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# THE NATIONAL LABOR RELATIONS BOARD: RECENT DECISIONS AND THEIR IMPACT ON WORKERS' RIGHTS

## JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

EMPLOYMENT AND WORKPLACE SAFETY SUBCOMMITTEE

COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS

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# THE NATIONAL LABOR RELATIONS BOARD: RECENT DECISIONS AND THEIR IMPACT ON WORKERS' RIGHTS

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**Thursday, December 13, 2007**
**U.S. House of Representatives**
**Subcommittee on Health, Employment, Labor and Pensions**
**Committee on Education and Labor**
**U.S. Senate**
**Employment and Workplace Safety Subcommittee**
**Committee on Health, Education, Labor and Pensions**
**Washington, DC**

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The subcommittees met, pursuant to call, at 10:01 a.m., in room 2175, Rayburn House Office Building, Hon. Robert Andrews [chairman of the House subcommittee] presiding.

Representatives present: Andrews, Miller, Kildee, Tierney, Wu, Holt, Loebsack, Hare, Clarke, Kline, McKeon, Boustany, Davis of Tennessee, Price, Foxx, and Walberg.

Senators present: Brown, Kennedy, and Isakson.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jordan Barab, Health/Safety Professional; Chris Brown, Labor Policy Advisor; Jody Calemine, Labor Policy Deputy Director; Carlos Fenwick, Policy Advisor for Subcommittee on Health, Employment, Labor and Pensions; Michael Gaffin, Staff Assistant, Labor; Brian Kennedy, General Counsel; Thomas Kiley, Communications Director; Ann-Frances Lambert, Administrative Assistant to Director of Education Policy; Sara Lonardo, Staff Assistant; Joe Novotny, Chief Clerk; Megan O'Reilly, Labor Policy Advisor; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Robert Borden, General Counsel; Cameron Coursen, Assistant Communications Director; Ed Gilroy, Director of Workforce Policy; Rob Gregg, Legislative Assistant; Richard Hoar, Professional Staff Member; Victor Klatt, Staff Director; Alexa Marrero, Communications Director; Lindsey Mask, Director of Outreach; Jim Paretti, Workforce Policy Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Loren Sweatt, Professional Staff Member; Partia Wu, Chief of Labor Policy (Senate HELP); William Kamela, WES Staff Director; Crystal Bridgeman, Professional Staff; Michael Waske, Professional Staff; Kaitlin Helms, Intern; and Sharon Block, Labor and Employment Counsel (Senate HELP).

Chairman ANDREWS [presiding]. Ladies and gentlemen, the subcommittee will come to order. We would ask for your attention.

Good morning, ladies and gentlemen. We appreciate your participation this morning. I am going to begin by yielding to the chairman of the Committee on Education and Labor for an opening statement. I will then take any time that remains on his 5 minutes, then we will turn to my friend, Mr. Kline.

Chairman?

Mr. MILLER. I won't use more than 30 seconds. Thank you very much, Mr. Chairman, for holding this hearing and to Senator Murray for joining us in this joint hearing.

The rights that we are going to discuss this morning in this hearing, the right to join together and collectively bargain for a better deal and the fundamental rights at the workplace, are absolutely just fundamental human rights. And these rights are enshrined in the National Labor Relations Act whose purpose is clear: protecting workers' full freedom of association and encouraging collective bargaining.

When those rights are undermined, it makes it harder for all Americans to get a fair share of the benefits of their productivity. It weakens and shrinks our middle class, and it makes our economy more unequal and less stable. And that is what is at stake when the National Labor Relations Board makes national labor policy. And that is why it is so important that this Congress pay close attention to the board's activities.

The board's recent decision to, among other things, make it less costly for employers to unlawfully fire union supporters or more difficult for workers to freely organize a union are deeply disturbing and an indication that the board has not just veered from its mission, but is now driving in the opposite direction of the rights that Congress ordered the board to enforce.

And I want to applaud you again for holding this hearing and Senator Murray. I know this is a difficult schedule coming here at the end of this session of this Congress. But I think it is important that we start building this record so that we can once again guarantee these basic and fundamental rights. Thank you.

[The statement of Mr. Miller follows:]

**Prepared Statement of Hon. George Miller, Chairman, Committee on Education and Labor**

Workers' rights have been under near-constant assault in the years since the start of the Bush administration.

We see it in a Supreme Court led by Bush appointees who hand down decisions that make it harder for workers to get justice when they are the victims of workplace discrimination. We see it in a highly politicized Labor Department that acts like an arm of the far right, each day looking for new ways to undermine workers' rights and workers' organizations.

And we see it in the anti-worker agenda of the National Labor Relations Board. Over the last several years, brick by brick, the NLRB has worked to dismantle the foundation of workers' rights in this country—the right to organize.

The rights of workers to join together and bargain collectively for a better deal are fundamental human rights. These rights are enshrined in the National Labor Relations Act, the purpose of which is clear: to protect workers' full freedom of association and encourage collective bargaining.

When those rights are undermined, it makes it harder for all Americans to get their fair share of the benefits of their productivity. It weakens and shrinks our middle class. It makes our economy more unequal and less stable.

That's what's at stake when the National Labor Relations Board makes national labor policy. And that's why it is so important that this Congress pay close attention to the Board's activities. The Board's recent decisions to, among other things, make it less costly for employers to unlawfully fire union supporters or more difficult for workers to freely organize a union are deeply disturbing—an indication that the Board has not just veered far from its mission but is now driving in the opposite direction of the rights that Congress ordered the Board to enforce.

I applaud Chairman Andrews and Chairwoman Murray for holding this important hearing today, and I look forward to hearing the testimony.

Thank you.

---

Chairman ANDREWS. Thank you, Mr. Chairman. I would like to welcome all the witnesses and thank them for their participation here this morning.

You know, there is a difference between controversial decisions borne out of legal ambiguity and decisions that I think subvert the purpose of public policy that are borne out of an ideological agenda. One of the questions before us this morning is to whether the recent spate of decisions, 61 of them, by the board in September is more fairly characterized as controversial decisions flowing from legal ambiguity or decisions that subvert the purpose of the National Labor Relations Act driven by the ideological agenda. We are going to debate that at some length this morning.

The other concern that I have is about procedure and timing. Batches of decisions are not uncommon from the National Labor Relations Board. Mr. Cohen's testimony, in particular, points that out. I know he is going to talk about that later.

But I am struck by the differential between the seeming urgency to render the September decisions and the lack of urgency with the rights of people who have lost their jobs under protected activities. In the Earthgrains case, the worker was fired in 1998. At every stage of the proceedings, it was found that the worker was protected by the law. The worker won, and has yet to recover back pay.

In the Baker Electric decision, it was found that a worker was unlawfully terminated, and there was an unlawful repudiation of a union agreement, 1993, 14 years ago. The worker won, has yet to collect a dime of back pay.

In the Domsee trading decision, 202 workers were illegally terminated in 1989 and 1990, 17 and 18 years ago. They won at every stage of the process. It was found that their rights were violated. They have yet to collect a penny of back pay.

I am struck by a concern of the relative urgency to render the decisions that we saw in September, many of which, I think, can be fairly characterized as pro-employer, not all, and the lack of urgency to deal with cases where there has been a finding up through the process where workers have been treated unlawfully and unfairly and have yet to receive any of the remedies the law entitles them to.

So we are going to have a vigorous discussion. We have an excellent panel, two excellent panels of witnesses. We look forward to what people have to say this morning. And I know we are going to be joined by our colleagues from the Senate. I will be recognizing both the chairpeople and ranking members upon their arrival.

At this time, I am going to recognize the ranking member of our subcommittee in the House, my friend from Minnesota, Mr. Kline.

[The statement of Mr. Andrews follows:]

**Prepared Statement of Hon. Robert E. Andrews, Chairman, Subcommittee on Health, Employment, Labor and Pensions**

Good morning and welcome to our joint hearing today entitled "The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights." The Health, Employment, Labor and Pensions (HELP) Subcommittee is honored to be joined by the Senate Employment and Workplace Safety Subcommittee, chaired by the distinguished Senator from Washington, Senator Murray.

During today's hearing, the committee will focus its attention on the 61 decisions the Board issued in September of this year. A majority of these decisions are viewed as many as a major shift in labor policy and an assault on the American worker and his or her right to collectively bargain. Specifically, many of these decisions are seen as undermining voluntary card check agreements and workers' remedies such as the ability to recover backpay.

The purpose of the National Relations Labor Act (NLRA) is to encourage collective bargaining. I am sure we will hear arguments today that argue this is no longer the purpose of the Act—which somehow the enactment of Taft-Hartley did away with this purpose. To simply put it, this premise is wrong.

Our purpose today is to examine whether the Board has 1) upheld the first principle of the NLRA (that is, encouraging collective bargaining) 2) distinguished between routine fact pattern and egregious fact pattern and 3) whether they applied the necessary remedial tools in those decisions. As Members of this committee and Congress, we have the right to alter these decisions if we conclude that these decisions are going in the wrong way as a matter of public policy.

A major contributor to the "middle class squeeze" is the decline in workers' freedom to organize and collectively bargain. When workers get their fair share, the economy benefits and the middle class grows stronger. The freedom to organize and collectively bargain has been under severe assault in recent decades and it is our role to determine whether the Board's recent decisions are contributing to the problem.

I thank the distinguished panel of witnesses we have before us today and look forward to hearing all of their testimony.

---

Mr. KLINE. Thank you, Mr. Chairman. And good morning.

Good morning to the panelists. In the past 11 months, this subcommittee under the leadership of Chairman Andrews has had the opportunity to engage in numerous examples of good faith bipartisan oversight in legislating. Sometimes we have agreed on solutions. And sometimes we have not.

But even when we haven't, no one has doubted our good faith commitment to truly and responsibly examine the issues. I am afraid this morning we may be moving into the realm of political theater and out of genuine oversight.

I expect we will hear a number of ominous sounding accusations this morning. We have had hints already. No doubt we will hear about how the National Labor Relations Board under Chairman Battista issued 61 cases this last September and how this represents some 11th hour, last-ditch effort by the board to stack the deck and roll back worker rights and protections as the Bush administration enters its final year. Somehow that number is given great significance—61 cases decided in a single month.

What we will not hear is that a high number of decisions being issued by the board in September, the final month of its fiscal year, is not at all uncommon. During the Bush administrative, the board has issued as few as 54 decisions in September of 2005 and as many as 114 in September of 2004. Equally important by way of comparison, from 1994 to 2000, the Clinton era board's number of September decisions ranged from a low of 53 to a high of 104. With more than 61 decisions handed down in all but 1 year.

So to suggest that 2007 marks some watershed year is to ignore history and fact. I expect we will hear claims from the majority that this board has sided always with employers and uniformly against workers and organized labor. That is simply not true.

Indeed, I can speak firsthand to an issue of great importance in my district, the board's decision in San Manuel Indian Bingo and Casino, which expanded the rights of unions to organize workers on sovereign Indian lands. As a sponsor of legislation to overturn this decision, which I strongly believe unfairly impinges on tribal sovereignty and tribal employers to the benefit of big labor, I can tell you without a doubt that this board has been far from a rubber stamp for management. But I expect that is what we will hear today.

Sadly, this conflict between rhetoric and reality is not surprising to anyone who has observed our committee as it delves into these issues, particularly where organized labor holds sway. We heard it in 2004 when the Bush administrative undertook the most comprehensive overhaul of our nation's overtime regulations in 50 years. We heard from organized labor and their think tanks that 8 million workers would lose overtime protections overnight and be left out in the cold. That just didn't happen.

We heard it with respect to decisions on who is and who is not considered a supervisor under the NLRA. We heard that the board's decision in the Kentucky River cases would reclassify 1.4 million employees as supervisors and strip 8 million more workers of the right to unionize. It didn't happen.

And I expect that we will hear more than once today that this decision or that one issued by the board will strip millions of workers of protection or deprive workers of the right to join a union, a right most of them, frankly, are glad to forfeit these days. But if history is any guide, there will be just one problem. It won't happen.

The question that I believe needs to be answered is this. Why are we here today? Make no mistake, I fully endorse the proposition that this committee and the subcommittees not only have the right, but the obligation to engage in vigorous oversight of the laws within our jurisdiction and the agencies and departments which administer them. I am deeply concerned, however, when this committee uses its hearing power cloaked in the garb of oversight to bring before us sitting adjudicators for the purpose of questioning or even attacking decisions with which the majority disagrees.

This hints at the types of abuse of power that this board is meant to prevent, not be subject to. I expect that almost every case we discuss today, certainly any issued by the board only weeks ago, is still an active, pending matter being adjudicated in the court system.

The decisions of the board are reviewable and enforceable by the Federal Circuit Courts of Appeals and ultimately the U.S. Supreme Court itself. I expect many of the cases we will discuss this morning will be back before the board in some form or fashion.

In short, Mr. Chairman, I am concerned about the process here today and the fact that we are bringing adjudicators before us to discuss cases that might still be before them. I want to make one point very clear. In our discussions today, whatever opinions come

from the members of Congress up here, that does not constitute a sense of Congress on any matter that may be appearing before the board.

With that, Mr. Chairman, I yield back.

[The statement of Mr. Kline follows:]

**Prepared Statement of Hon. John Kline, Ranking Republican, Subcommittee on Health, Employment, Labor and Pensions**

Good morning, Mr. Chairman.

In the past eleven months, this Subcommittee, under your leadership, has had the opportunity to engage in numerous examples of good faith, bipartisan oversight and legislating. Sometimes we have agreed on solutions, and other times we have not. But even when we haven't, no one has doubted our good faith commitment to truly and responsibly examine the issues.

Sadly, it is clear this morning that today's hearing is not one of those exercises. Indeed, today's hearing is little more than hollow, political theater.

I expect we'll hear a number of ominous sounding accusations this morning. No doubt we will hear about how the National Labor Relations Board under Chairman Battista issued SIXTY-ONE cases this last September, and how this represents some eleventh-hour, last ditch effort by the Board to "stack the deck" and roll back worker rights and protections as the Bush Administration enters its final year. Somehow that number is given great significance—SIXTY-ONE cases decided in a single month.

What we will NOT hear is that a high number of decisions being issued by the Board in September—the final month of its fiscal year—is not at all uncommon. During the Bush Administration, the Board has issued as few as 54 decisions in September of 2005, and as many as 114 in September of 2004. Equally important, by way of comparison, from 1994 to 2000, the Clinton-Era Board's number of September decisions ranged from a low of 53 to a high of 104, with more than 61 decisions handed down in all but one year. To suggest that 2007 marks some watershed year is to ignore history and fact.

I expect that we'll hear claims from the Majority that this Board has sided always with employers and uniformly against workers and organized labor. The accusation contradicts the facts. Indeed, I can speak first hand to an issue of great importance in my district—the Board's decision in San Manuel Indian Bingo and Casino—which expanded the rights of unions to organize workers on sovereign Indian lands. As the sponsor of legislation to overturn this decision—which I strongly believe unfairly impinges on tribal sovereignty and tribal employers to the benefit of organized labor—I can tell you without a doubt that this Board has been far from a rubber stamp for management. But I expect that is what we will hear today.

Sadly, this conflict between rhetoric and reality is not surprising to anyone who has observed our Committee as it delves into these issues, particularly where organized labor holds sway.

We heard it in 2004, when the Bush Administration undertook the most comprehensive overhaul of our nation's overtime regulations in fifty years. We heard from organized labor and their think tanks that 8 million workers would lose overtime protections overnight and be left out in the cold.

There's just one problem: it didn't happen.

We heard it with respect to decisions on who is and who is not considered a supervisor under the NLRA. We heard that the Board's decision in the Kentucky River cases would reclassify 1.4 million employees as supervisors and strip 8 million more workers of the right to unionize.

There's just one problem: it didn't happen.

And I expect that we will hear more than once today that this decision or that one issued by the Board will strip millions of workers of protection, or deprive workers of the right to join a union—a right most of them are glad to forfeit these days.

But if history is any guide, there will be just one problem: it won't happen.

A question that I believe needs to be answered is this: why are we here today? Make no mistake: I fully endorse the proposition that this Committee and its subcommittees has not only the right but the obligation to engage in vigorous oversight of the laws within our jurisdiction, and the agencies and departments which administer them. I am deeply concerned, however, when this Committee uses its hearing power, cloaked in the garb of "oversight," to bring before us sitting adjudicators for the purpose of questioning or even attacking decisions with which the Majority disagrees. This hints at the types of abuse of power this Board is meant to prevent, not be subject to.

I expect that almost every case we discuss today—certainly any issued by the Board only weeks ago—is still an active, pending matter being adjudicated in the court system. The decisions of the Board are reviewable and enforceable by the federal circuit courts of appeals, and ultimately, the U.S. Supreme Court itself. I expect many of the cases we'll discuss this morning will be back before the Board in some form or fashion.

In that light, it is plain to me that today's hearing runs the real risk of appearing to suggest how the Board should adjudicate those cases in the future. It is a well-established tenet of federal law and jurisprudence that federal courts do not render "advisory opinions" nor do they opine on facts not before them.

I would urge both Republican and Democrat witnesses from the Board to be mindful of that fact this morning, and expect that my colleagues will not ask, nor will witnesses offer, conclusions as to hypothetical matters that could come before the Board in the future, or opinions on facts and fact patterns that were not presented in the cases before them.

Finally, since I expect we will hear more than our fair share of hyperbole and rhetoric today, I want to make clear, on the record, that this morning's hearing in no way reflects any formal finding of Congress or of this Committee. It is important to be clear that nothing said here today, whether by witnesses or by Members, should be construed as precedent, or as evidence of the intent of Congress or the meaning of any case or statute.

I would close with an observation made in this Committee ten years ago:

Intentional interference in the judicatory activities of an independent agency, if indeed that was the majority's intent, is not simply inappropriate, it is an improper abuse of the subcommittee's oversight responsibilities.

Those words ring true today, as we take the unprecedented step of compelling sitting Members of the Board to offer testimony on pending cases. I could not agree more, and would associate myself with those remarks, made ten years ago by another one of our distinguished colleagues from New Jersey, a member of the full Committee Mr. Donald Payne. His words of caution and condemnation in 1997 are even more applicable to the hearing before us this morning.

With that, I yield back.

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[Additional submissions from Mr. Kline follow:]

[Statement from the Associated Builders and Contractors follows:]

# Statement of Associated Builders and Contractors

Hearing on National Labor Relations Board
Dec. 13, 2007
Before the Employment and Workplace Safety Subcommittee of
Senate Health, Education, Labor and Pensions Committee
and
Health, Employment, Labor, and Pensions Subcommittee of
House Education and Labor Committee

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Associated Builders and Contractors (ABC), would like to thank Chairwoman Murray, Chairman Andrews, Ranking Member Isakson and Ranking Member Kline as well as the members of the Senate Committee on Health, Education, Labor and Pensions Subcommittee on Employment and Workplace Safety and the House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions for holding this bi-cameral hearing today on the National Labor Relations Board. The committees' attention to the recent Board decisions and adjudication process is to be commended.

ABC is a national trade association representing more than 24,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms in 79 chapters throughout the United States. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform with in the industry's industrial and commercial sectors. Our diverse membership consists of both unionized and non-union companies who share the philosophy that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation.

Most of the recent National Labor Relations Board decisions that are the subject of this hearing do not significantly depart from past precedent. Those that do effect changes in previous legal doctrine are welcome (and overdue) corrections to erroneous policies, which better recognize the realities of the workplace. Where the NLRB has made modest changes in labor policy, ABC submits that the NLRB decisions are fully supported by and consistent with the National Labor Relations Act.

Specifically of interest to the construction industry were the following cases: *BE&K Const. Co.*, 351 NLRB No.29 (September 2007), *Toering Electric*, 351 NLRB No. 18 (September 2007) and *Oil Capitol Sheet Metal*, 349 NLRB No 118 (May 2007). It is these decisions on which ABC's comments will focus.

In September the National Labor Relations Board (NLRB) issued a new standard for review of employer lawsuits against unions, on remand from the U.S. Supreme Court's decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). In its decision on remand, *BE&K Construction Co.*, 351 NLRB No. 29 (Sept. 29, 2007) the NLRB held for the first time that the "filing and maintenance of a reasonably based lawsuit does not violate the [National Labor Relations Act (NLRA)], regardless of the motive for bringing it."

This case dates back to 1987, when ABC member firm BE&K unsuccessfully sued the Contra Costa Building Trades Council for seeking to delay construction on a $350-million project for USS-POSCO. The unions subsequently filed an unfair labor practice charge against BE&K, claiming that BE&K's lawsuit was filed to retaliate against the unions for engaging in protected concerted activity in violation of

Section 8(a)(1) of the NLRA. The NLRB agreed with the unions, but the U.S. Supreme Court reversed that ruling in 2002. The court remanded the case back to the NLRB for issuance of a new standard consistent with the First Amendment. Five years later, the NLRB has now reaffirmed that BE&K's lawsuit was "reasonably based in fact and law," and therefore held that the filing of the suit did not violate Section 8(a)(1). In its decision the NLRB established a new "bright line" test for employer litigation under the First Amendment. Under the new test, any lawsuit is protected from being an unfair labor practice so long as the suit is not "objectively baseless." The NLRB's BE&K decision fully conforms to the Supreme Court's holding and protects the First Amendment right of employers to defend themselves in court against unfair union attacks.

One of the most controversial tactics implemented by organized labor is "salting", the practice of intentionally placing trained union professional organizers on non-union jobsites to harass or disrupt company operations, apply pressure, increase operating and legal costs and ultimately put a company out of business. The objectives of the agents most often culminate in the filing of many unfair labor practice claims with the National Labor Relations Board (NLRB).

Salting is not really an organizing tool. It has become an instrument of economic destruction aimed at non-union companies that has little to do with organizing. A publication of the International Brotherhood of Electrical Workers, one of the principal proponents of this tactic, has described that union's salting tactics as a process of "infiltration, confrontation, litigation, disruption, and hopefully annihilation of all non-union contractors." Unions send their agents into open shop workplaces under the guise of seeking employment when their true intentions are to deliberately increase costs to employers through workplace sabotage and the filing of frivolous discrimination charges. ABC members across the country have become all too familiar with how disruptive, intimidating and damaging these pressure tactics can be. Union salting abuses have been documented by Congress in numerous hearings over the past decade.

In the *Toering Electric* case, decided on September 29, 2007, the NLRB recognized these workplace realities, ruling that an applicant for employment must be "genuinely interested" in seeking to establish an employment relationship with a hiring employer in order to be protected against hiring discrimination based on union affiliation or activity (*Toering Electric Co.*, 351 NLRB No. 18). The decision does not in any way undermine legitimate union organizing but merely seeks to curb blatant salting abuses by individuals having no genuine interest in employment. The NLRB properly stated that "submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity [under the NLRA]. Indeed, such conduct manifests a fundamental

conflict of interests ab initio between the employer's interest in doing business and the applicant's interest in disrupting or eliminating this business."

As a result of this decision, the Board has imposed on the NLRB General Counsel in all hiring discrimination cases the burden of proving that alleged discriminatees were genuinely interested in seeking to establish an employment relationship. ABC has long opposed salting abuse of the type acknowledged by the NLRB in this case. This NLRB decision has the potential to control some of the worst salting abuse by limiting the number of alleged discriminatees in future salting cases.

In another salting case, *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (May 2007), the NLRB properly recognized that union salts should not be presumed to be long term employees in discrimination cases for back pay purposes. The NLRB modified its general backpay presumption that an aggrieved salt would have been employed by the company for an indefinite period of time unless the employer rebuts the presumption. Under this former backpay standard, the indefinite period of time often lasted several years while lengthy administrative proceedings took place, unless the employer was able to prove otherwise. In *Oil Capitol*, however, the NLRB concluded that to apply the presumption of indefinite work in cases involving union salts is not only "unreasonable," but also "punitive" in effect. According to the board, such information is better known by the union than by the targeted employer. The NLRB cited evidence that union salts typically do not stay for long at non-union companies, preferring to continue their organizing efforts elsewhere. Similarly, in *Contractor Services, Inc.*, 351 NLRB No.4 (Sept. 27, 2007), the NLRB held that union salts who deliberately narrow their job search after being turned away from a non-union employer can lose some or all of their back pay claim, where evidence shows failure to mitigate damages.

