



9th Circuit: Contest NLRB Orders Before Board to Preserve Argument in Court

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An employer must file a motion for reconsideration with the National Labor Relations Board (NLRB) when contesting a modified remedial order if it wants to raise the argument with the reviewing appellate court, according to the 9th U.S. Circuit Court of Appeals.

Under the National Labor Relations Act, appellate courts only have jurisdiction to hear arguments that were raised before the NLRB, absent extraordinary circumstances. In this case, Legacy Health Systems tried to contest the remedy, which the board spontaneously added after deciding the case, for the first time before the 9th Circuit. The 9th Circuit held that it did not have jurisdiction to consider the argument.

Legacy Health operates several hospitals, clinics and labs in Portland, Ore. It is party to a number of different collective bargaining agreements with a variety of labor unions. It also has many positions that are not unionized.

Legacy Health had an unwritten policy prohibiting employees from simultaneously holding bargaining unit and nonbargaining unit positions. Employees could hold more than one position, but only if both positions were union, or both positions were nonunion positions. When the Service Employees International Union, Local 49 learned of this policy, it filed an unfair labor practice charge.

A two-member board upheld the administrative law judge's decision that Legacy Health violated the act. But the board also modified the recommended order and added a phrase ordering Legacy Health to find substantially equivalent work for three affected employees if the positions they would have received were no longer available.

When Legacy Health refused to follow the order, the board asked the 9th Circuit to enforce it. But the U.S. Supreme Court declared two-member board decisions invalid, so the 9th Circuit remanded the decision to the board. On remand, a three-member board adopted the modified order. Two days later, the board applied for enforcement with the 9th Circuit.

Legacy Health argued that the board's remedial order did not reflect the temporary nature of the employment positions at issue. The board argued that Legacy Health had waived this argument because it did not raise it before the board. In response, Legacy Health noted that it could not have raised the argument before the board because its objection was to the language that the board added in its modified order after deciding the case. Legacy Health argued that the court had jurisdiction under the extraordinary circumstances exception in the act.

The 9th Circuit disagreed. The court held that Legacy Health should have moved for reconsideration of the board's modified remedial order even after the board applied for enforcement of the order. This is because the board and the courts of appeals have concurrent jurisdiction until the board sends a certified list of the record to the court. In this case, the certified list was sent to the court 28 days after the board applied for enforcement, giving Legacy Health 28 days to move for reconsideration and raise its argument with the board. Because it did not, the court held that it failed to preserve the issue.

NLRB v. Legacy Health System, 9th Cir., No. 10-72478 (Nov. 21, 2011).

Professional Pointer: Employers must make sure to preserve their arguments by contesting the board's order by moving for reconsideration with the board itself before raising the argument in the appellate court.

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Editor's Note: *This article should not be construed as legal advice.*

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