SYLLABUS

Office: Room 843
Telephone: 906-5056
E-mail: mmalin@kentlaw.edu

We will supplement in-class discussions electronically. I encourage you to e-mail me questions and comments about the material we discuss in class. Unless you specify that you want your e-mail to remain confidential, if I believe the question or comment could be of general interest to the class, I will forward it together with my response to the entire class. I encourage all students in the class to respond and continue the discussion.

Office Hours: No appointment is necessary. Simply come by anytime. I am usually there.

Text: Dau-Schmidt, Malin, Corrada, Cameron & Fisk, Labor Law for the Contemporary Workplace (West 2009) and Statutory Supplement. Additional materials will be posted on the class website.

Grades: Final exam grade which may be raised or lowered based on class participation.

You are expected to attend class and to be prepared regularly. In cases of significant deviation from this expectation, grades may be adjusted downward.

Final exam is open book and open note to the following extent: You may bring and use the casebook, supplement, any handouts distributed in class or via the class website, printouts of any NLRB decisions assigned during the semester, and any notes personally prepared by you or prepared jointly with other members of the class. Note that you will be locked out of your laptop hard drive during the exam so any notes you bring must be printed out on regular 8 1/2 by 11 inch paper. You may not share materials during the exam.

Computer Tutorial: I have developed a computer exercise designed to teach NLRB procedure. Every student is required to do this exercise on or before September 14,
2008. The tutorial is available on the class website under the tutorial tab or you can go directly to it via the internet at http://www2.cali.org/autopublish/lessons/9000885/index.php

**Ptolemy Discharge:** We will have a simulated NLRB investigation of a charge that an employer violated § 8(a)(3) of the NLRA by discharging an employee named Ptolemy because of his union activities. Information on the simulation is attached to this syllabus. We will need five volunteers: one to play the plant manager, two to play attorneys for the NLRB and two to play attorneys for the company. I will take volunteers on a first come, first selected basis.

**Upcoming Conferences:** Students are encouraged to attend our upcoming conferences on Federal Sector Labor Law on September 17, and on Illinois Public Sector Labor Law on November 13. You may attend at no charge, but must register in advance, by e-mailing clestaff@kentlaw.edu or calling 312-906-5090. If you wish to receive a set of course materials and receive meals, you must volunteer to help work the registration table. You may volunteer when you register.

**NLRB Website:** [www.nlrb.gov](http://www.nlrb.gov). This is a very useful website and you should visit it. It contains full text of NLRB decisions and of NLRB General Counsel Advice Memoranda, among other things.
initial assignment schedule

august 24: introduction

read text pp. 1-18, 25-59. also consider the following problem (you will want to consult the norris-la Guradia act, 29 U.s.c. §§ 101 - 115, supp pp.35-40)

your client is a trucking company which transports new cars from factories in and around detroit, michigan to new car dealers across the country. your client has been party to a contract with other new car transport companies and the international brotherhood of teamsters, local 299. the contract has a provision prohibiting strikes during its term.

the contract was about to expire. negotiations were progressing but a new agreement had not been reached. your client and the other trucking companies agreed with the union to extend the old contract, including its no strike clause, and to make any increases in wages and benefits that might ultimately be agreed to in a new contract retroactive to the date the old contract was scheduled to expire. eventually, the parties agreed on a new contract. however, the local 299 membership rejected it in a ratification vote.

your client and the union leadership returned to the bargaining table. they again agreed to extend the old contract and to make increases in wages and benefits that might ultimately be agreed to in a new contract retroactive. when this agreement was announced, the members of local 299, against the directives of the local's leadership, struck your client and the other trucking companies. their picket signs complain of sweetheart deals between the local's officials and the employers, corrupt local officials, failure to prosecute grievances vigorously, and a general lack of leadership. your client's entire operation has been shut down, as have the operations of the other new car transport companies. the auto manufacturers' inventory is piling up and they have threatened to move as much of the work as possible to the railroads. what advice can you give your client regarding its legal options?