These recent salting decisions have merely shifted certain evidentiary burdens from the employer to the Board's General Counsel. These decisions are well within the NLRB's statutory authority and are based upon sound legal reasoning.

On an additional note, although our focus today has necessarily been on NLRB decisions directly affecting the construction industry, our review of other Board cases recently decided confirms our position that the NLRB has acted well within its statutory authority. In particular, ABC supports the NLRB's recent holding in *Dana Corp.*, 351 NLRB No. 28 (September 29, 2007), which protects the right of employees to petition for secret ballot elections within 45 days after a card check recognition agreement between a union and their employer.

Conclusion

None of the NLRB decisions that are the subject of this hearing undermine worker rights. The NLRB should be commended for recognizing the realities of the work place and for making modest course corrections to better balance the interests of labor and management.

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[Letter from the U.S. Chamber of Commerce follows:]

U.S. CHAMGER OF COMMERCE,
*December 13, 2007.*

Dear Senators MURRAY and ISAKSON and Representatives ANDREWS and KLINE: On behalf of the U.S. Chamber of Commerce (Chamber), the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, I am pleased to submit this statement for today's joint hearing on the National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights.

The Chamber has numerous concerns with the National Labor Relations Act (NLRA or Act) and interpretations of the Act by the National Labor Relations Board (NLRB or Board) as they impact employees, employers, and labor organizations. For example, the way in which labor organizations can use "blocking charges," as permitted by the Board, is a serious delay tactic that labor unions have used to deny workers the ability to exercise their rights to decide whether or not to be represented by a labor organization in a federally-supervised private ballot election.

The Chamber would welcome an open discussion about the strengths and weaknesses of the NLRA and how it might be improved to achieve, in practice, the most appropriate balance of the rights of individual employees, employers, and labor unions. Unfortunately, based on history and press reports, it is unlikely such a discussion will take place today.

Instead, it appears that this hearing is designed to continue to propagate myths and half-truths about organizing in today's workplace, the state of U.S. labor law, and its interpretation and enforcement by the NLRB. The purpose of this statement is not to offer a complete rebuttal to these points, but rather to point out some more egregious examples where rhetoric has surpassed reason and to remind the Committee about this current Board's record on overturning precedent and issuing decisions.

However, before discussing the NLRB and recent cases, it is necessary to stress our objection to the Committee calling sitting board members to testify about recent decisions, many of which are still under appeal. While NLRB members are clearly not Article III judges, they do serve in a quasi-judicial role as offices of an independent agency. As such, they should be free of inappropriate influence by Congress or the Administration. While it is clearly appropriate for Congress and interested parties to agree, disagree, or be critical of specific Board decisions, it is inappropriate to call sitting Board members to testify about specific cases (as opposed to the agency's budget, proposed reorganization, and the like) and the committee's actions today set a dangerous precedent. Board members will be less likely to responsibly carry out their duties in making decisions if they can expect to be summoned before Congress every time they issue an unpopular decision. We hope the Committee will reconsider this precedent.

*Rhetoric Surpasses Reason*

The NLRB, as the federal agency charged with implementing, interpreting, and enforcing the NLRA, is certainly open to criticism and, indeed, the Chamber has not hesitated to criticize the Board when it has disagreed with a decision. Indeed, an open and honest debate over the merits of Board decisions is a healthy exercise and should be encouraged. However, in recent years, we have seen a disturbing trend in the tone of the debate. Instead of disagreement, we have ad hominem attacks, instead of criticism, hyperbole, and instead of reasoned discussion, vitriolic rhetoric. Compounding this are reports based on shoddy research and half-truths that have been relied on by policy-makers, including members of this committee, in attacking the Board and its decision.

By way of example, consider the debate over the Board's decision last year in Oakwood Healthcare, Inc.[1] This decision involved the NLRB's determination of which employees are considered supervisors under the NLRA. This issue was before the Board because the Supreme Court had, twice, rejected the NLRB's prior attempts to apply the NLRA's supervisory exemption to certain health care providers.

The NLRB's decision was roundly condemned by unions and their allies. AFL-CIO President John Sweeney said the decision "welcomes employers to strip millions of workers of the right to have a union by reclassifying them as 'supervisors' in name only."[2] Anna Burger, Chair of the Change to Win Coalition, called the decision "illogical, dishonest, and anti-democratic" and said that the decision "created a blueprint for eliminating the right to organize for most professionals and from millions of leadpersons and employees who are currently represented."[3]

Earlier this year, the House Employer-Employee Relations Subcommittee held a hearing on this issue in which Chairman Andrews said that the decision "dramatically expanded the definition of supervisor far beyond the limits of the act intended and far beyond the limits of common sense. In so doing, it stripped an estimated

8 million workers—particularly skilled and professional employees—of the right to organize."[4]

These statements and many like them rely on a report by Ross Eisenbrey and Lawrence Mishel of the Economic Policy Institute entitled Supervisors in Name Only: Union Rights of Eight Million Workers at Stake in Labor Board Ruling. The report was issued on July 12, 2006, more than two months before the NLRB issued the Oakwood decision. The EPI report was not and could not be based on the NLRB's decision. Instead, it was based upon pure conjecture and fear that they NLRB would adopt an "extreme employer-centric position" on Oakwood and all similar cases pending before the Board.[5]

In reality, the NLRB did not issue an extreme employer-centric position. Instead, of the more than 180 employees at issue in Oakwood, the Board found a mere 12 to be supervisors. In addition, in the 15 months since the Oakwood decision was issued, we are not aware of a single Board decision relying on the reasoning in Oakwood that found even a single employee to be a supervisor.

However, in spite of the fact that millions of workers have not lost their rights, critics of Oakwood continue to propagate this myth, relying on a so-called analysis that came out before the decision was known. They have even relied on it to push legislation through changing the NLRA. While reasonable people can certainly disagree over the precise tests used to determine whether or not an individual qualifies as a supervisor, the rhetoric used by labor union officials as well as some in Congress clearly is beyond the pale and only serves to demonize the NLRA and the Board.

A more recent example is the characterization of the NLRB's decisions issued in September, 2007. Union leaders[6] have dubbed these decisions the "September Massacre," arguing that the majority of decisions issued in September stripped workers of their rights to organize. The hyperbole invoked by the phrase "massacre" aside, the assertion simply does not hold. Indeed, of the 61 decisions the Board issued in September, 2007, the majority were unanimous and were not the least bit controversial. In fact, Democratic NLRB Members Liebman and Walsh only offered a dissenting opinion in about one-third of the cases. Also of note is that in a majority of decisions, the NLRB ruled against the employer in question. Looking at the Board's September decisions as a whole, they can hardly be characterized as a "kangaroo court"[7] or as the "Chamber of Commerce Board"[8] as some have alleged.

Considering the specific cases decided in September, perhaps the most controversial case was the Board's decision in Dana Corp. and Metaldyne Corp,[9] where the Board held that when an employer and union attempt to evade the NLRA's provisions to let workers decide whether or not to be represented by a union by secret ballot, the workers have a right to be told about the pending recognition and an opportunity to request a private-ballot election. This is arguably the single most pro-worker decision the Board issued all month, as it provides a mechanism to let employees intervene when unions and employers conspire to deprive them of an opportunity to make this important decision in private and free from coercion. Nevertheless, the Board's decision has been cast as shameful by organized labor.[10]

In another of the more controversial decisions, Anheuser-Bush, Inc.,[11] the Board refused to grant reinstatement to a group of employees who were discharged after their illegal conduct was discovered by the employer's use of surveillance cameras. While the Board made clear that the employer should have bargained with the union over the use of cameras, that was not at issue in the case. The sole issue was whether or not the employees, who were discovered to be sleeping on the job, urinating on the employer's roof, and using illegal drugs, were entitled to get their jobs back. Most Americans would probably agree with the Board's decision—that such conduct does not warrant a federally-protected right of reinstatement.

Certainly, some of the Board's decisions issued in September, such as Dana / Metaldyne, are significant and worthy of debate. However, many other of the so-called controversial cases produced common sense results.[12] Whatever one thinks of Dana/Metaldyne or any of the other 60 cases issued by the Board in September, these decisions cannot justify closing the Board down as many in the labor movement have suggested.[13] Indeed, such a ploy would stop the Board from issuing the many routine decisions that are critical to ensuring workers, union, and employer rights are respected, not to mention the fact that it would dramatically increase the backload of cases.

*Current NLRB's Record*

The Bush-NLRB has a surprising record when it comes to overturning precedent—in fact, it has overturned precedent far fewer times than its predecessor Clinton-NLRB and the decisions the Bush Board have overturned were of newer, less well-established, cases. For a comprehensive analysis of these cases, the Committee

should review the paper prepared by G. Roger King for an American Bar Association meeting last year.[14]

King notes in his paper that the Clinton Board issued 3,458 reported decisions and of those, 60 overturned precedent. In these 60 decisions 1,181 years of precedent was lost.[15] When subtracting out decisions that were unanimous or in which the majority dissented, the number is reduced to 444 years of precedent lost.[16]

The Bush Board, by contrast, has issued 1,037 reported decisions in which 9 reversed precedent. In these 9 cases, 146 years of precedent was lost. When subtracting out unanimous decisions or those in which the majority dissented, the number is reduced to 64 years of precedent lost.[17]

King also examines the rate at which courts of appeals overturn the NLRB to give some indication as to whether its decisions are consistent with the NLRA. By his assessment the Clinton Board was upheld in full, depending on the year, between 60 and 70 percent of the time. By contrast, the Bush Board has been upheld in full between 74 and 78 percent of the time. When considering cases upheld in full or in part, the Clinton Board rate was between 72 and 85 percent, while the Bush Board was between 79 and 96 percent.[18]

While King's data is from last year, it is certainly illustrative of the fact that the current NLRB has not perpetrated a long drive against worker rights. To the contrary, in a purely statistical sense, its record is on par with and, in some cases, better than the prior Board's.

In short, the Chamber hopes that the committee will push aside the shrill rhetoric surrounding the NLRB's recent decisions and instead look at the Board's decisions in a measured and reasoned way. Having an oversight debate based on fictitious analyses and half-truths will do little to ensure that the NLRA is appropriately enforced.

Sincerely yours,

RANDEL K. JOHNSON,
*Vice President, Labor, Immigration and Employee Benefits.*

ENDNOTES

[1] 348 N.L.R.B. No. 37 (2006).

[2] Michelle Amber and Michael R. Triplett, Long-Awaited Ruling on Supervisors Prompts Flood of Reaction from Unions, Management, DAILY LABOR REPORT (BNA), Oct. 4, 2006.

[3] Id.

[4] Prepared statement of Rep. Robert Andrews, Are NLRB and Court Rulings Misclassifying Skilled and Professional Employees as Supervisors, May 8, 2007, retrieved online at *http://edlabor.house.gov/statements/050807RAHearingStatement.pdf.*

[5] EPI Report at 2.

[6] Thousands of Workers Rally to Condemn the Bush Labor Board's Massive Assault on Workers, Change to Win Press Release, Nov. 15, 2007 (quoting Greg Tarpinian, Executive Director of Change to Win).

[7] Activists Protest Anti-Labor Labor Board, IBEW Press Release, Nov. 15, 2007 (quoting AFL-CIO Voice@Work Director Fred Azcarate). Retrieved from *http://www.ibew.org/articles/07daily/0711/071115—ActivistsProtest.htm.*

[8] Id. (quoting United Mine Workers President Cecil Roberts).

[9] 351 N.L.R.B. No. 28 (2007)

[10] See Statement by AFL-CIO President John Sweeney on Latest NLRB Decision to Undermine Workers, Oct. 3, 2007.

[11] 351 N.L.R.B. No. 40 (2007).

[12] Anheuser-Bush, for example.

[13] See Michelle Amber, Labor Unions Protest NLRB Decisions Demand Agency 'Close for Renovations', DAILY LABOR REPORT (BNA), Nov. 16, 2007 (quoting Fred Azcarate, director of the AFL-CIO's Voice@Work campaign).

[14] G. Roger King, We're Off to See the Wizards: A Panel Discussion on the Bush Board's Decisions * * * and the Yellow Brick Road Back to the Clinton Board (2006).

[15] Id. at 2-3.

[16] Id.

[17] Id. at 5-6. Our understanding is that when this data is updated to the present time, the bush Board has issued 21 decisions overturning precedent for 343 years of precedent lost.

[18] Id. at 4, 6.

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Chairman ANDREWS. I thank my friend. I do want to note for the record that subpoenas were not issued for this hearing today. The members of the board who are here are here voluntarily. So any suggestion they are being coerced to be here is just not accurate.

I would be honored at this time to recognize the chairman of the Senate Committee on Health, Education, Labor, and Pensions,

aptly named HELP, the senator from Massachusetts, Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman. And I want to express our appreciation to you, Chairman Andrews and to Senator Murray, all of the members of the House Committee, and our colleagues here in the Senate for having this particular meeting. It is enormously important that the legislative branch understands how the National Labor Relations Board is functioning and working and whether it is complying with the law itself.

And it is entirely appropriate that we look at the experience and decisions of the board itself in trying to understand it better. We have the recognition that over the recent years the fact that union membership has declined and with that, the safety net which has been basic and supportive to millions of America's workers, has been frayed and been fractured, that the income for working families has lost its purchasing power and in many instances, deteriorated.

And it is important that we understand exactly what role the National Labor Relations Board has taken. And we will get to some of the notorious cases, the Dana Corporation case and the Wurtland case, that hopefully we will have some opportunity to understand their reasoning.

But it is clear that in the 5 years that this board has been in power, we have seen an unprecedented rollback in the protection for workers' rights. This board has undermined collective bargaining at every turn, putting the power of the law on the side of lawbreakers, not victims, on the side of a minority of workers who want to get rid of a union, not the majority who want one and on the side of employers who refuse to hire union supporters, not the hard-working union members who want to exercise their democratic rights.

So I thank the chair for having this hearing. It is a matter of enormous importance. And if I was entitled to a few minutes, if I could take the last 45 seconds and yield that to my friend and colleague, a former member of yours and someone who has been a leader on our committee in terms of workers' rights, Mr. Brown.

Chairman ANDREWS. We would be happy to welcome our friend home.

Senator BROWN. Thank you. Thank you, Chairman Andrews.

And thank you, Senator Kennedy. The issues that Senator Kennedy talked about are exactly right. We know that the decline in the middle class in this country is in large part reflective of, and a cause of, and a result of the decline of unionism. We know that in survey after survey large numbers of people, the majority of workers in most surveys would like to join a union if they had had an opportunity to. We know the kind of sophisticated operations that companies employ. And unfortunately, they have too often had an ally at the NLRB.

As Senator Kennedy pointed out, the Dana case and the Wurtland case decisions came down the same day. The Dana case says that collecting employee signatures in support of a union is an inferior process to the election process. Meanwhile in the Wurtland decision issued the same day, the board said workers' signatures

were objective proof that workers no longer wanted the union. Which is it?

And we saw those arguments during the debate about the Employee Free Choice Act. We know that a majority of Americans supported the Employee Free Choice Act, and we know that a majority of Americans would like the opportunity to join a union. And we would like to see an NLRB that reflected that majority sentiment, but more than that, an NLRB that simply believed in fair play.

I thank Chairman Andrews and Chairman Kennedy.

Chairman ANDREWS. Thank you. I note that neither Senator Isakson nor Senator Enzi is here. So what we are going to do is proceed with the witnesses. Upon either of their arrivals we will interrupt and give them the opening statement, if that is acceptable with everyone.

I wanted to welcome our first two witnesses. Robert Battista has been chairman of the National Labor Relations Board since 2002. Before becoming chair of the board, he was a management labor lawyer in Detroit. He is a former chair of the Labor and Employment Law Section of the Michigan Bar Association and a former member of the advisory committee to the Michigan Employment Relations Commission.

Chairman Battista graduated from the University of Notre Dame in 1961 with his B.A. and the University of Michigan Law School in 1964.

Welcome, Mr. Chairman.

And Wilma Liebman is a member of the NLRB who was appointed by President Clinton. Prior to joining the board, she served as deputy director of the Federal Mediation and Conciliation Service. And before that, Ms. Liebman served as special assistant to the director of that agency. A Philadelphia native, Ms. Liebman has a B.A. from Barnard College and a J.D. from the George Washington University Law Center.

Welcome, Member Liebman.

Mr. Chairman, we would ask that you make your statement. Our general practice is that we accept for the record the written statements of the witnesses. We ask people to summarize in 5 minutes their written statement. Frankly, given the service each of you has rendered, we will be quite liberal in interpreting that rule this morning.

That does not go for the lay witnesses, I must say, but it does for our members.

A yellow light will appear when you are 1 minute away from time. The red light means time. But again, please, take the time you think you need to explicate your position.

Good morning, Mr. Chairman.

## STATEMENT OF HON. ROBERT BATTISTA, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD

Mr. BATTISTA. Good morning, Mr. Chairman.

Chairwoman Murray, Ranking Member Isakson, Chairman Andrews, and Ranking Member Kline, and members of the subcommittees, thank you for this opportunity to discuss recent decisions of the National Labor Relations Board and their impact on

employee rights. I have three points I would like to make in my oral statement.

First of all, the September rush, as it is called, was certainly not political. I want to set the record straight regarding the number and timing of the decisions the board issued in September of 2007. Our critics allege that the Bush majority rushed out 61 decisions in September, which they describe as a massive assault on workers before the president's term ends. That is just not so.

Anyone with a basic knowledge of a board case processing knows that September, the last month of the fiscal year, is the busiest case production time. The board actually issued 70 decisions in September after a bipartisan effort of all five members to issue the oldest cases we had on the books.

The equivalent number for September issuances in the prior 4 years are 119, 54, 114, and 105. So our 70 in September is the second lowest for the 5 years.

As for the substance of what the board held, the decisions speak for themselves. It should be noted, however, that of the majority of unfair labor practice decisions issued in September, the board found one or more violations of the act by the employer involved.

The second point I would like to make is that the NLRB is performing its statutory mission. Notwithstanding the special interest group rhetoric you might be hearing about the NLRB, I want to assure Congress that the agency is successfully carrying out its statutory mission to administer the National Labor Relations Act as it has been written by Congress and interpreted by the reviewing courts.

Consider these facts. During my 5-year tenure as chairman, the NLRB recovered a total of $604 million in back pay with 13,279 employees offered reinstatement. In fiscal 2007, the NLRB held 1,559 representation elections in under 2 months. The unions won over half of them.

Over the same period, two-thirds of the 22,000 unfair labor practice charges that the NLRB received were investigated and resolved within 4 months. Of charges found to have merit, some 90 percent are settled prior to the issuance of a complaint.

In fiscal 2007, the median time to issue complaints was 98 days. Complaints that the regional directors do issue in meritorious cases go to hearings before NLRB administrative law judges. Their decisions could be appealed to the board in Washington.

The board's decisions are subject to review and enforcement in the U.S. Court of Appeals. In fiscal year 2007, our decisions were enforced in whole 86.6 percent of the time and in whole or in part, 97 percent of the time, the highest enforcement rates in the agency's history.

Since 1990, the cases pending before the board in Washington have represented only one or 2 percent of the cases filed with the agency nationwide. By focusing only on this small percentage of board decisions, some critics give the impression that the delay inherent in a fully litigated case is the norm. That is not true. Overall, the NLRB's case processing record is a very impressive one.

As for the board's productivity, since I became chairman, we issued almost 500 cases a year through the end of fiscal year 2007. The median number of days an unfair labor case was pending at

the board as of the end of fiscal year 2007 was 181 days. For representation cases, the median was 88 days.

We have reduced our backlog to 207 cases from 621 when we first came to the board, or a reduction of some 66.5 percent in 5 years. We are at the lowest case inventory in over 30 years. Granted, a lower intake of cases helped us in this effort, but overall, we did well in bringing the caseload down to a respectable working inventory.

Third, our critics lose sight of the fact that the statute was amended in 1947 by the Taft-Hartley Act to protect employees from not only employer interference, but also union misconduct and to give employees the equal right to refrain from union activities and representation. The board is obligated to enforce the law as enacted by Congress despite what any affected party may wish for.

The statute was not intended to benefit unions or employers. Rather, the rights granted by the statute belong only to employees whether unionized or not.

Once again, the fundamental principle of the act is to provide for employee free choice, allowing employees to decide for themselves whether they wish to be represented by a union or to otherwise act concertedly in dealing with their employer. The law is neutral, and so is this agency. Thank you for your attention.

[The statement of Mr. Battista follows:]

**Prepared Statement of Hon. Robert J. Battista, Chairman, National Labor Relations Board**

Chairwoman Murray, Ranking Member Isakson, Chairman Andrews and Ranking Member Kline, and Members of the Subcommittees: my name is Robert Battista, and I am Chairman of the National Labor Relations Board. The NLRB is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, as amended, the primary law governing relations between unions and employers in the private sector. The statute guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activity with or without a union, or to refrain from all such activity. Under the Act, the NLRB has two principal functions:

- to conduct secret-ballot elections among employees to determine whether or not the employees wish to be represented by a union; and
- to prevent and remedy statutorily defined unfair labor practices by employers and unions.

Thank you for the opportunity to discuss recent decisions of the National Labor Relations Board and their impact on employee rights. I understand you are most interested in the decisions we issued in September 2007. Before addressing specific decisions, I would like to cite some of this Board's accomplishments and to offer some observations about the Agency and the National Labor Relations Act.

Notwithstanding the special interest group rhetoric you may be hearing about the NLRB, I want to assure Congress that the Agency is successfully carrying out its statutory mission to administer the Act as its has been written by Congress and interpreted by the reviewing courts.

*Agency Performance*

In three days, I will have completed my five-year term as Chairman. I thought it would be appropriate to look back upon my term to see how the Board fared against the goals we established for the Agency when we first took office. In December of 2002, our goals as a Board were to become more productive, credible with the Court's, collegial, and transparent. As I will explain, we have substantially accomplished those goals.

*1. Productivity*

We certainly have become more productive. In fiscal year 2002, the last fiscal year before I became Chairman, the Board issued a total of 443 cases. Since I became Chairman in December 2002, the Board has issued almost 500 cases a year through the end of FY 2007 on September 30, 2007.

*GPRA Case Initiative*

In fiscal 2007, all Board Members made a determined effort to meet our goals pursuant to the Government Performance Results Act, which we refer to by the acronym "GPRA." Our internal GPRA goal for unfair labor practice ("C") cases was to issue by September 30, 2007, decisions in 90% of the 216 C cases pending as of May 1, 2006. Our internal GPRA goal for representation cases was to issue by September 30, 2007, decisions in 90% of the 59 representation ("R") cases pending as of October 1, 2006.

We were successful in issuing decisions in many of our oldest GPRA cases. Indeed, in fiscal 2007 we issued decisions in 48 of our oldest 50 cases. With regard to R cases, we issued rulings in 98.3% of all the R cases we had on October 1, 2006 thus exceeding our GPRA goal. We issued decisions in 84.1% of our GPRA C cases we had on hand on May 1, 2006. Thus, while we did not quite meet our internal GPRA C case goal, we were able to issue decisions in the great bulk of the old cases, many of which had lengthy records and difficult issues that seemed to have been handed down from one Board to another. Another way to look at the success of our efforts is to compare median case pendency periods. At the end of fiscal 2006, the median number of days that a C case was pending with the Board was 809 days. After our GPRA effort in Fiscal 2007, the median number of days a C case remained at the Board was 181 days.

We achieved a similarly dramatic reduction in median time for R cases. At the end of fiscal 2006, the median number of days an R case was at the Board was 409 days. After our GPRA effort in fiscal 2007, the median number of days for our R case inventory was 88.

While we still have some old C cases that we intend to decide before the end of the year, the claim that cases are languishing at the Board is no longer true.

