appeals courts on the question of whether the National Labor Relations Act requires the board to have at least three members in order to issue rulings. The appeals courts split 5-1 in favor of upholding the two-member board's authority, and the U.S. Supreme Court heard oral argument on the issue in March (24 LRW 452, 3/25/10).

The board was designed to have five members and decide most cases with three-member panels. By tradition, the board has two Democrats, two Republicans, and a fifth member from the president's party. The president designates one member as chairman.

Schaumber's term expires Aug. 27, putting more pressure on Senate Republicans to reach an agreement with the president if they want to have any Republicans on the board. Liebman's term runs until Aug. 27, 2011. If the three nominations are confirmed by the Senate, Hayes's term would end Dec. 16, 2012, Pearce's term would run until Aug. 27, 2013, and Becker's term would expire Dec. 16, 2014.

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