august 26: the NLRA: overview and coverage

skim pp. 65-107; read pp. 108- 127; 132-139

when you think of an independent contractor, what type of individual comes to mind? it is probably not a taxi driver. when you think of which workers have a greater need for collective bargaining, do you think of carlos zambrano or the taxi driver who drives him to wrigley field? yet, zambrano is an employee covered by the NLRA and is represented by a union, the major league baseball
Players’ Association - AFL-CIO and is covered by a collective bargaining agreement, whereas, as you learned from the Seafarers case, the taxi driver has no NLRA rights. On the other hand, the drivers for Roadway have collective bargaining rights. What explains the difference? What, if anything, could Roadway do to change the outcome in its case? Does this make sense? Can there be any method to this madness? Consider the approach in Canada as exemplified by the Saskatchewan statute quoted in Note 4 on pp.126-27. How does the approach to defining “employee” in Canada differ from the approach in the U.S.? Does your answer to that question help you in your search for a method in the madness of granting collective bargaining rights to professional athletes but not to taxi drivers?

The issue in Oakwood Care Center arises in a different manner but is in many ways similar to the issue in Seafarers and Roadway. There is no question that leased employees are employees under the NLRA. At issue in Oakwood Care and in Sturgis, the decision it overruled, is whether to combine those employees with the workers employed directly by the lessor for purposes of collective bargaining. What are the practical effects of combining them or making them organize separately? Why do you think employers choose to lease employees from other companies when those employees work side-by-side with the employer’s regular workers, performing identical tasks under the same supervisors? Does your analysis of the “method to the madness” of giving professional athletes collective bargaining rights while denying them to taxi drivers help you decide whether Oakwood or Sturgis is the better approach? The practice of leasing employees was unknown in 1935 when the NLRA was enacted or in 1947 and 1959 when it was last amended in any major way. Is this relevant to resolving the question?

August 31: NLRA Coverage Continued

Read pp. 139 - 147; 152 - 158; 165-192

The RLA, 45 U.S.C. § 151 Fifth, defines employee as, “every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of this service) who performs any work defined as that of an employee or subordinate official . . .” 45 U.S.C. § 181 refers to employees of air carriers as “any pilot or other person who performs ay work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.” How does this compare to the NLRA definition?
September 2: **Section 7 - the Heart of the NLRA**

Read pp.205 - 251

Compare the language of Section 7 of the NLRA to the Railway Labor Act, 45 U.S.C. § 152 Fourth, which declares simply, “Employees shall have the right to organize and bargain collectively through representatives of their own choosing.” Why might the NLRA protect “other concerted activity for mutual aid and protection” while the RLA lacks such language. Consider the significance of the distinction. Note that in the public sector, most states have adopted section 7 but some have not included the “other concerted activity” language, most notably California, New York and Oregon. Why might a state exclude such language from its definition of protected activity?

September 7: **Happy Labor Day**

September 9: **The Essence of Collective Representation**

Read pp. 251-293

September 14: **Union Access to Employees**

Read pp. 294-336

September 16: **Regulating the content of speech**

Read pp. 336-342. We will watch employer and union campaign propaganda films.

September 21: **Other Forms of Employer Interference**

Read pp. 342-351

**Runaway Shops**

Read pp. 364 - 370.

September 23 **Discrimination**

Read Ch. 4, pp 351-364
Ptolemy Discharge Simulation

September 28: **Yom Kippur; no class**
October 5

The Representation Election as the Route to Recognition

Read pp. 370-386 (You may also want to read pp. 386-390 which cover material covered in the tutorial). Consider the following problem:

At Hi-Tec Services, Inc., the IBEW has filed a representation petition seeking an election in a bargaining unit consisting of all CSRs who are located in the State of Illinois. CSRs are supervised, electronically, by Customer Service Managers (CSMs). Each CSM has a territory. There are two CSMs covering Illinois. One CSM is responsible for the State of Illinois north of Interstate 80. The other CSM is responsible for the State of Illinois south of Interstate 80. The CSMs occasionally assign work, although most often work is assigned from Hi-Tec's dispatchers who are located in three regional offices (East, Central and West). Illinois falls in the Central Region. CSMs are available for electronic consultation by the CSRs in their territories when the CSRs are having problems that require advice or assistance. CSMs also are the first line of contact by a customer with a complaint of concern. The dispatchers sometimes consult the CSMs prior to assigning a particular job. CSMs are furnished copies of all comments submitted by a customer concerning CSRs in their territories. CSMs are expected to monitor these comments and, if a pattern of negative comments develops, a CSM is expected to contact the CSR and offer assistance. CSM's do not complete performance appraisals of the CSRs and have no authority to discipline them. CSMs have, on a very few occasions, recommended discipline. The recommendation goes to the regional office, where the regional vice president has authority to administer discipline up to a 30 day suspension. Discharges must be approved by the Vice President of Operations, who is based in the West regional office in Seattle. CSMs spend 85 percent of their time working by themselves servicing customers. The dispatchers generally assign the most difficult or complex assignments to the CSMs.

CSRs in Illinois work almost exclusively in Illinois, except for a few times where one has been sent to assist with a customer in a neighboring state. There also have been a few occasions where CSRs from the St. Louis area have been dispatched to service customers in southern Illinois because Hi-Tec has few customers in southern Illinois and the St. Louis CSRs were geographically closer to those customers than the nearest Illinois CSR.
As counsel for Hi-Tec, how should you respond to the representation petition?

October 7

**By-Passing the Election: Forcing Recognition**

Read pp. 391- 410

As you read *Gissel*, consider the possible rationales for the bargaining order. Is it issued as a remedy for the employer's unfair labor practices (e.g. 8(a)(1), 8(a)(2), and 8(a)(3) violations? If so, what is the rationale? Is it based on the employer's duties under §§ 8(a)(5) and 8(d)? If so, what is the rationale? Does the Court tell us in *Linden Lumber*? What difference does it make which basis for *Gissel* we adopt? Consider the situation discussed in Note 4, page 95, where the employer has committed outrageous unfair labor practices but the union never got a majority of the employees signed on authorization cards. Consider the situation where the employer commits no unfair labor practices but otherwise learns that a majority of the employees desire union representation, as discussed in Notes 3 and 4, page 101.

October 12

**By-passing the Election: Pressuring the Employer for Voluntary Recognition**

Read pp. 410 - 428

October 21

**By-passing the Election: Voluntary Recognition**

Read pp. 428 - 447
Ptolemy Discharge

(Note - this problem was developed by Professor Robert J. Rabin of Syracuse University)

Enderby, Inc. has fired Henry Ptolemy, a lab technician for disloyalty to the company. The company claims that while at a public restaurant, Ptolemy, in a loud tone of voice, made disparaging remarks about the company’s products. These remarks were heard by a sales representative for a major customer, seated at the next table. As a result, the sales representative cancelled her company’s orders with Enderby.

Ptolemy filed a charge with the NLRB, alleging that his discharge violated section 8(a)(3). The regional office of the Board has begun an investigation to determine whether there is reasonable cause to issue a complaint. The Board agents have requested an interview with the plant manager, Max(ine) Maxwell; the company turned the matter over to its law firm which agreed to the interview and arranged the appointments. Two representatives of the law firm will assist Maxwell.

In class, two students will be lawyers for the company and will interview and prepare Maxwell for the investigation. Two students will be Board agents and will question Maxwell. Enderby’s goal is to convince the Board that the charge lacks merit and that a complaint should not issue. However, if Enderby has done something wrong, it does not want to admit liability during the investigation.

We will need five volunteers: two NLRB lawyers, two company lawyers and one person to play Maxwell. The NLRB lawyers will be given a copy of Ptolemy’s affidavit. They are to keep the information confidential. Maxwell will be given a confidential information sheet. The 8(a)(3) charge, attached, is a public document and has already been served on the company.