*Case Backlog at Lowest Level in Over 30 Years*

Furthermore, we have made real inroads on the backlog. Five years ago the case backlog at the Agency stood at 621 contested cases. Many of them had been at the Board for a number of years. At the end of FY 2007, we have reduced that backlog to 207 cases or a reduction of some 66.5%. Granted, a lower intake of cases helped us in this effort, but we did well in bringing the caseload down to a respectable working inventory.

*Board Issues Lead Case Decisions*

During the same period, the Board has issued 28 major decisions. We had hoped to issue more. However, to decide a major issue, the Board must have at least a three-member majority who are willing to sign on to the opinion. That task was made doubly difficult because during my chairmanship, the Board had fewer than 5 members for 18 months or 30% of the time, including all of calendar year 2005. Of course, when a new member comes on to the Board, it takes a while for the new member to come up to speed, acclimate himself or herself with staff, and for the Board to develop the necessary chemistry to reach consensus or even a majority.

*Representation Case Activity*

With regard to representation case activity at our Regional Offices during FY 2007, 2,439 (RC and RM) petitions were filed, which resulted in holding 1,559 elections.

- Unions won 54.3% of those elections;
- The time from the filing of a petition to the holding of an election was 39 median days;
- 93% of the elections were held within 56 days;
- 78.9% of all R cases were closed by the Agency within 100 days from the filing of the petition.
- Only 13 cases involved a technical refusal to bargain to test the certification, which means employers challenged the certification of unions in court in only 1.1% of the elections that unions won.

*Board Collects Over One-Half Billion Dollars in Backpay*

In FY 2007, the NLRB collected $110,388,806 in backpay, and 2,456 employees were offered reinstatement. Over my tenure as Chairman, the NLRB recovered a total of $604 million on behalf of employees as backpay or reimbursement of fees, dues, and fines, with 13,279 employees offered reinstatement.

All and all, from a productivity standpoint, we have done a very credible job, of which I am proud. In the words of one longtime observer of this Agency, "the efficiency and productivity of the Board continues to serve as a role model for many Federal agencies." G. Roger King, "We're Off to See the Wizards" A Panel Discussion on the Bush II Board's Decisions * * * And The Yellow Brick Road Back to

the Record of the Clinton Board, (paper presented at the American Bar Association, Section of Labor and Employment Law, 34th Annual Development of the Law Under the National Labor Relations Act Mid-Winter Committee Meeting on February 26 to March 1, 2006).

*2. Credibility in the Courts*

Building credibility with the U.S. Courts of Appeals was the second objective. In fiscal 2002, the prior Board had its decisions enforced in the courts in whole 60.4% and in whole or in part 70.8% of the time. From December 2002, when I took office, through September 30, 2007, the decisions of the Board have been enforced by the Courts in whole 78.1% and in whole or in part 87.7% of the time. Indeed, in fiscal 2007, our decisions were enforced in whole 86.6% and, in whole or in part, 97% of the time. Both of these enforcement rates are the highest in the Agency's history.

*3. Collegiality*

Fostering collegiality and bipartisanship was a third goal, and despite strongly-worded dissents in some of the more important cases, in the main, the whole Board has been fairly collegial. Despite differences, which are not always predictable based upon political affiliation, we have tried to be guided by tolerance and respect for each other's strongly held views.

*4. Transparency*

The last of our goals has been to make the Agency more transparent to the public it serves by implementing the President's Management Agenda and E-Gov initiatives. We have renovated the Agency's Web site by greatly expanding its content, making it interactive, more user-friendly, and greatly enhancing its E-Filing capacity. We also are building an enterprise-wide electronic case management system designed to reduce reliance on paper-based processes, improve operational efficiency, and better serve the public.

*Criticisms and Responses*

*Complexity of the Board's Responsibility*

Some critics of the Board emphasize that the Act, as amended, retains the language from its original statement of purpose, found in the 1935 Wagner Act, calling for the encouragement of collective bargaining. These commentators invoke this language to fault the Board for not doing enough to promote unionism. In my opinion, this is an anachronistic view that ignores the amendments to the 1935 Act and the complexity of the Board's responsibility.

The Board's responsibility is much more complex than the promotion of any institution's agenda because of the interplay of two essentially legal (as opposed to economic) forces. First, the Wagner Act was not Congress' last word. The Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 amended the original Wagner Act substantively and philosophically. Second, the courts have interpreted the Act and its amendments in a way that reflects the compromises underlying the legislation and leaves no room for the Board to construe and apply the amended Act as if it were the property of a single interest group.

*Balancing Competing Interests*

As defined by the sum total of the amendments and the court decisions, the Board's mission is to balance and accommodate competing interests, which typically conflict with one another. For example, although employees have the right to organize and engage in collective bargaining, employees also are assured of the right not to engage in union or concerted activity. Thus, the narrower goals of the original Act were tempered significantly by a broader notion of workplace democracy, voluntarism and neutrality, as expressed in the Taft-Hartley amendments. As one of our most eminent labor law and constitutional scholars, the late Archibald Cox, put it: The Taft-Hartley Act "represents a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining." Archibald Cox, Some aspects of the Labor Management Relations Act of 1947. 61 Harv. L. Rev. 1, 24 (1947).

My own view is that Professor Cox was absolutely right insofar as he saw the Taft-Hartley amendments as adopting a posture of complete equipoise on the question of whether employees should choose union representation. In the words of the Supreme Court, "The Act is wholly neutral when it comes to that basic choice" (NLRB v. Savair Manufacturing). Once employees have freely chosen union representation, however, I think that the policy of encouraging the collective bargaining process retains its vitality.

Even in the context of collective bargaining, the statute is neutral as to the outcome of negotiations. In this regard, Section 8(d) of the Act defines the obligations of the parties to engage in good faith bargaining, but specifically notes that "such

obligation does not compel either party to agree to a proposal or require the making of a concession. * * *"

Another example of the resolution of conflicts between competing interests occurs in the context of economic battles over terms of a collective bargaining agreement. Although employees are entitled to strike for better working conditions, the right of an employer to continue business operations has been recognized since the beginning of the Act's history. Thus, employers are allowed to hire replacement workers during the strike, who need not be displaced once the strike is over.

This balancing of competing interests also is illustrated in the frequently litigated question of whether a union has a right to engage in concerted activity—like picketing or handbilling—on the private property of an employer. Over 50 years ago the Supreme Court told the Board that when the Section 7 rights to engage in concerted activity conflict with property rights, the Board must accommodate the two "with as little destruction of one as consistent with the maintenance of the other."

*Criticisms are Politically Motivated and Without Foundation*

The polemics of certain groups against recent decisions of the Board are nothing more than special-interest attacks designed to gain support for their position in the coming election cycle. The hue and cry is that the "Bush majority" rushed out 61 decisions in September in a "massive assault on workers" before the President's term ends. That is just not so. Anyone with a basic knowledge of Board case processing knows that September, the last month of the fiscal year, is the busiest case production time. The Board actually issued 70 decisions in September, after a bipartisan effort by all five Members to issue the oldest cases. The equivalent numbers for September issuances in the prior four years are 119, 54, 114, and 105. As for the substance of what the Board held, the decisions speak for themselves. It should be noted, however, that in the majority of unfair labor practice decisions issued in September, the Board found one or more violations of the Act by the employer involved.

Should parties appeal the decisions, one of the 12 circuits of the U.S. Courts of Appeals will decide whether to affirm or reverse the Board. If a Board decision is balanced and well reasoned, generally it gets enforced. As I stated previously, in FY 2007, which ended on September 30, 2007, the Board's decisions were enforced by the courts at historically-high levels.

Our critics' prognostications that "the NLRB system is broken and has become a tool of corporate interest," are simply false. Unions are winning a majority of representation elections, most of which are held within two months. The Board has averaged issuing almost 500 decisions a year during my tenure. The median number of days an unfair labor practice case has been pending at the Board is 181 days; for representation cases, the median is 88 days. This is not the record of a Board that is the captive of any group or institution.

*Mission Is to Enforce Entire Statute*

Our critics declare that the National Labor Relations Act was passed by Congress in 1935 "to encourage workers to have unions and to bargain collectively." However, they lose sight of the fact that the statute was amended in 1947 by the Taft-Hartley Act to give employees the equal right to refrain from union activities and representation, and to protect employees from not only employer interference but also union misconduct. Often critics fail to comprehend that the Board's mission is to enforce the entire law as enacted by Congress despite what any affected party may wish for—a return to 1935 or to some future legislative result.

*NLRA Protects Employees*

The statute was not intended to benefit unions or employers. Rather, the rights granted by the statute belong only to employees—whether unionized or not. Once again, the fundamental principle of the Act is to provide for employee free choice, allowing employees to decide for themselves whether or not to be represented by a union or otherwise to act concertedly in dealing with their employer.

If employees exercise their right of free choice in favor of union representation, the policy of the Act, and the responsibility of the Board, is to encourage collective bargaining by making sure that unions as well as employers bargain in good faith, free from governmental interference. If employees exercise their right of free choice not to be represented, it is the Board's responsibility to respect that choice and ensure against union restraint or coercion. The law is neutral * * * and so is this Agency.

*Most Cases Resolved Quickly*

Another criticism leveled at the Board focuses on the delay in processing cases to final conclusion. The overall case processing times, however, reveal the criticism's

delay premise to be exaggerated. In FY 2007 the NLRB received 25,471 cases, 22,147 of which were unfair labor practice cases, and the remaining 3,324 were representation cases. After the General Counsel investigates the unfair labor practice cases, typically about one third of the cases are determined to have merit. In FY 2007, 36.6% of the cases were found to have merit. These investigations usually are completed in about two months.

*Only 1-2% of Cases are Appealed to Board*

Of the cases found to be meritorious, some 90% are settled prior to the issuance of a complaint. Complaints that Regional Directors do issue in meritorious cases are considered by NLRB Administrative Law Judges, and judges' decisions can be appealed to the Board here in Washington, D.C. In FY 2007, the median time to issue complaints was 98 days. Since 1990, the cases pending before the Board in Washington have represented only 1% to 2% of cases filed with the Agency nationwide. These cases tend to present the most difficult and complex issues in labor law. By focusing only on this small percentage of cases, some critics give the impression that delay inherent in a fully-litigated case is the norm. This is not true. Although, admittedly, some of these fully litigated cases take too long to resolve, such delays are not typical. Overall the NLRB's case processing record is impressive.

The vast majority of these cases are resolved without the necessity of litigation. Historically, the Board's settlement rate has been very high; in FY 2007, 97% of all unfair labor practice cases filed in the field offices were settled.

*Board Decisions Speak for Themselves*

The decisions this Board has issued are correctly decided, soundly reasoned, and speak for themselves. In many instances, the decisions are unanimous. True, some of the more important decisions have not been, but dissent is healthy for many reasons, including the assurance dissent provides that the members in the majority have considered carefully opposing views and arguments.

*Evolution of Labor Policy under the Act*

The genius of the Act is that it sets forth enduring fundamental principles, and yet allows for flexibility and change. It accomplishes the former by setting forth fundamental principles in clear and compelling language. It accomplishes the latter by using broad language that gives the administering agency, the Board, the freedom and responsibility to make policy judgments within the parameters of those principles.

More specifically, the enduring fundamental principles include: the employee freedom to choose to be represented or not; the guarantee of good-faith bargaining free from governmental interference if employees choose representation; an electoral mechanism to insure that employees are appropriately grouped together, and can vote in secret; the duty to sign and honor contracts that are freely agreed to; and the protection of employers from labor disputes in which they are not involved.

Within these principles, there is considerable discretion vested in the Board. Congress chose broad language, and then left it to the Agency to act in its discretion, so long as it does not depart from the principles. A few examples will suffice:

1. Congress said that an employer shall not "interfere with" Section 7 rights. Is it "interference" to prohibit persons who are not employees of the property owner from engaging in union solicitation on company property? If the persons are truly outsiders, the Supreme Court has told us that the answer almost always is "no." But what happens if the persons are employees of a tenant of the property owner who come to work on that property every day? This is an issue on which the Board held oral argument about a month ago.

2. Should employees have the right to oust or change a representative? The simple answer is "yes," but the Board has the power to limit this right in the interest of bargaining stability through contract-bar rules, certification year rules, and "reasonable time" insulated periods. In its recent decision in Dana Corp., 351 NLRB No. 28 (2007), the Board adjusted the balance between freedom of choice and bargaining stability.

3. Should the duty to bargain include the duty to supply information? The simple answer is "yes," but the Board has the discretion to determine such matters as relevance and confidentiality. The Board historically has distinguished between information that pertains to employees within the bargaining unit the union represents and information that pertains to employees or entities outside the bargaining unit. In the former case, the information is presumptively relevant and the union is entitled to the information without any further showing. In the later case, the information is not presumptively relevant, and the union is not entitled to the information unless it can show that it is relevant to the union's duties as the collective bar-

gaining representative. The Board currently is considering when and to whom the union must demonstrate that such requested information is relevant.

*Reversal of Precedent*

With such difficult policy judgments in mind, it is not surprising that Board law changes from time to time. The Board's freedom to act within parameters means that over time different Boards will act in different ways.

Our Board, indeed, has reversed precedent but not as frequently as the Board did during the years 1994 to 2001. Having compiled the statistics for a paper delivered at the American Bar Association, Section of Labor and Employment Law, 34th Annual Development of the Law Under the National Labor Relations Act Mid-Winter Committee Meeting on February 26 to March 1, 2006, G. Roger King reported:

From March 1994 until December 2001 the Clinton Board issued 60 decisions * * * which reversed Board precedent.

In these 60 decisions 1,181 years of precedent were overturned, or "lost."

During this timeframe [December 2002 to February 2006] the Bush II Board issued 9 decisions * * * which reversed precedent.

When all cases decided by the Bush II Board which reversed precedent are included 146 years of precedent was "lost."

From February 2006 until present, our Board issued an additional 12 decisions that overruled precedent, and the number of years of precedent "lost" was 197. In total, the prior Board issued 60 decisions that overruled 1181 years of precedent and our Board has issued only 21 decisions that overruled 343 years of precedent. The bottom line is that our Board reversed precedent only one-third as many times as the prior Board. Moreover, in many of these cases we restored the precedent that had been overruled by the prior Board.

This evolution of policy is precisely what Congress intended when it gave the Board policy-making function. So long as the Board does not stray from the Act's fundamental principles, and so long as the Board explains the reasons that impel it to disagree with a prior decision, the Board has the power to change. The Act envisions the federal judiciary as the arbiter of the Board's statutory faithfulness. Where the Board has strayed too far from the Act's fundamental principles or has not explained its reasons, the Courts will decline to enforce the Board's decisions. As noted earlier, our enforcement record in the Courts of Appeals is at a historic high, which is strong proof that our decisions have been faithful to the statute.

Of course, all responsible Members realize the value of stare decisis—. the value of having stability, predictability and certainty in the law. However, if a Member honestly believes that a prior precedent no longer makes sense, and that a change would be more in keeping with the fundamental principles described above, he/she can—and may feel obligated to—vote to change the law. To be sure, the values of stare decisis counsel against an onslaught of changes. But prudently exercised, change is proper and, indeed, was envisaged by Congress.

Similarly, because of the limited terms of Members, and the evolving composition of the Board, it is not surprising that some Boards will be viewed as being more liberal and other Boards as being more conservative. Although such characterizations grossly oversimplify the decisional process and do not account for each Board member's personal and usually nuanced policy orientations, the characterizations may well describe public perceptions. In view of the structure set up by Congress, this should not be seen as startling. But again, prudence requires that a given Board not swing radically to the left or right.

Overall, the Board has not had radical swings to the left or right. Most of the law is well-settled, and the parties litigate the facts under those principles. In a few areas, the law has gone through periods of flux, but ultimately it has settled down. For example, the Board flip-flopped for years on whether misrepresentations are objectionable conduct in an election context. But, in Midland, 263 NLRB 127 (1982), the Board ultimately held that such conduct would not ordinarily be objectionable. The law has been thus for 23 years. Similarly, the Board wrestled for years as to the burdens of proof in 8(a)(3) cases. Finally, the Board articulated a clear test in Wright Line, 251 NLRB 1083 (1980). The law has been thus for 25 years. In addition, the Board held for a time that interrogation about Section 7 activity was per se coercive. After judicial criticism, the Board abandoned this approach in Rossmore House 269 NLRB 1176 (1984). The law has been thus for over 20 years. Finally, the Board once held the view that plant relocations were contract modifications, even if the contract contained no clause proscribing relocations. Milwaukee Spring, 235 NLRB 720 (1978). The Board later abandoned that view, Milwaukee Spring, 268 NLRB 601.(1984), and then held that relocations were bargainable only in limited circumstances. Dubuque Packing, 303 NLRB 368 (1991). The law has been thus for over 16 years.

*Protecting Workplace Democracy*

These are examples of Board fluctuations which ultimately resulted in stability. I submit that the ultimate stable point was true to the Act's fundamental principles. By being true to its principles, and yet flexible enough to change, the Board has continued to serve the national interest in protecting workplace democracy.

Throughout the years, the NLRB has been a bastion protecting the right of workers to choose union representation or no representation, and if they choose union representation, to make sure that the Act's twin objectives for the collective bargaining process are carried out—that the parties bargain in good faith and that they do so free from governmental interference. We continue to vigorously uphold workers' rights and the Act's bargaining process objectives in a fair and balanced manner.

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Chairman ANDREWS. Mr. Chairman, thank you.

Member Liebman, with your consent, what we are going to do here is ask Senator Isakson for his opening statement at this time, and then we will proceed to your statement, ma'am.

Welcome home, Johnny, back from the House.

Senator ISAKSON. Thank you, Mr. Chairman. And I apologize to the gentlelady for being late, but we had a couple of votes in the Senate. And I will cut my statement very short.

Quite frankly, when I heard about this hearing, I wondered what it might be about because I didn't know of anything pending that would cause a typical congressional hearing to take place. And then I read Chairman Miller's press release that was issued about it. And I want to read one sentence from it that basically is the sentence that troubles me about the intent of the hearing.

It says, "The Bush's NLRB decisions may be appealed to the United States Circuit of Appeals and ultimately to the United States Supreme Court, a process which after 60 years has not produced sufficient clarity or managed to protect workers." So basically, I take it, that this is to discuss decisions that have been made in the past by the Supreme Court when they upheld NLRB rulings or possibly even discuss decisions that are pending either before the court or on appeal.

In either case, the Congress has no business in this branch of government calling either the judiciary or for that matter, the executive branch before while a case is pending. The NLRB was created by Congress in 1935 to be an independent, quasi-judicial body. Their decisions, like those of judges, speak for themselves. There is no reason why the board members should have to come to Capitol Hill to explain themselves.

NLRB's decisions can and are appealed in the Federal Circuit Court. And undoubtedly, some of those cases the majority wishes to discuss today are in the process of being appealed. But I want to point out that when these cases are appealed, the courts overwhelmingly stand behind the board. In fact, the courts have upheld their decisions in whole or in part 97 percent of the time.

Our founding fathers created a three-legged stool of government, the executive, the legislative, and the judicial branch. And ultimately the decisions the executive branch makes in interpreting the laws that the legislative branch passes, if there is a question, go to a court system, which is the ultimate appeal, not a committee of the United States Congress.

And I yield back the balance of my time.

[The statement of Senator Isakson follows:]

Statement of Senator Johnny Isakson

"The National Labor Relations Board:
Recent Decisions and Their Impact on Workers' Rights"

December 13, 2007

- Since this hearing was first discussed last month, I was and continue to be opposed to it.

- Congressional hearings allow Members the opportunity to examine issues within our jurisdiction, advocate legislation, and glean facts from expert witnesses. I welcome the opportunity to participate in such hearings, even when called by the other side.

- Today is no such hearing. Today, we sit here solely to appease those who wish to stage political theatre.

- There is no legislation the majority wishes to discuss; they have no intent to convey any of their ideas about public policy.

- No, they call this hearing solely to berate a sitting Member of the National Labor Relations Board because they do not agree with some of his decisions. This is dangerous precedent.

- The NLRB was created by Congress in 1935 to be an independent, quasi-judicial body. Their decisions, like those of judges, speak for themselves; there is NO reason why Board Members should have to come to Capitol Hill to explain their decisions further.

- If Congress insists on calling NLRB Members before them to scold them over their decisions, it could have a chilling effect on their ability to decide future cases fairly and independently, as required by the National Labor Relations Act.

- NLRB decisions can and are appealed to Federal Circuit Courts. Undoubtedly, some of these cases the majority wishes to discuss today are in the process of being appealed. As such, it is wholly improper for Congress to intervene in an ongoing legal matter.

- When these cases are appealed, the Courts overwhelming stand behind this board. In fact, the Courts have upheld their decisions, in whole or in part, 97% of the time. Clearly, federal judges hardly see this Board as the radical right-wing anti-union board the majority will depict today.

- For these reasons and more, I reiterate my opposition to this hearing.

- The American people deserve a Congress that uses its authority with discretion and fairness. Those who called today's hearing have done neither.

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Chairman ANDREWS. I thank the senator.

And I welcome Member Liebman. And we will hear her testimony.

**STATEMENT OF HON. WILMA LIEBMAN, MEMBER, NATIONAL LABOR RELATIONS BOARD**

Ms. LIEBMAN. Thank you. Good morning, Chairwoman Murray, Ranking Member Isakson, Chairman Andrews, and Ranking Member Kline, and members of the subcommittee, thank you for inviting me to testify about the recent decisions of the National Labor Relations Board. And thank you for holding this hearing.

For too long labor law and policy issues have been removed from public discussion. The controversy over the board's recent decisions has had the positive effect of focusing public attention on these issues. They matter to working people, to businesses, and to our economy and society as a whole.

I have dissented from many of the board's decisions. Those issued in September are the climax of a trend that is now several years old. The impact on workers' rights has been uniformly negative.

Today fewer workers have fewer rights and weaker remedies under federal labor law. Virtually every recent policy choice made by the board impedes collective bargaining, creates obstacles to union representation, or favors employer interests. The result is a loss of faith in the board and growing disenchantment with the law.

Some might say that the current board's decisions simply reflect the typical change of orientation that occurs with every new administration. But something different is going on now. More see change than seesaw, not just tilting the seesaw, but tearing up the playground.

It was not surprising, perhaps, when the current board reflectively overruled a series of decisions by the prior Clinton board. But it has also reached back decades in some cases to reverse longstanding precedent going to the core values of this statute.

The loss of confidence in the board is reflected in our dramatically declining case intake. Increasingly disillusioned, unions have turned away from the board, especially its election machinery.

It is a troubling signal when protesters converge on the board and demand that it be closed for renovations. To dismiss this discontent as merely politics is a mistake, if not irresponsible.

Time does not permit me to discuss these decisions in any detail. I have tried to do that in my written statement. Nearly all of the significant decisions include dissents, which hopefully speak for themselves.

In September, the board issued divided decisions that, among other things, created obstacles for employers and unions who want to establish relationships by means of voluntary recognition, a case I might add that cannot be appealed under our statutory scheme to the courts of appeals. The September decisions also made it easier for employers to withdraw recognition from a union without an election, legalized hiring discrimination against some who seek to organize a workforce, made it harder for those who have been unlawfully fired to collect remedial back pay, and allowed employers to file retaliatory lawsuits against unions and employees without fear of being held liable.

None of these decisions should have surprised a careful observer of the current board. In my written statement and in a new article in the Berkeley Journal of Employment and Labor Law I have surveyed the work of the current board, its rulings, and its decision-making process. For people who are committed to the goals of the National Labor Relations Act, it is a troubling story.

The board has said for the first time that freedom of choice, which is to say the freedom to reject union representation, prevails in the statutory scheme over promoting collective bargaining. It has taken special care to ensure that employees are free to refrain from union activity and to reject union representation while showing little concern about the rights of employees to engage in concerted activity, to choose and keep a union, and to be free from anti-union discrimination.

And in case after case, it has found that employees' statutory rights must yield to countervailing business interests of all sorts, including private property rights, various managerial prerogatives, notions of workplace civility, and employer free speech rights. Under this statute, when policy choices so persistently go this way, we have a problem.

In addition, the board has regularly ignored the economic realities of the workplace or the vulnerability of working people. And it has departed from established law without adequate predicate or good reason, as the dissents have argued.

Today's labor laws were the product of tremendous struggle. We honor that struggle when we take the act seriously, when we enforce it fairly and thoughtfully, and even when we point out its shortcomings. Certainly, the board operates under significant constraints, a judicial, political, and economic climate indifferent or even hostile to collective bargaining, and arguably antique statute.

Still the board can play a meaningful role in preserving the values of this act and in furthering its aim. Its failure to do even that is a lost opportunity.

At a time when union membership is at an historic low point and the earnings gap growing, board decisions threaten to undo the law's assumption about collective action as a means to redress economic inequality. Restoring federal labor law to its intended purposes is obviously no panacea, but it would be a step in the right direction.

Thank you. And I would be happy to answer your questions.

[The statement of Ms. Liebman follows:]

**Prepared Statement of Hon. Wilma B. Liebman, Member, National Labor Relations Board**

Chairwoman Murray, Ranking Member Isakson, Chairman Andrews and Ranking Member Kline, and Members of the Subcommittees: Thank you for inviting me to testify today about the recent decisions of the National Labor Relations Board and their impact on workers' rights. It is my privilege to appear before you today.

I dissented from many of the Board's recent decisions—and from many earlier decisions, as well. Unfortunately, their impact on workers' rights has been uniformly negative. As Member Dennis Walsh and I said in one dissent, the Board's recent decisions "will surely enhance already serious disenchantment with the [law's] ability to protect the right of employees to engage in collective bargaining."[1] While any one decision standing alone may not be cataclysmic in impact, viewed together, they represent a pattern of weakening the protections of the Act.

Today, fewer workers have fewer rights, and weaker remedies, under the National Labor Relations Act. Virtually every recent policy choice by the Board impedes collective bargaining, creates obstacles to union representation, or favors employer interests. It is inconceivable under this statute that the answer could always be the same. No wonder that there has been loss of faith in the Board. That development is regrettable. It exacerbates an already existing concern whether the Act is still effective in protecting the right to organize and in promoting collective bargaining—the core purposes of federal labor law, alongside ensuring employee free choice in these matters.

A. My perspective on the Board's decisions is shaped by my considerable experience there and by a career spent in labor law and labor policy, both in and out of government.

Now in my third term, I am the longest-serving Member of the current Board. I began my service a little more than ten years ago, on November 14, 1997, after being appointed by President Clinton and confirmed by the Senate. I was reappointed and confirmed in 2002 and again in 2006. My current term expires in August 2011. By that time, I will be the third longest-serving Member in the history of the Board.

Before joining the Board, I served for several years at the Federal Mediation and Conciliation Service (FMCS), first as Special Assistant to the Director and then as Deputy Director. I came to the FMCS from a labor union, the Bricklayers and Allied Craftsmen, where I served as Labor Counsel. Previously, I had been legal counsel at the International Brotherhood of Teamsters for nine years. I began my legal career at the Board, where I served as a staff attorney from 1974 to 1980, after graduating from the George Washington University Law Center here in Washington. In short, my career has come full circle: from the Board, to the Board.

I understand that today's hearing was prompted by the flurry of decisions issued by the Board in September of this year, as its fiscal year drew to a close. I will address some of those decisions specifically, from a dissenter's perspective. But first, I would like to thank both Subcommittees for focusing attention on the Board and its work.

For too long, labor law and policy issues have been removed from public policy discourse. These are difficult issues, and consensus on resolving them may be hard to achieve—which must explain why the National Labor Relations Act has not been significantly amended since 1947. But I would hope for a common recognition that these issues are important, no matter how dry and legalistic they sometimes seem—that they matter to working people, to businesses, and to our economy and our society as a whole. It is critical that these issues receive informed consideration from the public and from the Congress. If our industrial era law does not keep pace with the realities of today's economy and the evolving workplace, then the protections it seems to offer workers are illusory. Today social and economic pressures on the collective bargaining system are compounded by a legal regime that is making it harder for that system to work and by an administrative agency that, at bottom, lacks commitment to fixing the problem.[2]

B. Let me turn to the Board's September decisions, and begin by putting them in context. First, the decisions attracted attention not only because of their holdings, but because they were issued more or less as a group. On that last score, I hesitate to fault my colleagues at the Board. The Board's goals for promptly deciding cases, under the Government Performance and Results Act (GPRA), are keyed to the fiscal year, which ends on September 30. It has become common in recent years for the Board to push hard during the final months of the fiscal year to issue decisions: in effect, to rush to meet the GPRA deadline. That practice may not be ideal, but it is not nefarious. The result, of course, may be that several major decisions issue virtually at once. And if those decisions all, or nearly all, cut the same way, their impact is felt more forcefully, and the perception of unfairness is more acute. That is what happened this year.

That said, there is something extraordinary about the Board's recent decisions. They are the climax of a trend that is now several years old. The Board is notorious for its see-sawing with every change of Administration. But something different is going on—more "sea change" than "see-saw." The current Board, it seems to me, is divorced from the National Labor Relations Act, its values, and its goals. Its decisions have demonstrated as much. It was not surprising, perhaps, when the current Board reflexively overturned a series of decisions by the prior, Clinton Board. But the current Board has reached back decades, in some instances, to reverse long-established precedent, often going to the core values of this Act. And it has often reversed precedent on its own initiative, without seeking briefing or oral argument. Most important, when the Board has decided to reverse precedent, its reasons for doing so have fallen short—as dissenting opinions have pointed out.[3]

The result has been more than a change in the law, or discontent with the outcome of particular cases. It has been a loss of confidence in the Board and the legitimacy of the process, not only among persons and groups on the losing end of Board decisions, but also among neutral observers, including labor-law scholars.[4] The Board's case intake is down accordingly. Unions have turned away from the Board's election machinery, and employees and unions hesitate to file unfair labor practice charges, skeptical—or even fearful—of the result.[5] In an historic twist, unions are increasingly turning to state or local governments for help in protecting workers, with diminished hope that the federal government can be a guarantor of important rights. It is a troubling signal when protesters converge on the Board and demand that the Board be closed for renovations. To dismiss this discontent as merely politics is a mistake, if not irresponsible. We all have an interest in preserving the legitimacy of the legal process.

C. I will highlight only a few of the decisions issued by the Board in September 2007. Nearly all of the significant cases include a dissent, which hopefully speaks for itself.

Of the September cases, the most significant, and disturbing to me, is a decision creating new obstacles for employers and unions who wish to establish a collective-bargaining relationship by means of voluntary recognition. In recent years, unions have increasingly sought to bypass the Board's election machinery and to negotiate voluntary recognition arrangements. The Board's procedures are seen as taking too long, leaving employees vulnerable to coercion by employers, and generating campaign animosity that can taint a new bargaining relationship.

Under long-established law, an employer is free to recognize a union voluntarily—rather than demanding that the Board conduct an election—if the union is able to demonstrate that it has uncoerced majority support among employees, typically by collecting signatures on authorization cards.[6] After voluntary recognition, the Board will not entertain an election petition, or permit an employer to withdraw recognition from the union unilaterally, until a reasonable period for collective bargaining has elapsed. This so-called "recognition bar" rule—which encourages voluntary rec-

ognition and stabilizes collective bargaining—has been in place, without challenge, for 40 years.[7]

No longer. In Dana Corp., 351 NLRB No. 28 (Sept. 29, 2007), the Board overruled precedent and jettisoned the recognition bar, without solid factual support for its ruling. In dissenting from the Board's decision to consider the issue raised in Dana, Member Walsh and I observed that with respect to voluntary recognition, union "[s]uccess * * * has prompted greater scrutiny" by the Board.[8]

Now, when an employer agrees to voluntarily recognize a union, after the union has demonstrated majority support, it must post a notice informing employees that it has done so and telling them how they can get rid of the union. That posting opens a 45-day window period, during which employees—provided they marshal 30 per cent support among their co-workers—may petition the Board for an election to decertify the union.

In dissent, Member Walsh and I explained the serious flaws in the majority's decision. The majority failed to recognize that voluntary recognition is a "favored element of national labor policy," as at least one federal appellate court has put it.[9] By effectively putting voluntary recognition under a cloud, the majority's new scheme discourages employers from recognizing unions without an election. And if an employer does extend voluntary recognition, the parties' new collective-bargaining relationship cannot operate effectively until the window-period closes. Unions will be under great pressure to produce results for employees during that period, yet employers will have little incentive to bargain seriously, if they cannot be sure the relationship will continue. As the dissent put it, the decision in Dana "relegates voluntary recognition to disfavored status by allowing a minority of employees to hijack the bargaining process just as it is getting started."[10]

I should point out that the notice to employees required in Dana—informing them that they may challenge the employer's voluntary recognition of a union—is unprecedented. Remarkably, more than 70 years after the National Labor Relations Act was passed, the Board does not require employers to post any notice informing employees of their rights under federal labor law, except three days before a scheduled election and as a remedy in cases where the employer has committed an unfair labor practice.[11] The Board has never acted on long-pending petitions for rulemaking requiring such a notice. It is high time we did.

This is not the only aspect of the Dana decision that at least suggests a double-standard. In Dana, one of the reasons offered by the majority for its new rule is the claim that Board elections are more reliable in determining employees' true wishes than are the signed cards typically collected by unions to establish majority support. In this respect, Dana can be contrasted with another September decision, Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50 (Sept. 29, 2007). There, a two-Member majority held that an employer had lawfully withdrawn recognition from a union—without an election—because the union had lost majority support. The majority relied on a petition signed by a majority of employees that stated: "We the employee's [sic] * * * wish for a vote to remove the Union. * * *" The employees, of course, did not get the vote they wanted; rather, their employer was permitted to decide for them whether they would continue to be represented by the union. In dissent, Member Walsh argued that the employer should have been required to seek a Board election.[12] The majority rejected that view, concluding that the petition—despite its, at best, ambiguous wording—was enough to establish that employees no longer wanted union representation.

In Dana, then, employee-signed cards are treated as suspect when they are used to establish union representation. But in Wurtland, the Board had no trouble in relying on an employee-signed petition to end union representation, without an election, even though employees seemed to be asking precisely for an election. That contrast understandably raised questions about the Board's fairness.[13] From all appearances, the current Board is much more protective of employees who wish to reject unionization than it is of employees who seek to unionize. Likewise, unilateral employer action to withdraw recognition from a union is apparently favored, but unilateral employer action—without a Board election—to recognize a union is not.[14]

Another troubling September decision was Toering Electric Co., 351 NLRB No. 18 (Sept. 29, 2007). There, the Board cut back on the protections granted to union salts: union members who apply for work with non-union employers in order to uncover anti-union discrimination and, if hired, to engage in organizing activity. Salting is an important organizing tool for many unions, especially in the construction industry. The Supreme Court has held, unanimously, that salts are statutory employees under the National Labor Relations Act and thus are entitled to the protection of the law, including when they seek work.[15]

In cases involving salts, the Board's framework for finding unlawful hiring discrimination was carefully crafted in a bipartisan 2000 decision, FES, 331 NLRB 9

(2000). The current Board, however, has moved farther and farther away from FES, taking an approach to salting that is at odds with Supreme Court doctrine and that makes it easier for employers to engage in anti-union discrimination.

To begin, in a May 2007 decision, Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (May 31, 2007), a Board majority—without being asked to and without inviting briefs—adopted new rules for determining the length of the backpay period and entitlement to other remedies when a union salt has been discriminated against. Reversing Board precedent that had been approved by the federal courts, the majority said that it would no longer presume that a salt would have worked from the date he was unlawfully denied employment until the date the employer made a valid job offer to him—the general presumption that applies to all victims of unlawful discrimination. This rule is an example of the well-established principle in Board law (and in our legal system generally) that uncertainties are to be resolved against the wrongdoer: here, the employer who engaged in unlawful discrimination. Rather than adhere to this principle, the majority adopted a new rule, effectively requiring the salt to prove how long he would have worked—despite the fact that he had never been hired in the first place and that there is no practical way to establish how long an organizing drive might have lasted, or how it would have turned out, if the salt had been hired. Failure to meet this evidentiary burden not only cuts off backpay, but also precludes being instated on the job, as a remedy. As Member Walsh and I pointed out in our dissent, that approach is fundamentally unfair. We said that the Board was treating salts as "a uniquely disfavored class of discriminatees." 349 NLRB No. 118, slip op. at 10.

In September, the Board went farther, again acting on its own initiative, without briefing, oral argument, or even a request to reconsider precedent. The Toering decision held, in effect, that employers were free to discriminate against union salts, unless it could be proved that the salts were genuinely interested in employment (as the Board only vaguely defined it). Of course, one purpose of salting is to uncover anti-union discrimination, just as civil rights groups employ testers to seek housing or employment.[16]

That decision marked a fundamental shift away from the traditional analysis in labor-law discrimination cases. Historically, discrimination cases have turned on the motive of the employer, not on the motive of the applicant for employment. Under the Board's new approach, an employer who categorically refused to hire union members would commit no violation of the law, unless a salt could prove that he would have accepted the job, if offered. Let me be clear. The Board did not simply limit the remedies for salts who failed to meet their evidentiary burden. Rather, it held that there could be no violation of the Act, without satisfactory proof of a genuine interest in employment—even if the employer's refusal to hire the salt was not motivated, in the least, by the salt's level of interest in the job.

In dissent, Member Walsh and I quoted the Supreme Court's words in a historic 1941 decision, holding that job applicants (and not merely current employees) were protected by the National Labor Relations Act:

Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185 (1941). We said that the Toering decision "creates a legalized form of hiring discrimination." 351 NLRB No. 18, slip op. at 21.

Other September decisions also eroded the Board's ability to enforce the law effectively, by cutting back on the remedies available to workers who have been victimized by unfair labor practices. These decisions continue the trend of recent years. Let me offer two examples.

In St. George Warehouse, 351 NLRB No. 42 (Sept. 30, 2007), the Board reversed more than 45 years of precedent to hold, for the first time, that the General Counsel was required to present evidence that an unlawfully-discharged employee took reasonable steps to find a new job after being fired, at the risk of being denied remedial backpay. Traditionally, it has been the employer's burden—as the wrongdoer—to establish that jobs were available and that the employee did not try hard enough to find one. In dissent, Member Walsh and I explained why the Board's traditional approach was fair and reasonable. Writing separately, I also made a more general point: that the majority was weakening a remedy that "has long been widely recognized as terribly weak to begin with." 351 NLRB No. 42, slip op. at 11. Labor-law scholars seem to be in unanimous agreement that the Board's backpay awards, because they require employees to mitigate their losses, are simply too small to deter employers from breaking the law.[17]

A second, unfortunate backpay case issued in September was the panel decision in Grosvenor Resort, 350 NLRB No. 86 (Sept. 11, 2007). There, a two-Member majority held, among other things, that certain employees, who had been unlawfully permanently replaced for striking, forfeited the right to full backpay, because they waited too long—more than two weeks—before seeking new work. To hold otherwise, the majority said, would "reward idleness." 350 NLRB No. 86, slip op. at 3. Member Walsh dissented, pointing out that the employees "did not sit idly by; they were engaged in concerted action [an unfair labor practice strike] to get their jobs back" and "[o]nce it became clear that that was not going to happen, * * * they all sought and obtained work." Id. at 11.[18] Member Walsh dissented as well from another, troubling holding of the majority: that certain employees who found interim work should have looked for additional work, instead of waiting for those jobs to begin. As Member Walsh pointed out, there is no good policy reason for demanding that employees look for "'interim interim' work." Id. at 13. In its parsimonious dissection of backpay claims, Grosvenor Resort suggests that the current Board is not committed to providing adequate remedies to victims of unfair labor practices. Reading Grosvenor Resort, one almost wonders who the wrongdoer really was: the employer or the employees. What reasonable employee will risk exercising her labor law rights, if she is uncertain about her chances at the Board, but can count on a long delay before a violation might be found, more delay before a remedy is awarded, and a meager remedy in the end.

For some apparent violations of the Act, finally, the Board will no longer grant any remedies. Among the September decisions was BE & K Construction Co., 351 NLRB No. 29 (Sept. 29, 2007), a case on remand from the Supreme Court. There, the majority held that a lawsuit that interferes with activity protected by the Act is lawful, even if it was filed with a retaliatory motive, so long as there is a reasonable basis for bringing the suit. In other words, even if an employer's sole motive in bringing the suit is to punish employees financially for daring to exercise their labor-law rights, and even if the suit itself is part of a coordinated series of unfair labor practices, the employer has not committed an unfair labor practice by pursuing litigation. It is certainly true that in this area, the Board must proceed carefully, in light of an employer's constitutional right to petition the government, including by filing a lawsuit against employees and their union. But the majority's position in BE & K that its sweeping protection of employer lawsuits was somehow dictated by the Supreme Court is simply incorrect, as Member Walsh and I pointed out in dissent.

D. I have touched on only some of the Board's September decisions. But rather than discuss all of them, I would point out that none of these decisions should have surprised a careful observer of the current Board. They represent the crest of a wave set in motion five years ago, when the labor-law tide turned.

Where decisional choices are available to the Board, the choice too often selected narrows statutory coverage or protection. Fewer workers have been afforded fewer rights; employee rights are subordinated to countervailing business interests; meaningful remedies are denied; and recent decisions that tried to update the law have been overruled. Increasingly, the Board has adopted a formalistic approach to interpreting the law, turning away from the real world and the challenges it poses for labor policy.[19]

To begin, the 2001-present Bush Board (in its various incarnations) has almost reflexively overruled many of the key decisions issued by the prior Clinton Board, which had endeavored to update the law by affording greater protections to workers in an evolving economy. For example, modest efforts were made to give more workers coverage under the Act's protections,[20] to enhance the ability of contingent workers to engage in collective bargaining,[21] to preserve representational rights after a corporate merger or consolidation,[22] and to provide non-union workers (more than 90 percent of today's private sector workforce) with an important protection against unfair discipline.[23]

Simultaneously, the present Board majority has undermined long-established doctrines that promote collective bargaining by allowing employers and unions to enter into voluntary recognition arrangements.[24] The Board has demonstrated a corresponding reluctance to revisit doctrines that hinder collective bargaining by allowing employers to unilaterally terminate collective bargaining relationships,[25] making it more difficult to bring the "necessary party" into the collective bargaining process,[26] facilitating employer pressure on employees to reject unionization,[27] placing artificial barriers in front of voluntary recognition of unions by employers,[28] and permitting employers to retaliate against employees for engaging in statutorily-protected conduct.[29]

Perhaps the best illustration of the Board's current decisionmaking is its 2006 decision in Oakwood Healthcare, Inc.,[30] interpreting key terms in the Act's definition

of a "supervisor." This decision came in the wake of the Supreme Court's decision in Kentucky River,[31] which had rejected the Clinton Board's attempt at a limiting interpretation with respect to professionals. In Oakwood, the Board majority—relying on dictionary definitions of ambiguous statutory terms, without explaining the choice among definitions—selected a more-expansive-than-necessary reading of the supervisory exclusion. The majority expressed its indifference to the impact of its decision, rejecting what it called the dissenters' "results-driven approach" in looking to the potential real-world consequences of the majority's interpretation.[32] The Board thus issued a decision that potentially swept many professional employees outside of the Act's protection, while failing to engage in the sort of reasoned decision making that Congress expected from the Board.

Unfortunately, Oakwood reflects a trend to limit the coverage of the Act itself.[33] When non-traditional (or non-traditionally employed) workers have sought to organize themselves into a union, the Board majority has denied them statutory "employee" status: graduate teaching assistants,[34] disabled workers,[35] artists' models,[36] and newspaper carriers.[37] The Board has also limited the ability of contingent employees—workers supplied by one employer to another—to engage in collective bargaining.[38]

In these cases, the majority justified its decisions on dubious policy grounds, giving little weight to the plain language of the Act (which is perhaps surprising, given the majority's adherence to a narrow textualism in Oakwood).[39] The Board largely ignored the economic realities of the employment relationships in question, and declined to exercise its discretion to afford a broader group of workers a right to collective representation.

What is the result? Fewer workers have fewer rights under the Act. In several recent decisions, the Board majority has chosen a very confined view of "concerted" activity for the purpose of "mutual aid or protection," as protected by section 7 of the Act.[40] All private sector workers covered by the Act, union-represented or not, have the right to engage in these activities. Yet, in IBM Corp.,[41] the Board held that, unlike unionized workers, employees in the non-union sector have no right to a witness at an investigatory interview that might lead to discipline. IBM reversed the recent Epilepsy Foundation[42] decision, which was significant not just for its specific holding, but also for its reminder that the statute's protections apply to unrepresented workers, whether they know it or not.[43] With IBM, the Board signaled that it was not prepared to treat non-union workers as fully within the Act's protection. Because so few private sector employees are unionized, statutory protections for non-union workers have never been more important. Such workers do, in fact, spontaneously act together to seek better working conditions,[44] and thus the Act might well matter to them.

The Board majority regularly has found that employee statutory rights must yield to countervailing business interests. These interests are far-ranging. They include private property rights (including an employer's property interest in a piece of scrap paper used to post a union-meeting notice),[45] various managerial prerogatives,[46] business justifications,[47] notions of workplace decorum and civility,[48] and employer free speech rights.[49] In cases involving unionized workers, the decisions signify a laissez-faire approach to bargaining, giving employers free rein to operate without meaningful bargaining.[50] Where non-unionized workers were involved, these cases signal that their right to join together to improve working conditions is largely illusory. In several cases, intimidating employer statements made during an organizing campaign were found to be lawful expressions of employer free speech.[51] But where employees make statements or engage in conduct seen as exceeding rules of civility, decorum, or loyalty, the employees have been held to have lost the protection of the Act.[52] These decisions suggest an underlying discomfort with government regulation of business, the notion of collective action, and the zeal that may accompany those efforts: the fundamental premises of this statute.

Although truly meaningful and effective remedies for unfair labor practices are limited under the Act, the Board nonetheless has refused to exercise the full remedial discretion it does have. For example, the Board has been reluctant to pierce the corporate veil to impose liability for unfair labor practices.[53] The regular refusal to issue Gissel bargaining orders (which require an employer to recognize a union with majority support, where the employer's unfair labor practices have frustrated the election process) is another such example.[54] So too is the continuing rejection of the "minority" bargaining order, where an employer's egregiously unlawful conduct has prevented a union from establishing majority support.[55] The Board has also shown no interest in adopting new modest monetary remedies for victims of discrimination.[56] Indeed, the Board's rulings have created new obstacles to backpay awards.[57] Decisions about other minor remedial innovations, such as the electronic posting of required notices to employees, have been deferred for no compelling reason.[58]

Some of the Board's recent decisions have failed to survive judicial scrutiny.[59] Other decisions have navigated the layers of precedent by ignoring precedent entirely or by distinguishing earlier cases on abstract, questionable grounds.[60] And too many decisions have cast doubt on precedent unnecessarily, or have applied it reluctantly, suggesting that the law may soon change, and sowing confusion.[61] This kind of decisionmaking is of little use to parties struggling to make sense of their statutory rights and duties. While it may dispose of particular cases, it is ultimately unhelpful in shaping a coherent national labor policy.

Meanwhile, the Board's approach to exercising and preserving its own authority is contradictory. It has jealously guarded its representation-case functions (discouraging union attempts to organize outside the Board's procedures),[62] while eagerly deferring to dubious arbitration decisions in unfair labor practice cases (sometimes frustrating the vindication of statutory rights).[63]

Perhaps this contradiction can be explained by the Board's orientation toward protecting employee free choice in the narrow sense: taking special care to ensure that employees are free to refrain from union activity and to reject union representation, while showing little concern about the rights of employees to engage in concerted activity, to choose (and keep) a union, and to be free from anti-union discrimination. Several Board decisions have made it more difficult for unions to organize workers.[64] As discussed above, the Board has rolled back protections for "salts," union members who seek employment to engage in organizing activity.[65] Other decisions have shown a disappointing reluctance to confront what clearly seemed to be wholescale employer discrimination in hiring.[66] Tellingly, the Board has stated expressly, for the first time, that the exercise of employee free choice is superior in the statutory scheme to the stability of collective bargaining.[67] This elevation of one of two competing ideals in the Act undoes the delicate balance long established in Board doctrine, and signals a devaluing of what is unique about this statute: the protection of collective rights.

E. My testimony today has largely been a reprise of my disagreements with the Board's majority. Regrettably, the Board is deeply divided. I wish that the Board were moving the law in a better direction, in harmony with the goals of the statute. But let me end my testimony by echoing the remarks that I made at my last swearing-in and by explaining why—even being in the minority, and even at a difficult historical moment—I feel honored to serve on the Board and to pursue the values embodied in our labor law.

Every day, I read cases involving working people who, despite the odds and the obstacles, join together to improve life on the job. They work on assembly lines and in cardiac wards, on construction sites and in mega-stores. They slaughter hogs and drive trucks, clean hotel rooms and care for the disabled. Sometimes they have unions to help them, but other times they act spontaneously to help each other—a reminder that solidarity is part of who we are. As long as that is the case, then the values embodied in the Act are living values, even after 71 years.

Whatever its flaws and anachronisms, and whatever the lapses made by the Board in applying it, the National Labor Relations Act is a remarkable piece of legislation. At its heart, the Act is a human rights law. No one in 1935 would have labeled the statute that way, but the label is accurate. The concept of fundamental rights at work is now part of the international legal order. Freedom of association and the freedom to engage in collective bargaining are recognized as core principles of a democracy. The National Labor Relations Act is the foundation of our commitment to values now recognized around the world.

Today's labor laws were the product of tremendous struggle. We honor that struggle when we take the Act seriously, when we enforce it fairly and thoughtfully, and even when we point out its shortcomings. Certainly, the Board operates under significant constraints: a judicial, political and economic climate indifferent or even hostile to collective bargaining; an arguably antique statute, and a lack of administrative will. Yet I would suggest that the Board, even under the current statutory scheme, can play a modest but meaningful role in preserving the values of this Act and in furthering its aims. Its failure to do even that is an unfortunate lost opportunity. At a time when union membership is at a historic low point, and the earnings gap growing, recent Board decisions are reinforcing trends that imperil collective bargaining as a national policy goal and that threaten to undo Congressional assumptions about collective action as a means to redress economic inequality. Restoring federal labor law to its intended purposes is obviously no panacea. But it would be a step in the right direction.

Thank you again for the opportunity to participate in this hearing.

ENDNOTES

[1] Dana Corp., 351 NLRB No. 28, slip op. at 11 (Sept. 29, 2007) (dissent).

[2] I have addressed this larger issue in an article that is forthcoming in the Berkeley Journal of Labor and Employment Law. Wilma B. Liebman, Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board, 28 Berkeley J. Employment & Labor L. 569 (2007). I have submitted the article for inclusion in the hearing record.

[3] The current Board has been, and remains, deeply divided, in cases both large and small. The percentage of dissents may be unprecedented. In 1984, during what is generally regarded as the most contentious period in the Board's recent history—the tenure of Chairman Donald Dotson—there were dissents in about 17% of all cases, counting dissents by any Member of the Board. In comparison, during Fiscal Year 2007, Member Dennis Walsh and/or I dissented in about 34% of the cases.

[4] See references in 28 Berkeley J. Employment and Labor L. at 570-71.

[5] The Board has experienced a dramatic, and unprecedented, decline in case filings in the past decade. Between fiscal years 1997 and 2007, the number of representation petitions filed dropped from 6,179 to 3,324, a 46% decline. (From 2005 to 2006 alone, the representation case intake dropped by 26%.) For the same ten-year period, unfair labor practice charges dropped from 33,439 to 22,147, a 34% decline.

[6] Any person may file an unfair labor practice charge with the Board, attacking the union's majority support as unlawfully coerced. That procedure may lead the Board to require the employer to withdraw recognition from the union.

[7] See Keller Plastics Eastern, Inc., 157 NLRB 583 (1966); Sound Contractors, 162 NLRB 364 (1966).

[8] Dana Corp., 341 NLRB 1283, 1284 (2004) (dissent).

[9] NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 750 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).

[10] 351 NLRB No. 28, slip op. at 17.

[11] Notably, the Board has required unions to provide employees with information related to the required payment of dues. See California Saw & Knife Works, 320 NLRB 224 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998).

[12] Wurtland was decided by a three-Member panel of the Board; I did not participate in the decision. I agree with Member Walsh's dissenting view, however.

[13] Curiously, the Dana majority contrasted union authorization cards used to win voluntary recognition with an anti-union employee petition, asserting that the petition would lead to an election. 351 NLRB No. 28, slip op. at 6 fn. 19. That assertion is simply wrong, as Wurtland demonstrates.

[14] For another example of this orientation, see the Board's August 2007 decision in Shaw's Supermarkets, Inc., 350 NLRB No. 55 (2007). There the Board permitted an employer to withdraw recognition from the union after the third year of a five-year agreement, even though the employer would not be permitted to file a petition for an election at that point, and even though a petition for a decertification election filed by employees was pending at the Board. In response to my dissent, the majority stated:

[T]his is a case where the employer is responding to an unsolicited and uncoerced expression of a loss of majority support for the union as a bargaining representative. Our dissenting colleague states that we do not seem to believe that that a Board election, based on the employee-filed petition, will vindicate employee freedom of choice. This is untrue. Rather, our concern is that, in the time it takes to ultimately resolve the representation case, employees will be forced to endure representation that they have unquestionably rejected. Id., slip op. at 4-5 (emphasis added).

The alarm about Board election delays that justified withdrawals of recognition in Shaw's and Wurtland is expressly minimized in Dana. 351 NLRB No. 28, slip op. at 6-7.

[15] NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995).

[16] The courts have held, notably, that job-applicant testers have standing to sue under Title VII of the Civil Rights Act, as Member Walsh and I pointed out in our Toering dissent. 351 NLRB No. 18, slip op. at 16 & fn. 12, citing Kyles v. J.K. Guardian Security Services, 222 F.3d 289, 300 (7th Cir. 2000).

[17] See, for example, Paul C. Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA, 96 Harv. L. Rev. 1769, 1789 (1983).

[18] The case was decided by a three-Member panel. I did not participate in the decision, but I agree with Member Walsh's dissent.

[19] See, e.g., Bath Iron Works Corp., 345 NLRB No. 33 (2005); Boghosian Raisin Packing Co., 342 NLRB 333 (2004); Alexandria Clinic, 339 NLRB 1262 (2003).

[20] New York Univ. Medical Ctr, 332 NLRB 1205 (2000), overruled by Brown Univ., 342 NLRB 483 (2004).

[21] Sturgis, 331 NLRB 1298 (2000), overruled by Oakwood Care Ctr, 343 NLRB 659 (2004).

[22] St. Elizabeth Manor, 329 NLRB 321 (1999), overruled by MV Transp., 337 NLRB 770 (2002).

[23] Epilepsy Found., 331 NLRB 676 (2000), overruled by IBM Corp. 341 NLRB No. 148 (2004).

[24] See, e.g., Dana Corp., 351 NLRB No. 28 (2007) (establishing window period for filing decertification petition, following employer's voluntary recognition of union); Shaw's Supermarkets, 343 NLRB 963 (2004) (granting review to consider whether employer waived right to Board election, and whether to permit such waiver with respect to after-acquired stores where union demonstrates majority support). See also Supervalu, Inc., 351 NLRB No. 41 (2007) (holding that contract provision requiring employer to recognize union at newly-organized stores was not mandatory subject of bargaining, absent proof that stores would be included in existing bargaining unit); Marriott Hartford, 347 NLRB No. 87 (2006) (granting review to consider whether union

had demanded voluntary recognition, permitting employer to file election petition with Board, where union sought agreement for card-check recognition).

[25] Nott Co., 345 NLRB No. 23 (2005) (permitting employer to withdraw recognition from union and repudiate collective-bargaining agreement, following employer's acquisition of non-union business and consolidation of union and non-union workforces of equal size).

[26] Airborne Freight Co., 338 NLRB 597 (2002) (declining to revisit current standard for determining joint-employer status, which requires direct and immediate control over matters relating to employment relationship).

[27] Frito-Lay, 341 NLRB 515 (2004) (following precedent that permits employer "ride-alongs" in which employer officials accompany truck drivers for up to 12 hours in order to campaign against union).

[28] Elmhurst Care Ctr., 345 NLRB No. 98 (2005) (continuing to prohibit employer from voluntarily recognizing union where employer has hired core group of employees, but is not yet engaged in normal business operations).

[29] Reynolds Electric, Inc., 342 NLRB 156 (2004) (continuing to apply rule that discharge of employee for engaging in concerted protected activity is lawful, absent showing that employer was aware of concerted nature of activity).

[30] 348 NLRB No. 37 (2006).

[31] 532 U.S. at 706.

[32] 348 NLRB No. 37, slip op. at 3.

[33] There are two notable exceptions to this trend: the decision to extend the Act's coverage to casinos on tribal reservations, San Manuel Indian Bingo & Casino, 341 NLRB 1288 (2004), enforced, 475 F.3d 1306 (D.C. Cir. 2007), and the decision rejecting the creation of a novel national-security exemption for private airport security screeners, Firstline Transp. Security, Inc., 347 NLRB No. 40 (2006).

[34] Brown Univ., 342 NLRB 483 (2004) (holding that educational relationship is not employment).

[35] Brevard Achievement Cnt., 342 NLRB 982 (2004) (holding that rehabilitative relationship was not employment).

[36] Pa. Acad., 343 NLRB 846 (2004) (holding that models were independent contractors).

[37] St. Joseph News-Press, 345 NLRB No. 341 (2005) (holding that carriers were independent contractors).

[38] Oakwood Care Ctr., 343 NLRB 659 (2004).

[39] 348 NLRB No. 37.

[40] See, e.g., Waters of Orchard Park, 341 NLRB No. 93 (2004) (two nurses who phoned a state hotline to report excessively hot conditions in a nursing home were not engaged in protected activity because their call was made in the interest of patient care, not their own terms and conditions of employment); Holling Press, 343 NLRB 301 (2004) (one female worker who sought the assistance of another in her sexual harassment charge against a male supervisor was looking out only for herself and not engaged in activity for mutual aid or protection).

[41] 341 NLRB 1288 (2004).

[42] 331 NLRB 676 (2000), enfd. in relevant part, 268 F.2d 1095 (D.C. Cir. 2001).

[43] The majority justified its action by citing changes in the workplace, and, among other things, "the events of September 11, 2001, and their aftermath." 341 NLRB at 1291. In response, the New York City Bar Association issued a highly-critical position paper, which observed that "[t]o rely on such events in determining the rights of employees under the National Labor Relations Act distorts the legitimate decision making process and injects political considerations into a matter of statutory construction." See New York City Bar Association, Media Advisory, The New York City Bar Association Opposes NLRB Decision To Rely on the Terrorism Threat as a Reason to Deny Non-Union Employees The Right to Have A Representative Present During Disciplinary Interviews (Oct. 20, 2004); available at *http://www.abcny.org/PressRoom/PressRelease/2004—10—20.htm.*

[44] See, e.g., Phoenix Processor, 348 NLRB No. 4 (2006) (unrepresented workers on fish-processing ship engaged in walk-out to protest 16 1/2- hour day; discharge upheld relying on anti-mutiny statute); Quietflex Mfg. Co., 344 NLRB No. 130 (2005) (unrepresented workers engaged in 12-hour protest in employer's parking lot, but did not interfere with access or operations; discharge upheld).

[45] Johnson Tech., Inc., 345 NLRB No. 47 (2005) (finding lawful employer's warning to employee who used scrap paper to replace union-meeting notice that probably had been removed by management official).

[46] Deference to such prerogatives is illustrated by a series of decisions upholding the refusal of employers to provide unions with requested information. See, e.g., Raley's Supermarkets, 349 NLRB No. 7 (2007) (dismissing allegation that employer unlawfully refused to provide union with requested information related to grievance involving employer investigation of alleged supervisory harassment); Northern Indiana Public Serv. Co., 347 NLRB No. 17 (dismissing allegation that employer unlawfully refused to provide union with investigatory interview notes involving alleged threat of violence by supervisor); Borgess Med. Ctr, 342 NLRB 1105 (2004) (refusing to order employer's disclosure of hospital incident reports, despite finding that refusal to provide reports to union was unlawful).

[47] See, e.g., Bunting Bearings Corp., 343 NLRB 479 (2004) (finding business justification for partial lockout limited to union members in bargaining unit), petition for review granted, 179 Fed. App'x. 61 (D.C. Cir. 2006); Midwest Generation, EME, LLC, 343 NLRB 12 (2004) (finding business justification for partial lockout based on extent of employees' participation in strike), petition for review granted, 429 F.3d 651 (7th Cir. 2005).

[48] See, e.g., American Steel Erectors, Inc., 339 NLRB 1315 (2003) (finding that employer lawfully refused to hire former union employee who had criticized employer's job-safety record before state agency); PPG Industries, Inc., 337 NLRB 1247 (2002) (finding that employer lawfully disciplined employee who used vulgarity in characterizing employer's conduct toward co-worker

being solicited to sign union card). See also Fineberg Packing Co., 349 NLRB No. 29 (2007) (finding that employer did not condone unlawful walkout by employees, despite manager's statement to employees that he was not firing anyone and that employees should "come back tomorrow").

[49] See, e.g., Aladdin Gaming, LLC, 345 NLRB No. 41 (2005) (finding lawful a management official's interruption of off-duty employees' conversation about signing union authorization cards); Werthan Packaging, Inc., 345 NLRB No. 30 (2005) (finding no objectionable election conduct where manager interrogated employee and stated that voting for union was not in best interests of employee and her family).

[50] See, e.g., Garden Ridge Mgmt., Inc., 347 NLRB No. 13 (2006) (dismissing allegation of surface-bargaining by employer and permitting withdrawal of union recognition), on motion for reconsideration, 349 NLRB No. 103 (2007) (denying General Counsel's motion for reconsideration); Richmond Times-Dispatch, 345 NLRB No. 11 (2005) (finding that employer did not claim inability to pay bonus and so lawfully refused to provide financial information to union, following employer's claim that it was "unable to pay" annual bonus and had "no choice" but to cancel bonus); Sea Mar Cmty. Health Ctrs., 345 NLRB No. 69 (2005) (finding no violation in employer's refusal to bargain over closure of operation that was established by official without approval by upper management).

[51] See, e.g., Medieval Knights, LLC, 350 NLRB No. 17 (2007) (finding that consultant's statement that hypothetical employer could lawfully "stall out" contract negotiations was not threat that electing union would be futile); TNT Logistics No. Am., Inc., 345 NLRB No. 21 (2005) (finding that supervisor's unsupported statement that employer would lose only customer if employees unionized was lawful expression of personal opinion); Manhattan Crowne Plaza Town Park Hotel Corp., 341 NLRB 619 (2004) (finding that employer's statement recounting mass discharge of recently-unionized employees at another employer's hotels was not threat of reprisal); Curwood, Inc., 339 NLRB 1137 (2003) (finding that employer's letter stating that customers viewed unionization negatively was lawful).

[52] See, e.g., Five Star Transportation, Inc., 349 NLRB No. 8 (2007) (upholding employer's refusal to hire school bus drivers, employed by prior contractor, who had criticized employer in letters to school board).

[53] See, e.g., Flat Dog Productions, Inc., 347 NLRB No. 104 (2006). In one recent glaring example, the Board majority refused to pierce the corporate veil to hold corporate co-owners personally liable for backpay obligations to employees who suffered financial consequences of flagrant unfair labor practices. By the time of the backpay proceedings, the co-owners had distributed all of the company's funds to themselves. The Board majority held, however, that because the distributions occurred before the unfair labor practice charges were filed, the distributions did not constitute an evasion of the company's legal obligations. A.J. Mechanical, Inc., 345 NLRB No. 22 (2005). The United States Court of Appeals for the District of Columbia Circuit disagreed, stating bluntly:

Surely, it is reasonable to infer that a thief who robs a bank in broad daylight knows well before the date of his indictment that he may one day face criminal liability. The corporate conduct at issue here is the labor-law equivalent of a daylight robbery. It was neither subtle nor close to the line of legality.

Carpenters and Millwrights, Local Union 2471 v. NLRB, 481 F.3d 804 (D.C. Cir. 2007). See also US Reinforcing, Inc., 350 N.L.R.B. No. 41 (2007) (refusing to find that two companies were alter egos, where principals co-habited but were not married).

[54] See, e.g., Hialeah Hospital, 343 NLRB 391 (2004).

[55] First Legal Support Services, 342 NLRB 350 (2004).

[56] Hotel Employees, Local 26, 344 NLRB No. 70 (2005) (declining to order "tax compensation" remedy for victim of discrimination who incurs heightened tax burden as result of receiving lump sum backpay award).

[57] St. George Warehouse, 351 NLRB No. 42 (2007) (reversing precedent and placing burden on General Counsel to produce evidence concerning discriminatee's job search, when employer demonstrates availability of jobs), and Grosvenor Resort, 350 NLRB No. 86 (2007) (denying backpay to discriminatees for not seeking work quickly enough and for not seeking interim employment while waiting for previously secured interim employment to commence), discussed more fully above. See also Anheuser-Busch, Inc., 351 NLRB No. 40 (2007) (reversing precedent and holding that employees discharged based on information from unlawfully-installed security cameras are not entitled to remedy); Aluminum Casting & Engineering Co., 349 NLRB No. 18 (2007) (denying employees full backpay for unlawfully withheld wage increase); Georgia Power Co., 341 NLRB 576 (2004) (denying employee unlawfully withheld promotion because General Counsel failed to prove that employee "certainly" would have been promoted).

[58] Nordstrom, Inc., 347 NLRB No. 28 (2006).

[59] See Jochims v. NLRB, 480 F.3d 1161, 1164 (D.C. Cir. 2007) (reversing Board's finding of supervisory status, observing that "the Board completely deviated from its own precedent and issued a judgment that is devoid of substantial evidence"); Guardsmark, LLC v. NLRB, 475 F.3d 369 (D.C. Cir. 2007) (reversing Board's finding that employer's anti-fraternization rule was lawful); United Steel Workers v. NLRB, 179 Fed. Appx. 61 (D.C. Cir. 2006) (remanding, as inconsistent with precedent, Board's finding that partial lockout was non-discriminatory, and observing that it was "not appropriate" for Board to "speculate" as to employer's motive for lockout, given employer's burden of proof); New England Health Care Employees Union v. NLRB, 448 F.3d 189, 193 (1st Cir. 2006) (reversing Board's "arbitrary and capricious" determination that employer lawfully refused to reinstate economic strikers, based on secret hiring of permanent replacements); International Chemical Workers Union Council v. NLRB, 447 F.3d 1153 (9th Cir. 2006) (reversing, based on lack of substantial evidence, Board's determination that employer did not plead inability to pay and thus lawfully refused to provide financial information to union during bargaining); Slusher v. NLRB, 432 F.3d 715 (7th Cir. 2005) (reversing Board's determination that employer lawfully discharged union steward for purportedly harassing anti-union

employee); Local 15, Int'l Bhd. of Electrical Workers v. NLRB, 429 F.3d 651 (7th Cir. 2005) (reversing Board's determination that partial lockout was non-discriminatory and remanding with instructions to find lockout unlawful); Brewers & Maltsters, Local Union No. 6 v. NLRB, 414 F.3d 36 (D.C. Cir. 2005) (reversing, based on conflict with precedent, Board's refusal to grant make-whole remedy to employees disciplined as result of employer's unlawful installation of surveillance cameras).

[60] See, e.g., Bath Iron Works, 345 NLRB No. 33 (2005), enf'd., 475 F.3d 14 (1st Cir. 2006) (dissenting opinion) (implicating "competing analytical approaches where an employer claims the right to act unilaterally with respect to a mandatory subject of bargaining, based on language in a collective-bargaining agreement").

[61] See, e.g., American Red Cross Missouri-Illinois Blood Services Region, 347 NLRB No. 33 n. 21 (2006); Construction Products, Inc., 346 NLRB No. 60 n. 1 (2006); Siemens Building Tech., 345 NLRB No. 91 n. 5 (2005); Vanguard Fire & Supply Co., Inc., 345 NLRB No. 77 n. 9 (2005); Daimler-Chrysler Corp., 344 NLRB No. 154 fn. 1 (2005); Contract Flooring Systems, Inc., 344 NLRB No. 117 at 1 (2005); Meijer, Inc., 344 NLRB No. 115 n. 7 (2005).

[62] See, e.g., Boeing Co., 349 NLRB No. 91 (2007); Advanced Architectural Metals, Inc., 347 NLRB No. 111 (2006); United States Postal Serv., 383 NLRB. No. 3 (2006).

[63] See, e.g., Kvaerner Phila. Shipyard, Inc., 347 NLRB No. 36 (2006); Smurfit-Stone Container Corp., 344 NLRB No. 82 (2005); Aramark Services, Inc., 344 NLRB No. 68 (2005).

[64] Teamsters Local 75 (Schreiber Foods), 349 NLRB No. 14 (2007) (finding that union unlawfully charged objecting non-members for organizing expenses, where union failed to prove that organizing within same industry leads to increased union wage rates); Randell Warehouse, Inc., 347 NLRB No. 56 (2006) (reversing Clinton Board precedent and finding that union's videotaping of campaign-literature distribution was objectionable); Harborside Healthcare, Inc., 343 NLRB 906 (2004) (reversing precedent and liberalizing standard for finding pro-union supervisory conduct objectionable in context of representation elections). See also Correctional Medical Services, Inc., 349 NLRB No. 111 (2007) (upholding discharge of unrepresented employees who picketed health-care employer, based on union's failure to provide statutorily-required advance notice).

[65] See Toering Electric Co., 351 NLRB No. 18 (2007) (requiring General Counsel to prove that salt is genuinely interested in employment with employer, to establish violation in hiring-discrimination case); Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (2007) (reversing judicially-approved precedent and requiring General Counsel to establish duration of remedial period for salts).

[66] Zurn/N.E.P.C.O., 345 NLRB No. 1 (2005), petition for rev. denied, Northern Michigan Bldg. & Const. Trades Council v. NLRB, 2007 WL 1805667 (6th Cir. June 20, 2007).

[67] Nott Co., 345 NLRB No. 23 (2005) ("[A]lthough industrial stability is an important policy goal, it can be trumped by the statutory policy of employee free choice. That policy is expressly in the Act, and indeed lies at the heart of the Act."). For illustration of the consequences of this orientation, see Dana Corp, supra; Shaw's Supermarkets, Inc., 350 NLRB No. 55 (2007)(permitting employer to withdraw recognition from union after third year of five-year agreement, even though petition for election could not be filed); Badlands Golf Course, 350 NLRB No. 28 (2007) (permitting employer to withdraw recognition from union less than three weeks after minimum six-month period of insulated bargaining, following earlier unlawful withdrawal of recognition).

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[Additional submission of Member Liebman follows:]

# ESSAY

# Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board

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*In this Essay, the senior member of the National Labor Relations Board reflects on the aging of American labor law and the agency that administers it. In her view, the National Labor Relations Act, which has not been updated in 60 years, is now out of sync with a transformed economy. Meanwhile, the Board, even accounting for the statutory, judicial and political constraints under which it operates, has failed in its duty to apply the statute dynamically. The author suggests, however, that the stakes are too high to abandon hope for a revitalization of labor law and policy.*

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The views expressed in this article are mine alone and do not reflect the views of any other Board Member or the NLRB.

I have benefited from the scholarly writings of each of the commentators I have cited in this article, but I would especially like to acknowledge Ohio State University Law School Professor James J. Brudney for his thinking on the subject of this article, and, in general, for his scholarship on labor law and policy issues. Special thanks to my Chief Counsel, John F. Colwell, for his invaluable assistance with this article, and generally for his help in carrying out the responsibilities of my position. Likewise, I thank Michael Oswalt, a student at Duke University Law School and a summer law clerk on my staff, for his great assistance with this article. I also wish to thank all the current and former members of my staff for their contribution to the work of this Agency.

## I.
## INTRODUCTION

Today, more than seventy years after passage of a law intended to encourage collective bargaining and equalize bargaining power between labor and capital, there is rapidly rising income inequality,[1] and organized labor, as a percentage of the private sector workforce, is at a historic low point.[2]

Various commentators describe the National Labor Relations Act,[3] enacted in 1935 (the Wagner Act), and "essentially unchanged since 1947"[4] (the Taft-Hartley Act amendments),[5] as dead, dying, or at least "largely irrelevant to the contemporary workplace"—a doomed legal dinosaur.[6] In their view, the Act has failed to protect workers' rights to organize and to promote the institution of collective bargaining. Scholars contend that labor law suffers from "ossification."[7] Some even say that it is "contributing to the demise of the very rights it was enacted to protect."[8] Collective action seems "moribund."[9] Supporters of the Act are "in despair."[10] The National

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1. Analysis of Internal Revenue Service data reveals that the earnings gap is now the widest since 1928, with the richest 1% of Americans having captured most of the economy's 2005 growth, and the bottom 90% getting nothing. David Cay Johnston, *Income Gap is Widening, Data Shows*, N.Y. TIMES, Mar. 29, 2007. *See also* Greg Ip, *The Gap in Wages is Growing Again for U.S. Workers*, WALL ST. J., Jan. 23, 2004 (describing the declining power of unions as a factor in widening income disparities).

2. Union membership has declined from about 35 percent of the private sector workforce in the mid-1950s to less than 8 percent today. Steven Greenhouse, *Labor Seeks Boost From Pro-Union Measure*, N.Y. TIMES, Feb. 23, 2007, at A1; Press Release, Bureau of Labor Statistics, *Union Members in 2006* (Jan. 25, 2007), *available at* http://www.bls.gov/news.release/union2.nr0.htm.

3. 29 U.S.C. §§151-169 (2000).

4. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 942 (1996) [hereinafter Brudney, *A Famous Victory*].

5. 29 U.S.C. §§ 141-187 (2000).

6. Brudney, *A Famous Victory*, *supra* note 4, at 942. See Cynthia Estlund, *The Death of Labor Law*? NYU Law School, Public Law Research Paper No. 06-16, 2 Ann. Rev. of L. & Social Science (Dec. 2006). For a management lawyer's perspective, see Harry Sangerman, NLRB: DOA?, 33 EMPLOYEE RELATIONS L. J. 74 (2007). See also Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POLICY R. 375 (2007), for the view that the dysfunction of the system of labor law has given rise to innovation.

7. In writing about labor law's "ossification," New York University Law School Professor Cynthia Estlund observed, "I know of no other major American legal regime—no other body of federal law that governs a whole domain of social life—that has been so insulated from significant change for so long." Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). *See also* James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1572 (1996) [hereinafter Brudney, *Reflections*] ("Without expressly saying so, Congress has declined to make a continuing commitment to group action as a means of regulating the workplace.").

8. Brudney, *A Famous Victory*, *supra* note 4, at 942. *See also* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 938, 943-45 (2007).

9. Brudney, *Reflections*, *supra* note 7, at 1563.

10. Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993).

Labor Relations Board, charged with administering the Act, is "isolated and politicized."[11] "What went wrong?" and "Can we fix it?" are the questions of the day.[12]

Meanwhile, the Board's case intake has plummeted.[13] Increasingly disillusioned with the law's ability to protect worker rights, labor unions have turned away from the Board, and especially from its representation procedures.[14] This disenchantment has intensified in recent years as the Board, in case after case, has narrowed the statute's coverage, cut back on its protections, and adopted an increasingly formalistic approach to interpreting the law.[15] More and more, unions are seeking to negotiate recognition in the workplace rather than use the Board's election machinery.[16] And, in a historical twist, organized labor has turned increasingly to state and local governments for help in protecting workers,[17] with diminished hope that the federal government can be a guarantor of important rights.[18] Whether labor is right or wrong about the Board makes

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11. James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005) [hereinafter Brudney, *Isolated*].

12. Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, B.C. L. REV. 125 (2003).

13. The Board's representation case intake has declined by 26% from 2005 to 2006. From 1997 to 2007, it declined by 41%. During that same ten-year period, unfair labor practice case intake declined by 31%. BNA DAILY LABOR REPORT, *Board Inventory Lowest in Decades*, Jan. 17, 2007, at S9.

14. UNITE HERE President Bruce Raynor recently stated that the "government labor relations environment" has become "dysfunctional," forcing unions to decide "whether they want the NLRB structure to continue." *NLRB in Decline, Distrusted, Board Member, Union Leader, Say*, BNA DAILY LABOR REPORT, Jun. 4, 2007, at C1.

15. *See infra* notes 74-130 and accompanying text.

16. *See, e.g.*, David Wessel, *Capital: Some Workers Gain With New Union Tactics*, WALL ST. J., Jan. 31, 2002; James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005); Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, 16 LAB. LAW. 201 (2000) (criticizing the increased use of recognition agreements in union organizing).

17. *See, e.g.*, Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Law?*, LERA Meetings, Jan. 2006 (forthcoming as *The Promise of Progressive Federalism*, *in* MAKING THE POLITICS OF POVERTY AND INEQUALITY (Jacob Hacker, Suzanne Mettler & Joseph Soss eds., 2007);,*available at* http://www.press.uillinois.edu/journals/irra/proceedings2006/freeman.html; Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 404-08 (2001) (discussing the prevalence of union neutrality agreements with state and local entities); Chamber of Commerce v. Lockyer, 463 F.3d 1076 (9th Cir. 2006) (en banc), *cert. pending* (finding a California law, which forbade employers receiving state funds from using those funds on union-related speech, was not preempted by the NLRA); Healthcare Ass'n v. Pataki, 471 F.3d 87 (2nd Cir. 2006), *petition for en banc rehearing en banc pending* (challenging a New York State law that forbade employers receiving state funds from using those funds to encourage or discourage union organization).

18. BNA DAILY LABOR REPORT, *supra* note 14, at C1. In 2002, then-HERE President John Wilhelm had this to say about the NLRB election system: "We have concluded that the system is simply broken and won't be fixed until there's a realization in Congress that workers don't have the right to organize under the present system." David Wessel, *Some Workers Gain with New Union Tactics*, WALL ST. J., Jan. 31, 2002.

little difference. In this case, the perception of the law's failure is what matters.

Something has indeed gone wrong. Somewhere along the way, New Deal optimism has yielded to raw deal cynicism about the law's ability to deliver on its promise. The National Labor Relations Act, by virtually all measures, is in decline if not dead. Nor, at least until recently, has there been any real prospect for labor law reform.[19]

In this context, what remains of the Act's original promise to achieve "economic advance and common justice"?[20] Is the NLRB destined to operate on the legal margins of a failed statute? Certainly, the Board operates under significant constraints: a judicial, political, and economic climate indifferent or even hostile to collective bargaining; an arguably antique statute; and a lack of administrative will. Yet I would suggest that the Board, even under the current statutory scheme, can play a modest but meaningful role in preserving the values of this Act and in furthering its aims. Its failure to do even that is an unfortunate lost opportunity.

In this Essay, I will sketch the historical arc of the Act's decline, describe the factors that constrain the Board in seeking to keep the Act relevant in the contemporary workplace, and examine the Board's own recent tendency to accelerate the downward trend. There are reasons enough for disenchantment with labor law, I readily acknowledge, but there are also grounds to reject despair.

## II.
## HOW TIME TARNISHED THE ACT

Unquestionably, the National Labor Relations Act generated enormous optimism about its promise of economic justice through collective action.[21] It was a centerpiece of President Franklin Roosevelt's Second New Deal, which focused on reviving the Great Depression economy through regulation of business.[22] Over the next twenty-five years, millions of

19. *See generally* Employee Free Choice Act, H.R. 800, 110th Cong. (2007); Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act, H.R. 1644, 110th Cong. (2007).

20. 79 CONG. REC. 10720 (1935) (statement of President Franklin D. Roosevelt upon signing the National Labor Relations Act (the Wagner Act), on July 5, 1935); LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3269 (1935).

21. *See* ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985, 40 (1986) ("The National Labor Relations (or Wagner) Act was one of the seminal enactments in American history"); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 151 (1963) ("The Wagner Act was one of the most drastic legislative innovations of the decade").

22. *See* LEUCHTENBURG, *supra* note 21, at 163 ("1935 marked the birth of a Second New Deal"); THE DEVELOPING LABOR LAW 25 (John E. Higgins, Jr. ed.) (5th ed. 2006) ("The Great Depression and the advent of President Franklin D. Roosevelt's New Deal spawned a political climate that was favorable—or at least tolerant of—the major federal legislation thought necessary at the time to promote the growth of organized labor.").

workers voted for union representation in NLRB-conducted elections.[23] And millions achieved a middle-class way of life through collective bargaining and agreements that provided fair wages and benefits in major industries of the economy.[24] This was the golden age of collective bargaining. For several decades, the labor law regime worked, and so it was respected. The law seemed to promise, and to some extent delivered, workplace democracy and equality in bargaining power.[25] The Act was remarkable for pioneering the administrative agency model,[26] and for its record of replacing sometimes-bloody labor conflict with the orderly procedures of the law.[27]

The story of faded trust in the law unfolded gradually. By 1983, Harvard Law School Professor Paul Weiler lamented that "[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution."[28] By then, organized labor was in steady decline.[29] In 1981, President Reagan fired striking air-traffic controllers, a watershed event.[30] The economy was changing dramatically.[31] Foreign trade had begun to surge;[32] technology was beginning to transform ways of communicating and doing business;[33] oil prices were climbing;[34] a major

23. By the mid-1950s, unions had come to represent around 35% of the private sector workforce. *See* ZIEGER, *supra* note 21, at 193.

24. *See* ZIEGER, *supra* note 21, at 137 ("The 1950s and 1960s were years of advance for working people and for the labor movement . . . . Organized labor . . . achieve[d] security and influence of unprecedented proportions. Union membership continued to grow . . . . Bold collective bargaining gains . . . decisively transformed workers' life styles, both on the shop floor and in the larger society.").

25. American family incomes grew by an average of 2.8% a year from 1947 through 1973, with every sector of society seeing its income roughly double. LAWRENCE MISHEL, JARED BERNSTEIN & SYLVIA ALLEGRETTO, THE STATE OF WORKING AMERICA, 2006/2007, 44-47 (2007).

26. *See generally* PETER IRONS, THE NEW DEAL LAWYERS 296 (1982) (calling the administrative process the "characteristic instrument of political and economic reform" of the twentieth century and the NLRB the "signal demonstration of the phenomenon").

27. The NLRA appeared to provide a peaceable resolution to the labor conflicts that had afflicted American society for generations. "Trials of combat" were replaced by the "orderly procedures" of the law, and largely disappeared after its enactment. The enormous wave of strikes that followed World War II was accompanied by little violence, in contrast to those that occurred after World War I. The sharp decline in the level of industrial violence was considered another one of the achievements of the labor law. Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, *in* THE HISTORY OF VIOLENCE IN AMERICA 378-80 (1969).

28. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

29. By 1984, union density in the private sector had declined to under 20%. Labor historian Robert Zieger called the labor movement of the mid-eighties "besieged and uncertain." ZIEGER, *supra* note 21, at 193.

30. RICK FANTASIA & KIM VOSS, HARD WORK 66-67 (2004).

31. ZIEGER, *supra* note 21, at 194-95.

32. *Id.* at 194 (describing the rise in Japanese and Third World imports of core industrial products during the 1980s).

33. *Id.* at 195 (reporting the rise of "high-technology enterprise" in the 1980s).

34. Energy Information Administration Monthly Energy Review, *Petroleum Prices*, May 2007, *available at* http://www.eia.doe.gov/emeu/mer/pdf/pages/sec9_2.pdf (depicting the steep rise in crude oil prices during the early 1980s).

recession had hit the nation;[35] and real wages were stagnating.[36] In collective bargaining, concessions were frequently sought and two-tier wage structures became common.[37]

What followed over the next two decades is familiar. The Cold War ended; technological innovation accelerated; relentless competition, both domestic and global, grabbed the economy; major industries were deregulated; manufacturing declined and the service sector exploded; shifting demographics changed the composition of the workforce; and a fourth wave of immigrants crossed our borders.[38] All of this flux has put severe strains on the collective-bargaining system created by the Act, and on labor and business, both struggling to adapt to and survive in a changing economy.[39]

Through the late 1970s, management's priority in employment practice was to build a stable, loyal workforce.[40] The existing system of labor law was designed with a particular workplace model in mind. This workplace was characterized by a stable contract of hire between a single employer and employees engaged in work of a continuing nature at a fixed location, with hierarchical organization of work and promotion ladders.[41] This model—exemplified by the manufacturing plants of the 1930s and 1940s—is increasingly anachronistic in a post-industrial and fiercely competitive global economy that has led firms to place a premium on flexibility instead

35. THOMAS A. KOCHAN, HARRY C. KATZ, & ROBERT B. MCKERSIE, TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 112-13 (1994).

36. *See id.* at 116-17 (describing the marked slowdown in pay growth throughout the early 1980s).

37. ZIEGER, *supra* note 21, at 194 (discussing the rise of "two-tier systems of compensation" and concession bargaining in the 1980s). *See also* KOCHAN et al., *supra* note 35, at 114-18, 132 (describing concessionary agreements and "two-tier pay system[s]" as phenomena arising in the difficult bargaining environment of the 1980s).

38. BRUCE NISSEN, UNIONS IN A GLOBALIZED ENVIRONMENT 4-7 (2002).

39. *See, e.g.*, Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 10 (1994) (suggesting a vast incompatibility exists between the "premises of our labor relations system and the pressures of competitive product markets"); *see generally* KOCHAN, *supra* note 35, at x-xx (describing the diverse array of external bargaining pressures faced by management and labor in recent years).

40. PETER CAPPELLI, CHANGE AT WORK 16-21 (1997) (describing the traditional employment arrangement of the 1970s as marked by stable training, development, internal promotion, and organizational policies).

41. *See* NISSEN, *supra* note 38, at 168 ("U.S. manufacturing unions [arose] during a particular period of capitalist evolution. This was a period when Fordism was the dominant production regime, when factories were large, and when workers were employed on the assembly line. The height of Fordism coincided with . . . a truce . . . whereby the U.S. government supported the rights of workers to be represented by unions and to engage in collective bargaining with their employers. In turn, business accepted labor unions as part of the institutional framework in which they operated . . . .").

of stability in employment patterns.[42] The social contract that governed employment for decades has been broken.[43]

The employer-employee relationship has changed in many industries, as has the nature of work itself. Work is increasingly contingent, with heavy reliance on outside contractors and staffing agencies.[44] There is continuous job-churning, as technology and skills become obsolete.[45] Restructurings, downsizings, and outsourcings of work abound, as do mergers and consolidations. Vertically-integrated corporations are dis-integrating, with ancillary functions being contracted out.[46]

In this economic environment, unionized bargaining units and bargaining unit work regularly disappear.[47] Organizing workers is therefore a Sisyphean task for unions, and pushing for job security, wages and benefits means pushing uphill as well. With labor weakened, strikes have all but disappeared as an effective weapon in collective bargaining disputes.[48] Compounding the dilemma, business resistance to unionization, which is perceived as a handicap in competing against non-union rivals, is

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42. *See id.* at 169-74 (describing the demise of the Fordist employment regime, and the "globalization and flexible production" employment model that has replaced it. The latter is marked by contracting out, offshore production, worker instability, and "flexibility taken to extremes.").

43. *Id.* at 168 ("The accord has fallen apart.").

44. CAPPELLI, *supra* note 40, at 4 ("[T]raditional methods of managing employees and developing skilled workers inside companies are breaking down. What we see in their place is a new employment relationship where pressures from product and labor markets are brought inside the organization and used to mediate the relationship between workers and management.").

45. As Katherine Stone describes, technological change has spurred "a new constellation of job structures" in the twenty-first century labor market, upsetting long-held assumptions about stability and continuity in the employer-employee relationship. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 289 (2004). But technological change has also led to new jobs, as expanded access to advanced communication and computing equipment creates entrepreneurial opportunities for more and more people. Kevin Taglang, *Meeting Workforce Demands in the Digital Economy*, DIGITAL DIVIDE NETWORK, Dec. 4, 2000, *available at* www.digitaldivide.net/articles/view.php?ArticleID=279. While many new business ventures fail, others prosper, resulting in job churning across the country. *Id.* Indeed, as described by New York Times economics reporter Daniel Gross, today, the United States economy is a "giant job-churning machine," where "each quarter destroys nearly 7 percent of existing jobs and creates a roughly equivalent percentage." Daniel Gross, *Behind That Sense of Job Insecurity*, N.Y. TIMES, Sept. 10, 2006.

46. LYNN A. KAROLY & CONSTANTIJN W.A. PANIS, THE 21ST CENTURY AT WORK 117 (2004). *See also* Virginia Postrel, *Economic Sense: Vertical Integration Worked Well in Its Day; Now Companies Thrive by Turning to Specialists*, N.Y. TIMES, June 19, 2003 ("Since the 1980's, American corporations have been disintegrating—not falling apart, but becoming more specialized. Revenues or production volumes may be as large as ever, but even big companies tend to combine fewer stages of production under the same corporate ownership.").

47. CAPPELLI, *supra* note 40, at 63, 220.

48. In fact, scholars have suggested that workers have effectively lost the right to strike. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004). Indeed, while in 1946, there were nearly 6,000 strikes involving 4.6 million workers, today there are no more than 300 strikes a year. JEREMY BRECHER, STRIKE! 228 (1972); FEDERAL MEDIATION & CONCILIATION SERVICE, 2006 ANNUAL REPORT 7 (2006), *available at* http://fmcs.gov/assets/files/annual%20reports/FY2006_Annual_Report.pdf.

generally strong and often sophisticated.[49] Low union density is both a cause and a consequence of employer resistance.

## III.
## HOW THE BOARD HAS COMPOUNDED ITS CONSTRAINTS

In this historical context, American labor law, enacted when the prototypical workplace was the factory, and the rotary telephone was "the last word in desktop technology,"[50] increasingly appears out of sync with changing workplace realities.[51] Yet the Board itself has made little sustained effort to adjust its legal doctrines to preserve worker protections in a ruthlessly competitive economy. In short, labor law policymakers and enforcers have done too little, too late.

To be sure, even a Board firmly committed to a dynamic application of the law would be limited in what it could do. A variety of factors and forces constrain the Board's discretion, and to this extent, the Board's arguable obsolescence was predictable, given big changes in the American economy and in American society that are beyond its control. But even allowing for its limited power, the Board itself has made things worse, not better, in recent years. After addressing the constraints on the Board, I highlight the Board's recent missteps.

### *A. What Constrains the Board*

Some of the constraints on the Board are inherent in the Act itself, beginning with the statutory text. These constraints also include the Board's own accumulated precedent, a statutory prohibition against employing economists, the oversight of the federal courts, and other factors.

First, there is the statutory text. Written during the industrial era and in the context of a more stable economy,[52] some provisions of the law seem antiquated. Even the statutory bargaining-unit model of collective bargaining may be misaligned with today's economy.[53]

The misalignment between law and reality is particularly well-illustrated by the provisions added to the Act by the 1947 Taft-Hartley Amendments[54] that define the Act's coverage and exclusions. For example,

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49. Estreicher, *supra* note 39, at 4 (disagreeing with general consensus among academic commentators that employer resistance to unionism is the "principal culprit behind the plummeting unionization rate").

50. Michael J. McCarthy, *Sympathetic Ear: Your Manager's Policy On Employees' E-Mail May Have a Weak Spot Labor Board Takes On Rules That Restrict Discussion Of Workplace Concerns Vindicated, but 'Gun-Shy,'* WALL ST. J., Apr. 25, 2000, at A1.

51. *See supra* notes 44-46 and accompanying text.

52. *Id.*

53. *See supra* notes 44-49 and accompanying text.

54. 29 U.S.C. §§ 141-187 (2000).

the exclusion of "supervisors" is defined in terms[55] that are increasingly difficult to apply in settings (especially in non-industrial workplaces) where rank-and-file workers may have greater autonomy, where tiers of mid-level management have been eliminated, and where the lines between "worker" and "supervisor" are increasingly blurred. The Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*, reversing the Board's narrow reading of the supervisory exclusion as applied to nurses with certain authority over nursing assistants, illustrates the dilemma.[56] Writing for the majority, Justice Scalia acknowledged that the Board's interpretation was based on a sound policy argument (maintaining the proper balance of power between labor and management by preserving statutory coverage for professionals).[57] The problem, he said, was that "the policy cannot be given effect through this statutory text."[58]

The 1947 exclusion of "independent contractors" from the definition of employees entitled to the Act's protections similarly highlights the potential for conflict between sensible labor policy and statutory prescriptions.[59] The legislative history made clear that the Board must consider the common-law test for independent-contractor status. Congress specifically rejected the more dynamic approach—which focused on the economic realities of the relationship in light of the Act's goals—that had just been endorsed by the Supreme Court in *NLRB v. Hearst Publications, Inc.*[60] As the *Hearst* Court predicted, adoption of the common law test—"import[ing] this mass of technicality" into the NLRA— "would be ultimately to defeat, in part at least, the achievement of the statute's objectives" because "[m]yriad forms of service relationship with infinite and subtle variations in the terms of employment, blanket the nation's economy."[61] That prediction seems remarkably prescient in today's economic landscape, which reflects even

55. *See* 29 U.S.C. § 152(11) ("The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.").

56. 532 U.S. 706 (2001).

57. *Id.* at 719.

58. *Id.* at 720.

59. *See* 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include any individual having the status of an independent contractor."). For an extended critique of NLRA independent contractor doctrine, *see* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 1 (1999).

60. 322 U.S. 111 (1944). The Board's approach, endorsed in *Hearst*, was sharply criticized by the House Committee report accompanying the 1947 amendments. H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947).

61. *Id.* at 125-127. In *Hearst*, the Supreme Court observed that "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." 322 U.S. at 121.

greater diversity in employment arrangements than the *Hearst* Court observed in the 1940s.

Second, the Board's ability to innovate is constrained by well-established doctrines and more than seventy years of decisions (contained in 345 bound volumes, and counting).[62] The Board acts at its peril if it side-steps precedent, fails to reconcile conflicts in the case law, or overrules precedent without explaining why it is doing so.[63] At the same time, rigidly adhering to precedent without explaining why is the antithesis of the reasoned decision-making required of administrative agencies.[64]

Third, a little known provision of the Act prohibits the Board from employing economic analysts.[65] This provision was added by the 1947 Taft-Hartley Act because some members of Congress suspected the agency's economic researchers of being Communists.[66] It makes the Board ill-equipped to modernize labor law doctrines in response to a changing economy, let alone to make informed decisions based on economic realities. By design or happenstance, this handicap effectively promotes the Board's obsolescence. It is hard to imagine any other New Deal agency—such as the Securities and Exchange Commission or the Federal Communications Commission—operating without the ability to engage in economic research and analysis.

Fourth, there are the constraints imposed by the federal appellate courts, which review Board decisions, and by the Supreme Court. Even from the early days, the courts have sometimes limited the scope of the Act's protections.[67] Now, as union density has declined, jurists are increasingly unfamiliar with the notions of collective bargaining, solidarity, and unionization that inform the Act.[68] Combined with a growing insistence on strict statutory construction principles—such as the narrow

62. *See, e.g.*, Nott Co., 345 N.L.R.B. No. 23 (2005) (dissenting opinion, addressing employer's duty to maintain established bargaining relationship after various business transactions) ("Inevitably perhaps, over the course of nearly 70 years, the Board's decisions have sometimes collided with each other. Layer upon layer of doctrines interpreting the Act have evolved, with inconsistencies sometimes emerging and often unexplained.").

63. *See, e.g.*, Randell Warehouse of Arizona, Inc. v. N.L.R.B., 252 F.3d 445 (D.C. Cir. 2001); ITT Industries, Inc. v. N.L.R.B., 251 F.3d 995 (D.C. Cir. 2001).

64. *See, e.g.*, Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B., 309 F.3d 578 (9th Cir. 2002); *see also supra* Part III.B.

65. *See* 29 U.S.C. § 154(a) ("Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of . . . economic analysis.").

66. JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD 219-21 (1981).

67. *See* Pope, *supra* note 48, at 518; Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

68. Professor Brudney has studied the clash between the Board and the courts, particularly over the tension between the Act's policy to further collective bargaining and preserve its stability and the Taft Hartley-created right to refrain from collective action. Brudney, *A Famous Victory supra* note 4, at 943-47.

textualism suggested by Justice Scalia's statement in *Kentucky River*[69]—the Board's ability to interpret the Act's often-broad language in light of policy considerations, as opposed to dictionary definitions, is considerably limited.

Finally, other inherent constraints on the Board's effective administration of the Act have been thoughtfully described by labor law scholars. These include, notably, the statute's weak remedies, which fail both to deter wrongdoing and to compensate victims of unlawful discrimination,[70] and the contentious process that, at least in the last twenty-five years, often accompanies the nomination and confirmation of Board Members, leading to frequent turnover, extended vacancies, repeated recess appointments, and a resulting delay in deciding cases.[71]

### *B. How the Board Has Lost Its Way and Its Will*

Constrained or not, as an administrative agency responsible for enforcing Congressional policy, the Board does have discretion—indeed, it has a fundamental duty—to "adapt [its] rules and practices to the Nation's needs in a volatile, changing economy."[72] Surely, "the primary function and responsibility of the Board... is that of applying the general provisions of the Act to the complexities of industrial life."[73] But today, the perceived obsolescence of the Board is linked in substantial part to its seeming lack of administrative will.

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69. *See* 532 U.S. at 720 (noting "the policy cannot be given effect through this statutory text").

70. Weiler, *supra* note 28, at 1787-96; Estlund, *supra* note 7, at 1537. For a contrasting view, see the Supreme Court's decision in *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that immigration laws preclude the Board from awarding backpay to undocumented workers who are unlawfully discharged for union activities). Writing for the Court's 5-4 majority, Chief Justice Rehnquist explained:

> Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman—sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair labor practices....We have deemed such 'traditional remedies' sufficient to effectuate national labor policy regardless of whether the 'spur and catalyst' of backpay accompanies them.

*Id.* at 152 (citations omitted).

71. Delays in the legal process also make the system ineffective and deny justice. These delays are not new—the Seventh Circuit famously referred to the NLRB as the "Rip Van Winkle of administrative agencies" some years ago in *NLRB v. Thill*, 980 F.2d 1137, 1142 (7th Cir.1992)—but they became more pronounced after the 1980s, as the appointment process for Board Members became more politicized, thereby resulting in more vacancies, more turnover, and more delays. *See* Brudney, *Isolated*, *supra* note 11, at 243-52; John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. L.1 (2000).

72. American Trucking Assns. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967).

73. Ford Motor Co. v. NLRB, 441 U.S. 448, 496 (1979), quoting NLRB v. Insurance Agents, 361 U.S. 477, 499 (1960); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); and NLRB v. Steelworkers, 357 U.S. 357, 362-363 (1958).

The Board is not only failing to maximize its available discretion, but its recent decisions are marginalizing statutory rights. While any one decision standing alone may not be cataclysmic in impact, viewed together, they represent a pattern of weakening the protections of the Act.[74] Where decisional choices are available to the Board, the choice too often selected narrows statutory coverage or protection. Fewer workers have been afforded fewer rights; employee rights are subordinated to countervailing business interests; meaningful remedies are denied; and recent decisions that tried to update the law have been overruled. Increasingly, the Board has adopted a formalistic approach to interpreting the law, turning away from the real world and the challenges it poses for labor policy.[75] This approach threatens to result in a loss of confidence in the Board's decisionmaking, not simply in terms of the results reached, but also in the way those results are reached.

To begin, the 2001-present Bush Board (in its various incarnations) has almost reflexively overruled many of the key decisions issued by the prior Clinton Board, which had endeavored to update the law by affording greater protections to workers in an evolving economy. For example, modest efforts were made to give more workers coverage under the Act's protections,[76] to enhance the ability of contingent workers to engage in collective bargaining,[77] to preserve representational rights after a corporate merger or consolidation,[78] and to provide non-union workers (more than 90 percent of today's private sector workforce) with an important protection against unfair discipline.[79]

At the time, those decisions triggered widely divergent criticism. A former Board Chairman described the Clinton Board as engaging in "an orgy of overruling existing precedents,"[80] and a management practitioner

74. University of Michigan Law School Professor of Law Emeritus Theodore J. St. Antoine made these observations in remarks to the Headquarters staff of the NLRB on the occasion of the Board's seventieth anniversary. Theodore J. St. Antoine, *After 70 Years of the NLRB: Warm Congratulations—and a Few Reservations*, LAW QUADRANGLE NOTES, Fall 2005, at 98, 101.

75. *See, e.g.*, Bath Iron Works Corp., 345 N.L.R.B. No. 33 (2005); Boghosian Raisin Packing Co., 342 N.L.R.B. 333 (2004); Alexandria Clinic, 339 N.L.R.B. 1262 (2003). For an illustration of the debate between current Board Members on this subject, *see* BNA DAILY LABOR REPORT, *Two Current Board Members Describe Differing Approaches to Decisionmaking*, May 27, 2005, at A-10; BNA DAILY LABOR REPORT, *Members Schaumber, Liebman Discuss Differing Views on Recent Board Decisions*, Mar. 3, 2005.

76. New York Univ. Medical Ctr, 332 N.L.R.B. 1205 (2000), *overruled by* Brown Univ., 342 N.L.R.B. 483 (2004).

77. Sturgis, 331 N.L.R.B. 1298 (2000), *overruled by* Oakwood Care Ctr, 343 N.L.R.B. 659 (2004).

78. St. Elizabeth Manor, 329 N.L.R.B. 321 (1999), *overruled by* MV Transp., 337 N.L.R.B. 770 (2002).

79. Epilepsy Found., 331 N.L.R.B. 676 (2000), *overruled by* IBM Corp. 341 N.L.R.B. No. 148 (2004).

80. Edward B. Miller, *NLRB Forum: Strikes, Lockouts and Boycotts*, 51 LAB. L. J. 89, 94 (2000).

said its decisions were "ripe for judicial reversal."[81] In contrast, two union practitioners observed that the decisions revealed the "increasingly confined (indeed relatively insignificant) doctrinal terrain on which the conflict over U.S. labor policy is enacted."[82] As it turned out, each of those decisions—and others—was short-lived.[83]

In turn, the present Board majority has undermined long-established doctrines that promote collective bargaining by allowing employers and unions to enter into voluntary recognition arrangements.[84] The Board has demonstrated a corresponding reluctance to revisit doctrines that hinder collective bargaining by allowing employers to unilaterally terminate collective bargaining relationships,[85] making it more difficult to bring the "necessary party" into the collective bargaining process,[86] facilitating employer pressure on employees to reject unionization,[87] placing artificial barriers in front of voluntary recognition of unions by employers,[88] and

81. Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative*, 16 LAB. LAW. 75, 80 (2000).

82. Jonathan P. Hiatt & Craig Becker, *Drift and Division on the Clinton NLRB*, 16 LAB. LAW. 103 (2000).

83. For other decisions reversing Clinton Board precedent, *see, e.g.*, Jones Plastic & Engineering Co., 351 N.L.R.B. No. 11 (2007) (addressing significance of at-will employment relationship to status as permanent striker replacement), *overruling* Target Rock Corp., 324 N.L.R.B. 373 (1997); TruServ Corp., 349 N.L.R.B. No. 23 (2007) (permitting decertification petition to be processed after post-petition settlement of unfair labor practice charges against employer), *overruling* Douglas-Randall, Inc., 320 N.L.R.B. 431 (1995); Crown Bolt, Inc., 343 N.L.R.B. 776 (2004) (rejecting presumption that employer's plant-closure threat was widely disseminated), *overruling* Springs Industries, 332 N.L.R.B. 40 (2000); Saint Gobain Abrasives, Inc., 342 N.L.R.B. 434 (2004) (requiring Regional Director to conduct hearing before dismissing decertification petition filed after alleged unfair labor practices by employer), *rev'g* Priority One Services, 331 N.L.R.B. 1527 (2000). Additional reversals of precedent are discussed *infra* notes 102, 127-128.

84. *See, e.g.*, Dana Corp., 351 N.L.R.B. No. 28 (2007) (establishing window period for filing decertification petition, following employer's voluntary recognition of union); Shaw's Supermarkets, 343 N.L.R.B. 963 (2004) (granting review to consider whether employer waived right to Board election, and whether to permit such waiver with respect to after-acquired stores where union demonstrates majority support). *See also* Supervalu, Inc., 351 N.L.R.B. No. 41 (2007) (holding that contract provision requiring employer to recognize union at newly-organized stores was not mandatory subject of bargaining, absent proof that stores would be included in existing bargaining unit); Marriott Hartford, 347 N.L.R.B. No. 87 (2006) (granting review to consider whether union had demanded voluntary recognition, permitting employer to file election petition with Board, where union sought agreement for card-check recognition).

85. Nott Co., 345 N.L.R.B. No. 23 (2005) (permitting employer to withdraw recognition from union and repudiate collective-bargaining agreement, following employer's acquisition of non-union business and consolidation of union and non-union workforces of equal size).

86. Airborne Freight Co., 338 N.L.R.B. 597 (2002) (declining to revisit current standard for determining joint-employer status, which requires direct and immediate control over matters relating to employment relationship).

87. Frito-Lay, 341 N.L.R.B. 515 (2004) (following precedent that permits employer "ride-alongs" in which employer officials accompany truck drivers for up to 12 hours in order to campaign against union).

88. Elmhurst Care Ctr., 345 N.L.R.B. No. 98 (2005) (continuing to prohibit employer from voluntarily recognizing union where employer has hired core group of employees, but is not yet engaged in normal business operations).

permitting employers to retaliate against employees for engaging in statutorily-protected conduct.[89]

Perhaps the best illustration of the Board's current decisionmaking is its 2006 decision in *Oakwood Healthcare, Inc.*,[90] interpreting key terms in the Act's definition of a "supervisor." This decision came in the wake of the Supreme Court's decision in *Kentucky River*,[91] which had rejected the Clinton Board's attempt at a limiting interpretation with respect to professionals. In *Oakwood*, the Board majority—relying on dictionary definitions of ambiguous statutory terms, without explaining the choice among definitions—selected a more-expansive-than-necessary reading of the supervisory exclusion. The majority expressed its indifference to the impact of its decision, rejecting what it called the dissenters' "results-driven approach" in looking to the potential real-world consequences of the majority's interpretation.[92]

The Board thus issued a decision that potentially swept many professional employees outside of the Act's protection, while failing to engage in the sort of reasoned decisionmaking that Congress expected from the Board. When dictionary definitions matter more than economic or workplace realities, the Board abdicates its intended role as an expert administrative agency charged with making labor law and policy tailored to the complexities of a changing economy.

Unfortunately, *Oakwood* reflects a trend to limit the coverage of the Act itself.[93] When non-traditional (or non-traditionally employed) workers have sought to organize themselves into a union, the Board majority has denied them statutory "employee" status: graduate teaching assistants,[94] disabled workers,[95] artists' models,[96] and newspaper carriers.[97] The Board has also limited the ability of contingent employees—workers supplied by one employer to another—to engage in collective bargaining.[98]

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89. Reynolds Electric, Inc., 342 N.L.R.B. 156 (2004) (continuing to apply rule that discharge of employee for engaging in concerted protected activity is lawful, absent showing that employer was aware of concerted nature of activity).

90. 348 N.L.R.B. No. 37 (2006).

91. 532 U.S. at 706.

92. 348 N.L.R.B. No. 37, slip op. at 3.

93. There are two notable exceptions to this trend: the decision to extend the Act's coverage to casinos on tribal reservations, San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1288 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007), and the decision rejecting the creation of a novel national-security exemption for private airport security screeners, Firstline Transp Security, Inc., 347 N.L.R.B. No. 40 (2006).

94. Brown Univ., 342 N.L.R.B. 483 (2004) (holding that educational relationship is not employment).

95. Brevard Achievement Cnt., 342 N.L.R.B. 982 (2004) (holding that rehabilitative relationship was not employment).

96. Pa. Acad., 343 N.L.R.B. 846 (2004) (holding that models were independent contractors).

97. St. Joseph News-Press, 345 N.L.R.B. No. 341 (2005) (holding that carriers were independent contractors).

98. Oakwood Care Ctr., 343 N.L.R.B. 659 (2004).

In these cases, the majority justified its decisions on dubious policy grounds, giving little weight to the plain language of the Act (which is perhaps surprising, given the majority's adherence to a narrow textualism in *Oakwood*).[99] The Board largely ignored the economic realities of the employment relationships in question, and declined to exercise its discretion to afford a broader group of workers a right to collective representation. As Member Walsh and I observed in one dissent, if the majority were correct about the statute, then the "National Labor Relations Act itself could not guarantee an important, and growing, segment of American workers the right to collective bargaining. The problem here, however, is not the statute, but the agency that administers it."[100]

What is the result? Fewer workers have fewer rights under the Act. In several recent decisions, the Board majority has chosen a very confined view of "concerted" activity for the purpose of "mutual aid or protection," as protected by section 7 of the Act.[101] All private sector workers covered by the Act, union-represented or not, have the right to engage in these activities. Yet, in *IBM Corp.*,[102] the Board held that, unlike unionized workers, employees in the non-union sector have no right to a witness at an investigatory interview that might lead to discipline. *IBM* reversed the recent *Epilepsy Foundation*[103] decision, which was significant not just for its specific holding, but also for its reminder that the statute's protections apply to unrepresented workers, whether they know it or not.[104] As one commentator observed, before *Epilepsy Foundation,* "the scope of coverage of section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law."[105] With *IBM*, the Board signaled that

99. 348 N.L.R.B. No. 37.

100. Oakwood Care Ctr., 343 N.L.R.B. at 670.

101. *See, e.g.*, Waters of Orchard Park, 341 N.L.R.B. No. 93 (2004) (two nurses who phoned a state hotline to report excessively hot conditions in a nursing home were not engaged in protected activity because their call was made in the interest of patient care, not their own terms and conditions of employment); Holling Press, 343 N.L.R.B. 301 (2004) (one female worker who sought the assistance of another in her sexual harassment charge against a male supervisor was looking out only for herself and not engaged in activity for mutual aid or protection).

102. 341 N.L.R.B. 1288 (2004).

103. 331 N.L.R.B. 676 (2000), *enf'd. in relevant part*, 268 F.2d 1095 (D.C. Cir. 2001).

104. The majority justified its action by citing changes in the workplace, and, among other things, "the events of September 11, 2001, and their aftermath." 341 NLRB at 1291. In response, the New York City Bar Association issued a highly-critical position paper, which observed that "[t]o rely on such events in determining the rights of employees under the National Labor Relations Act distorts the legitimate decision making process and injects political considerations into a matter of statutory construction." *See* New York City Bar Association, Media Advisory, *The New York City Bar Association Opposes NLRB Decision To Rely on the Terrorism Threat as a Reason to Deny Non-Union Employees The Right to Have A Representative Present During Disciplinary Interviews* (Oct. 20, 2004), *available at* http://www.abcny.org/PressRoom/PressRelease/2004_10_20.htm.

105. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New* Again, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002) (internal citation omitted). *See also* William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23 (2006).

it was not prepared to treat non-union workers as fully within the Act's protection. Because so few private sector employees are unionized, statutory protections for non-union workers have never been more important. Such workers do, in fact, spontaneously act together to seek better working conditions,[106] and the Act might well matter to them. The *IBM* decision is thus a powerful omen of the statute's growing irrelevance.

The Board majority regularly has found that employee statutory rights must yield to countervailing business interests. These interests are far-ranging. They include private property rights (including an employer's property interest in a piece of scrap paper used to post a union-meeting notice),[107] various managerial prerogatives,[108] business justifications,[109] notions of workplace decorum and civility,[110] and employer free speech rights.[111] In cases involving unionized workers, the decisions signify a *laissez-faire* approach to bargaining, giving employers free rein to operate without meaningful bargaining.[112] Where non-unionized workers were

106. *See, e.g.*, Phoenix Processor, 348 N.L.R.B. No. 4 (2006) (unrepresented workers on fish-processing ship engaged in walk-out to protest 16 ½-hour day; discharge upheld relying on anti-mutiny statute); Quietflex Mfg. Co., 344 N.L.R.B. No. 130 (2005) (unrepresented workers engaged in 12-hour protest in employer's parking lot, but did not interfere with access or operations; discharge upheld).

107. Johnson Tech., Inc., 345 N.L.R.B. No. 47 (2005) (finding lawful employer's warning to employee who used scrap paper to replace union-meeting notice that probably had been removed by management official).

108. Deference to such prerogatives is illustrated by a series of decisions upholding the refusal of employers to provide unions with requested information. *See, e.g.*, Raley's Supermarkets, 349 N.L.R.B. No. 7 (2007) (dismissing allegation that employer unlawfully refused to provide union with requested information related to grievance involving employer investigation of alleged supervisory harassment); Northern Indiana Public Serv. Co., 347 N.L.R.B. No. 17 (dismissing allegation that employer unlawfully refused to provide union with investigatory interview notes involving alleged threat of violence by supervisor); Borgess Med. Ctr, 342 N.L.R.B. 1105 (2004) (refusing to order employer's disclosure of hospital incident reports, despite finding that refusal to provide reports to union was unlawful).

109. *See, e.g.*, Bunting Bearings Corp., 343 N.L.R.B. 479 (2004) (finding business justification for partial lockout limited to union members in bargaining unit), *petition for review granted*, 179 Fed. App'x. 61 (D.C. Cir. 2006); Midwest Generation, EME, LLC, 343 N.L.R.B. 12 (2004) (finding business justification for partial lockout based on extent of employees' participation in strike), *petition for review granted*, 429 F.3d 651 (7th Cir. 2005).

110. *See, e.g.*, American Steel Erectors, Inc., 339 N.L.R.B. 1315 (2003) (finding that employer lawfully refused to hire former union employee who had criticized employer's job-safety record before state agency); PPG Industries, Inc., 337 N.L.R.B. 1247 (2002) (finding that employer lawfully disciplined employee who used vulgarity in characterizing employer's conduct toward co-worker being solicited to sign union card). *See also* Fineberg Packing Co., 349 N.L.R.B. No. 29 (2007) (finding that employer did not condone unlawful walkout by employees, despite manager's statement to employees that he was not firing anyone and that employees should "come back tomorrow").

111. *See, e.g.*, Aladdin Gaming, LLC, 345 N.L.R.B. No. 41 (2005) (finding lawful a management official's interruption of off-duty employees' conversation about signing union authorization cards); Werthan Packaging, Inc., 345 N.L.R.B. No. 30 (2005) (finding no objectionable election conduct where manager interrogated employee and stated that voting for union was not in best interests of employee and her family).

112. *See, e.g.*, Garden Ridge Mgmt., Inc., 347 N.L.R.B. No. 13 (2006) (dismissing allegation of surface-bargaining by employer and permitting withdrawal of union recognition), *on motion for reconsideration*, 349 N.L.R.B. No. 103 (2007) (denying General Counsel's motion for reconsideration); Richmond Times-Dispatch, 345 NLRB No. 11 (2005) (finding that employer did not claim inability to

involved, these cases signal that their right to join together to improve working conditions is largely illusory. In several cases, intimidating employer statements made during an organizing campaign were found to be lawful expressions of employer free speech.[113] But where employees make statements or engage in conduct seen as exceeding rules of civility, decorum, or loyalty, the employees have been held to have lost the protection of the Act.[114] These decisions suggest an underlying discomfort with government regulation of business, the notion of collective action, and the zeal that may accompany those efforts: the fundamental premises of this statute.

Although truly meaningful and effective remedies for unfair labor practices are limited under the Act,[115] the Board nonetheless has refused to exercise the full remedial discretion it does have. For example, the Board has been reluctant to pierce the corporate veil to impose liability for unfair labor practices.[116] The regular refusal to issue *Gissel* bargaining orders (which require an employer to recognize a union with majority support, where the employer's unfair labor practices have frustrated the election

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pay bonus and so lawfully refused to provide financial information to union, following employer's claim that it was "unable to pay" annual bonus and had "no choice" but to cancel bonus); Sea Mar Cmty. Health Ctrs., 345 N.L.R.B. No. 69 (2005) (finding no violation in employer's refusal to bargain over closure of operation that was established by official without approval by upper management).

113. *See, e.g.*, Medieval Knights, LLC, 350 N.L.R.B. No. 17 (2007) (finding that consultant's statement that hypothetical employer could lawfully "stall out" contract negotiations was not threat that electing union would be futile); TNT Logistics No. Am., Inc., 345 N.L.R.B. No. 21 (2005) (finding that supervisor's unsupported statement that employer would lose only customer if employees unionized was lawful expression of personal opinion); Manhattan Crowne Plaza Town Park Hotel Corp., 341 N.L.R.B. 619 (2004) (finding that employer's statement recounting mass discharge of recently-unionized employees at another employer's hotels was not threat of reprisal); Curwood, Inc., 339 N.L.R.B. 1137 (2003) (finding that employer's letter stating that customers viewed unionization negatively was lawful).

114. *See, e.g.*, Five Star Transportation, Inc., 349 N.L.R.B. No. 8 (2007) (upholding employer's refusal to hire school bus drivers, employed by prior contractor, who had criticized employer in letters to school board). *See generally* Matthew Finkin, *Disloyalty! Does Jefferson-Standard Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. 541 (2007), *available at* http://ssrn.com/abstract=976725).

115. *See supra* note 70.

116. *See, e.g.*, Flat Dog Productions, Inc., 347 N.L.R.B. No. 104 (2006). In one recent glaring example, the Board majority refused to pierce the corporate veil to hold corporate co-owners personally liable for backpay obligations to employees who suffered financial consequences of flagrant unfair labor practices. By the time of the backpay proceedings, the co-owners had distributed all of the company's funds to themselves. The Board majority held, however, that because the distributions occurred before the unfair labor practice charges were filed, the distributions did not constitute an evasion of the company's legal obligations. A.J. Mechanical, Inc., 345 N.L.R.B. No. 22 (2005). The United States Court of Appeals for the District of Columbia Circuit disagreed, stating bluntly:

> Surely, it is reasonable to infer that a thief who robs a bank in broad daylight knows well before the date of his indictment that he may one day face criminal liability. The corporate conduct at issue here is the labor-law equivalent of a daylight robbery. It was neither subtle nor close to the line of legality.

Carpenters and Millwrights, Local Union 2471 v. NLRB, 481 F.3d 804 (D.C. Cir. 2007). See also US Reinforcing, Inc., 350 N.L.R.B. No. 41 (2007) (refusing to find that two companies were alter egos, where principals co-habited but were not married).

process) is another such example.[117] So too is the continuing rejection of the "minority" bargaining order, where an employer's egregiously unlawful conduct has prevented a union from establishing majority support.[118] The Board has also shown no interest in adopting new modest monetary remedies for victims of discrimination.[119] Indeed, the Board's rulings have created new obstacles to backpay awards.[120] Decisions about other minor remedial innovations, such as the electronic posting of required notices to employees, have been deferred for no compelling reason.[121]

Some of the Board's recent decisions have failed to survive judicial scrutiny.[122] Other decisions have navigated the layers of precedent by ignoring precedent entirely or by distinguishing earlier cases on abstract, questionable grounds.[123] And too many decisions have cast doubt on

117. *See, e.g.*, Hialeah Hospital, 343 N.L.R.B. 391 (2004).

118. First Legal Support Services, 342 N.L.R.B. 350 (2004).

119. Hotel Employees, Local 26, 344 N.L.R.B. No. 70 (2005) (declining to order "tax compensation" remedy for victim of discrimination who incurs heightened tax burden as result of receiving lump sum backpay award).

120. St. George Warehouse, 351 N.L.R.B. No. 42 (2007) (reversing precedent and placing burden on General Counsel to produce evidence concerning discriminatee's job search, when employer demonstrates availability of jobs); Anheuser-Busch, Inc., 351 N.L.R.B. No. 40 (2007) (reversing precedent and holding that employees discharged based on information from unlawfully-installed security cameras are not entitled to remedy). *See also* Grosvenor Resort, 350 N.L.R.B. No. 86 (2007) (denying backpay to discriminatees for not seeking work quickly enough and for not seeking interim employment while waiting for previously secured interim employment to commence); Aluminum Casting & Engineering Co., 349 N.L.R.B. No. 18 (2007) (denying employees full backpay for unlawfully withheld wage increase); Georgia Power Co., 341 N.L.R.B. 576 (2004) (denying employee unlawfully withheld promotion because General Counsel failed to prove that employee "certainly" would have been promoted).

121. Nordstrom, Inc., 347 N.L.R.B. No. 28 (2006).

122. *See* Jochims v. NLRB, 480 F.3d 1161, 1164 (D.C. Cir. 2007) (reversing Board's finding of supervisory status, observing that "the Board completely deviated from its own precedent and issued a judgment that is devoid of substantial evidence"); Guardsmark, LLC v. NLRB, 475 F.3d 369 (D.C. Cir. 2007) (reversing Board's finding that employer's anti-fraternization rule was lawful); United Steel Workers v. NLRB, 179 Fed. Appx. 61 (D.C. Cir. 2006) (remanding, as inconsistent with precedent, Board's finding that partial lockout was non-discriminatory, and observing that it was "not appropriate" for Board to "speculate" as to employer's motive for lockout, given employer's burden of proof); New England Health Care Employees Union v. NLRB, 448 F.3d 189, 193 (1st Cir. 2006) (reversing Board's "arbitrary and capricious" determination that employer lawfully refused to reinstate economic strikers, based on secret hiring of permanent replacements); International Chemical Workers Union Council v. NLRB, 447 F.3d 1153 (9th Cir. 2006) (reversing, based on lack of substantial evidence, Board's determination that employer did not plead inability to pay and thus lawfully refused to provide financial information to union during bargaining); Slusher v. NLRB, 432 F.3d 715 (7th Cir. 2005) (reversing Board's determination that employer lawfully discharged union steward for purportedly harassing anti-union employee); Local 15, Int'l Bhd. of Electrical Workers v. NLRB, 429 F.3d 651 (7th Cir. 2005) (reversing Board's determination that partial lockout was non-discriminatory and remanding with instructions to find lockout unlawful); Brewers & Maltsters, Local Union No. 6 v. NLRB, 414 F.3d 36 (D.C. Cir. 2005) (reversing, based on conflict with precedent, Board's refusal to grant make-whole remedy to employees disciplined as result of employer's unlawful installation of surveillance cameras).

123. *See, e.g.*, Bath Iron Works, 345 N.L.R.B. No. 33 (2005), *enf'd.*, 475 F.3d 14 (1st Cir. 2006) (dissenting opinion) (implicating "competing analytical approaches where an employer claims the right to act unilaterally with respect to a mandatory subject of bargaining, based on language in a collective-bargaining agreement").

precedent unnecessarily, or have applied it reluctantly, suggesting that the law may soon change, and sowing confusion.[124] This kind of decisionmaking is of little use to parties struggling to make sense of their statutory rights and duties. While it may dispose of particular cases, it is ultimately unhelpful in shaping a coherent national labor policy.

Meanwhile, the Board's approach to exercising and preserving its own authority is contradictory. It has jealously guarded its representation-case functions (discouraging union attempts to organize outside the Board's procedures),[125] while eagerly deferring to dubious arbitration decisions in unfair labor practice cases (sometimes frustrating the vindication of statutory rights).[126]

Perhaps this contradiction can be explained by the Board's orientation toward protecting employee free choice in the narrow sense: taking special care to ensure that employees are free to refrain from union activity and to reject union representation, while showing less concern about the rights of employees to engage in concerted activity, to choose (and keep) a union, and to be free from anti-union discrimination. Several Board decisions have made it more difficult for unions to organize workers.[127] In particular, the Board has rolled back protections for "salts," union members who seek employment to engage in organizing activity.[128] Other decisions have shown a disappointing reluctance to confront what clearly seemed to be whole-scale employer discrimination in hiring.[129] Tellingly, the Board has stated expressly, for the first time, that the exercise of employee free choice is superior in the statutory scheme to the stability of collective

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124. *See, e.g.*, American Red Cross Missouri-Illinois Blood Services Region, 347 N.L.R.B. No. 33 n. 21 (2006); Construction Products, Inc., 346 N.L.R.B. No. 60 n. 1 (2006); Siemens Building Tech., 345 N.L.R.B. No. 91 n. 5 (2005); Vanguard Fire & Supply Co., Inc. , 345 N.L.R.B. No. 77 n. 9 (2005); Daimler-Chrysler Corp., 344 N.L.R.B. No. 154 fn. 1 (2005); Contract Flooring Systems, Inc., 344 N.L.R.B. No. 117 at 1 (2005); Meijer, Inc., 344 N.L.R.B. No. 115 n. 7 (2005).

125. *See, e.g.*, Boeing Co., 349 N.L.R.B. No. 91 (2007); Advanced Architectural Metals, Inc., 347 N.L.R.B. No. 111 (2006); United States Postal Serv., 383 N.L.R.B. No. 3 (2006).

126. *See, e.g.*, Kvaerner Phila. Shipyard, Inc., 347 N.L.R.B. No. 36 (2006); Smurfit-Stone Container Corp., 344 N.L.R.B. No. 82 (2005); Aramark Services, Inc., 344 N.L.R.B. No. 68 (2005).

127. Teamsters Local 75 (Schreiber Foods), 349 N.L.R.B. No. 14 (2007) (finding that union unlawfully charged objecting non-members for organizing expenses, where union failed to prove that organizing within same industry leads to increased union wage rates); Randell Warehouse, Inc., 347 N.L.R.B. No. 56 (2006) (reversing Clinton Board precedent and finding that union's videotaping of campaign-literature distribution was objectionable); Harborside Healthcare, Inc., 343 N.L.R.B. 906 (2004) (reversing precedent and liberalizing standard for finding pro-union supervisory conduct objectionable in context of representation elections). *See also* Correctional Medical Services, Inc., 349 N.L.R.B. No. 111 (2007) (upholding discharge of unrepresented employees who picketed health-care employer, based on union's failure to provide statutorily-required advance notice)..

128. See Toering Electric Co., 351 N.L.R.B. No. 18 (2007) (requiring General Counsel to prove that salt is genuinely interested in employment with employer, to establish violation in hiring-discrimination case); Oil Capitol Sheet Metal, Inc., 349 N.L.R.B. No. 118 (2007) (reversing judicially-approved precedent and requiring General Counsel to establish duration of remedial period for salts).

129. Zurn/N.E.P.C.O., 345 N.L.R.B. No. 1 (2005), *petition for rev. denied*, Northern Michigan Bldg. & Const. Trades Council v. N.L.R.B., 2007 WL 1805667 (6th Cir. June 20, 2007).

bargaining.[130] This elevation of one of two competing ideals in the Act undoes the delicate balance long established in Board doctrine, and seems to signal a devaluing of what is unique about this statute—the protection of collective rights. Given this orientation, it is unfortunate, but not surprising, that some critics question whether the Board still believes in its mission.

## IV. WHAT COMES NOW?

Twenty years ago, one scholar described the New Deal as the major incubation period for federal legislation, and predicted that "mouldering statutes and elderly agencies" would plague our legal system in years to come.[131] Some scholars have argued that the National Labor Relations Act was doomed from the start.[132] Nonetheless, and despite imposing evidence, both empirical and anecdotal, of labor law's decline, there remains, at least among some practitioners, a stubborn attachment to this law and its lofty ambition of economic justice.[133]

The good news from the past year is that labor law issues have once again entered the public domain. In the summer of 2006, extensive news coverage[134] surrounded the then-expected issuance of the *Oakwood* decision on supervisory status, especially as applied to nurses.[135] Indeed, on July 18, 2006, the Comedy Central cable television network program *Colbert Report*

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130. Nott Co., 345 N.L.R.B. No. 23 (2005) ("[A]lthough industrial stability is an important policy goal, it can be trumped by the statutory policy of employee free choice. That policy is expressly in the Act, and indeed lies at the heart of the Act."). For illustration of the consequences of this orientation, *see* Dana Corp, *supra*; Shaw's Supermarkets, Inc., 350 NLRB No. 55 (2007)(permitting employer to withdraw recognition from union after third year of five-year agreement, even though petition for election could not be filed); Wurtland Nursing & Rehabilitation Center, 351 N.L.R.B. No. 50 (2007) (permitting employer to withdraw recognition from union based on employee petition seeking "a vote to remove the Union"); Badlands Golf Course, 350 N.L.R.B. No. 28 (2007) (permitting employer to withdraw recognition from union less than three weeks after minimum six-month period of insulated bargaining, following earlier unlawful withdrawal of recognition).

131. Brudney, *supra* note 4, at 941 (quoting GRANT GILMORE, THE AGES OF AMERICAN LAW 96 (1977)).

132. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, U. OF PENN. INST. FOR LAW & ECON RESEARCH PAPER NO. 06-17 (forthcoming), *available at* http://ssrn.com/abstract=920458).

133. *See supra* note 74 and accompanying text.

134. *See, e.g.*, Barbara Rose, *Board Decision Could Bar More From Unions*, CHI. TRIB., Oct. 4, 2006, at B9; Jane M. Von Bergen, *Testing Unions' Clout; Pivotal cases: For Some Employees, Their Union Status Hinges on an NLRB Decision that Will Define the Word "Supervisor"*, PHILADELPHIA INQUIRER, Aug. 10, 2006, at C1; Steven Greenhouse, *Labor Board Decision Broadens Definition of Supervisors*, N.Y. TIMES, Oct. 4, 2006, at A16.

135. *Oakwood* and its companion decisions were released on October 3, 2006. Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37 (2006); Croft Metals, Inc., 348 N.L.R.B. No. 38 (2006); Golden Crest Healthcare Ctr., 348 N.L.R.B. No. 39 (2006). See NLRB Press Release R-2603, *NLRB Issues Lead Case Addressing Supervisory Status in Response to Supreme Court's Decision in Kentucky River* (Oct. 3, 2006), *available at* www.nlrb.gov.

even included a segment on the issue.[136] And there has been wide coverage[137] of the Employee Free Choice Act,[138] approved by the House of Representatives on March 1, 2007, but filibustered in the Senate.[139] With this publicity, Americans are being educated about the erosion of the right to organize and the danger posed to our society as a consequence, especially in the context of growing income inequality.

Labor law policy has been marginalized for too long, and public dialogue on these issues has too long been absent. Public consideration of labor policy, in which the Board plays a positive role, is sorely needed if we are to protect the rights of workers to organize and bargain collectively in a competitive global economy. How do we achieve a proper balance between market freedom and democratic values? How do we preserve a middle-class society? Today, the story of faded trust in American labor law lies in the gap between early hopes and later results. Like dinosaur DNA, however, the promise of the Act is worth preserving. The stakes are too high to do otherwise.

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136. *The Colbert Report: Solidarity* (Comedy Central television broadcast Jul. 18, 2006), *available at* http://www.comedycentral.com/shows/the_colbert_report/index.jhtml.

137. *See, e.g.*, *Increasingly Labor's Day in Congress*, L.A. TIMES, Mar. 2, 2007; Steven Greenhouse, *House Passes Top Priority of Unions*, N.Y. TIMES, Mar. 2, 2007, at A14; Edward Epstein, *House Passes Pro-Labor Bill to Help Workers Form Unions*, S.F. CHRON., Mar. 2, 2007, at A4.

138. Employee Free Choice Act, H.R. 800, 110th Cong. (2007).

139. *See Supporters of Card Check Fall Short of Votes Needed to Limit Senate Debate*, DAILY LABOR REPORT (BNA), June 27, 2007, at AA-2.

Chairman ANDREWS. Thank you, Member Liebman, very much.

I will yield for questions to the chairman of the Education and Labor Committee, Mr. Miller.

Mr. MILLER. Thank you very much.

And thank you both, Chairman Battista, for your testimony and Ms. Liebman, for your testimony.

Ms. Liebman, I would like to go—in your formal presentation—excuse me, your written presentation to the committee on page 10, you sort of compare and contrast the Dana decision and the Wurtland decision. And I wondered if you might elaborate on that because I think it is—our deliberations in the Congress with respect to the Employee Free Choice Act where it was suggested by the opponents of the act throughout much of the debate that the signatures of workers were worth nothing, that they just weren't valid, they weren't worth it, that this was not a legitimate process, as you point out.

At least as I read your testimony, you suggest that the board has suggested, at least, contradictory positions in those two cases or, in fact, even maybe a double standard. And I just wonder if I am—I don't want to put words in your mouth, but if you would elaborate on that.

Ms. LIEBMAN. Yes, I would be happy to. Thank you. These two decisions, as you have mentioned, issued the same day. And they are somewhat surprising when you read them back to back because the Dana case, of course, involves the right of employers and unions to enter into voluntary recognition agreements providing for recognition of the union upon a showing of majority supporting, usually signatures on authorization cards without the necessity to hold a board election.

These are popular because unions have become disenchanted with the election machinery because of the delays in the process which allows virulent anti-union campaigns, in some cases, allows employer coercion. And if the union ultimately would win the election, it starts off the relationship in an adversarial or antagonistic way. So these arrangements have become very popular.

The Wurtland decision was in some ways the flip-side case. It was an employer who withdrew recognition from a union. Its employees had signed a petition saying that they wanted a vote to—I think the words were—get rid of the—we, the employees, wish for a vote to remove the union.

And the board majority said that that language was unambiguous because, well, because they said it was unambiguous, even though the language clearly is we wish for a vote. I think there are board cases which would say that if employees signed cards that said we want a vote to select union representation, that the board would not issue what is called a Gissel bargaining order based on language of that sort because the language clearly indicates that the employees would like a vote.

Another apparent inconsistency between these is that in the Dana case, the board minimized the delays inherent in the election process. Whereas in the Wurtland case, part of the explanation for allowing the employer to do this unilaterally was because of the delays in the election process.

This is compounded by a decision issued in August, the Shaw's case, in which similarly the board allowed an employer to withdraw recognition, even though there was a decertification petition pending with the board and even though the employer itself was not entitled to file a petition at that time because it had signed onto a 5-year agreement. But the explanation was we are going to allow this withdrawal of recognition so that employees do not have to endure union representation if they don't want it.

And again, another double standard is that no similar concern has been shown for employees who have to wait perhaps years to enjoy union representation when they voted for it, no similar concern that they have to endure non-representation. So I would say that there certainly appears to be a double standard.

The other possible explanation is that the board has pretty expressly stated for the first time in the board's history that the freedom of choice—and in this case, that would be the freedom to reject union representation—has paramount value in this statute over the goal of promoting collective bargaining. That is the first time that the NLRB has ever stated that ranking of statutory policies in that way.

Mr. MILLER. Chairman Battista, do you want to make a quick comment? I don't have much time left.

Mr. BATTISTA. Yes, I would, as a matter of fact. I don't see the Wurtland case and the Dana case as being opposites. In the Wurtland case, it was cards or a petition that triggered the employer's action to withdraw recognition from the union.

In the Dana case, it was the cards that the union presented to the employer that triggered the recognition initially. So cards played a role in both cases.

In the Dana case, the employer said—or the board said to the employer and to the union we are going to have a notice posted so employees know they have a right to a secret ballot election if they wish it. And it is only for 45 days. So there is a possibility of a secret ballot election changing that result or confirming it.

In the Wurtland case, if the union after the employer withdrew recognition wished to file a petition for certification and it was supported by the appropriate number of cards, we would conduct an election. And that election would determine whether the union is certified, recertified or not. So in both cases, there is a role for cards and for card check. And in both cases, there is a role that is played by secret ballot elections.

Mr. MILLER. I think Ms. Liebman took the question with what the employees were, in fact, asking for in the Wurtland case and also, I think, the question of whether there is any legal requirement for that posting at all.

Mr. BATTISTA. In the Wurtland case, the employees came to the employer and presented them with a petition saying that we want to remove local 1192, I think it is, as our collective bargaining representative.

Mr. MILLER. We want to vote to remove it.

Mr. BATTISTA. Now, if the employer is faced with evidence that a majority of the employees do not wish to be represented by the union, the employer has an obligation, I think, to act. He can act

in one of two ways under Levitts. He can file for an R.M. petition for an election. Or he can withdraw recognition.

It wasn't that the language was unambiguous. I don't believe we said the language was unambiguous. But we had to make a decision what the better interpretation of the language of the petition was. And we found the better interpretation of the language was that it didn't want a vote, but they wanted to remove the union.

Mr. MILLER. We will come back to this. I don't want to—we have got a lot of members here.

Chairman ANDREWS. Thank you, Mr. Chairman.

The chair recognizes the ranking member of the subcommittee, Mr. Kline, for questions.

Mr. KLINE. Thank you, Mr. Chairman.

I thank the witnesses for being with us today.

Chairman Battista, I have several questions and not enough time, so I am going to move fairly quickly. We know that polling shows that the vast majority of Americans want to protect the secret ballot.

In the landmark case of Gissel Packing, the Supreme Court noted that a secret ballot election is the "most satisfactory, indeed, the preferred method of ascertaining whether a union has majority support," and that card checks are "admittedly inferior to the election process." Let us just get on the record. Do you share that view, and why?

Mr. BATTISTA. Congressman, I would like to stay away from a question that deals with whether or not the act should be amended. But I would say to you I don't disagree with our Supreme Court. And I am a firm believer that the secret ballot election works well at the board.

Mr. KLINE. Okay. Thank you.

Member Liebman talked about delays in elections through the process. I wondered if you would like to address that and tell us how the performance of the board has been under your chairmanship, what kind of delays were experienced and put it in an historical context.

Mr. BATTISTA. I think we have done well in the past 5 years. As I said in my opening statement, we have reduced the backlog from 621 cases to 207 cases. We have taken the amount of time to see cases at the board and reduced it from 809 median days to 181 median days. We have reduced the amount of time that——

Mr. KLINE. Excuse me, that was 809 to 101?

Mr. BATTISTA. One hundred and eighty-one.

Mr. KLINE. One hundred and eighty-one. Thank you.

Mr. BATTISTA. One hundred and eighty-one median days. And we have taken the median days of representation cases at the board and reduced it from 409 days to 88 days. And so, I think we have done a good job in making the agency more productive and more efficient.

Mr. KLINE. Thank you. We have had some discussion already about the board under your chairmanship reversing precedent. And I would like to get into that for just a minute.

It is my understanding that in a number of cases, the board under your chairmanship overturned precedent, but it did so only to return to long-established board law. In other words, to restore

longstanding precedent that the Clinton era board had abandoned. Do you view that as the case? Could you comment on that?

Mr. BATTISTA. I think that is a fairly accurate reflection of what we have done. We have overturned precedent on 21 occasions. The Clinton board had between 1994 and 2002—I believe it was Roger King had the statistics that they overturned precedent on 61 occasions, and it was 1,100 years of precedent that they overturned. I think on our 21 occasions it is about 348 years.

And the main one precedent we overturned was a precedent that was established by the Clinton board. It was precedent that we felt was not appropriately overturned in the first place, and we returned to what was well-recognized precedent.

Mr. KLINE. Okay. And then finally, there is a lot of discussion about the act itself. And clearly, you have been accused, even here this morning, in saying that the National Labor Relations Board is broken and the board is not effectively doing its job and its role with the National Labor Relations Act.

Do you agree with that? I mean, clearly, you don't. I would like to give you the opportunity to say something about that.

Mr. BATTISTA. I mean, I disagree with that. I think the agency is really an example for most federal agencies. You look at what we do. We get 22,000, 23,000 unfair labor practices a year. And two-thirds of them are disposed of within 2 months. The remaining third, 90 percent of those are resolved, settled before 98 days, 98 median days, I believe it is.

And so, the vast bulk of our unfair labor practice cases are handled, either dismissed or settled, very early on in the game. The same is true for representation elections. Our elections are conducted in a median time of 39 days.

I think it is 90 percent of our elections are held in an actual time of 59 days from the filing of the petition. And the majority—I think it is 70 or 80 percent—of our representation cases are closed within a year. So I think we are doing a good job.

Mr. KLINE. Thank you, Mr. Chairman. I yield back.

Chairman ANDREWS. I thank my friend.

The chair yields for questioning to Senator Kennedy, Chairman Kennedy. Excuse me.

Senator KENNEDY. Thank you, Mr. Chairman.

I would like to ask Ms. Liebman. I think most of us understand that the National Labor Relations Board was set up to further collective bargaining. We have heard that the statute actually provides "to encourage the practice and procedure of collective bargaining by protecting the exercise by workers of full freedom of association, self-organization, designation."

And then there have been comments here this morning, well, it has been modified by other actions, Taft-Hartley, other actions by the Congress. I don't know in those actions by the Congress where that concept has been repealed. It still stands, as far as I understand the nature of the law.

And I am interested in your view about this balance. That is really the heart of this issue in question. What is the balance?

I think you referred earlier to your own view that workers doubt whether that balance is real today. And therefore, people have been discouraged from using what was established to be used to be effec-

tive to strengthen our economy, to be fair to workers in this country. And I want to give you an opportunity just to comment about the imbalance or the balance between employer and workers' rights.

Well, before talking about their rights, if you would talk about the balance to engage in union activity, the right to refrain from union activity subject to the majority will. What could you tell us from your own experience on the board and your background and obviously as someone who is not only a participant in this, but also someone who brings a great wealth of knowledge and experience and understanding the role of the NLRB?

Ms. LIEBMAN. Thank you, Senator Kennedy. I guess you could call me a strict constructionist or maybe even an originalist about this law. I believe that the majority's apparent conviction that Taft-Hartley somehow diminished the primacy of collective bargaining as a national policy goal is just wrong. I would call it revisionist history.

The Taft-Hartley amendment did not change the basic purpose of the law. The law's overriding aim was and still is to make it possible for workers to freely choose collective representation and to promote collective bargaining.

We have a federal labor law in the first place because Congress saw the need to help employees win union representation over the opposition of employers and thereby, to equalize bargaining power between labor and capitol. Taft-Hartley did add provisions to protect employees from union coercion as well. And, of course, it added the language to Section 7 of the act giving employees the right to refrain from union and other concerted activity.

So employees are free under this statute to choose freely to decline unionization, to reject the union that has represented them, to deal with their employers individually and to cede to their employers all effective control over the workplace. They have that right.

But the fact remains that the primary goal of this statute is to promote collective bargaining. Free choice exists, which means employee free choice and not the right of employers to choose for them, a case that Wurtland sort of highlights.

So as you say, Section 1 of the Wagner Act still remains in place making it the policy of this nation to promote collective bargaining. And Taft-Hartley itself in Section 201 stated, and I am going to read this, "It is the policy of the United States that the advancement of the general welfare, health, and safety of the nation can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining." That is in Taft-Hartley itself.

And finally, the Supreme Court in 1966 put it this way. "The object of the National Labor Relations Act is industrial peace and stability fostered by collective bargaining agreements providing for the orderly resolution of labor disputes between workers and employees." The board has consistently held up until this one that the primary purpose of this act is to promote collective bargaining freely chosen.

There are some cases where there is tension between these goals, and the board has always sought to maintain an equal balance.

But now it seems that the importance of collective bargaining has receded as a national policy goal. In some ways, it seems that labor law has been turned inside out.

Senator KENNEDY. Yes. I think I see the red light has gone on.

Senator Murray planned to represent our committee. She has been detained. She has asked me to put her statement and also an excellent letter signed by 57 law professors in the record.

Chairman ANDREWS. Without objection.

[The information follows:]

**Prepared Statement of Senator Patty Murray, Chairman, Subcommittee on Employment and Workplace Safety**

Good morning. I'm pleased to join Chairman Andrews and my colleagues from the Senate and House Labor Subcommittees today.

We're here to talk about an issue that is critical to our families—protecting a worker's right to organize.

I know personally what a union job means. My brother is a firefighter, and it has meant a middle class life for him and his family.

When Congress passed the National Labor Relations Act more than 70 years ago, it recognized that a fair labor market can exist only if employers and employees both have a respected voice in the system.

The purpose of the law was to ensure a balanced approach to labor-management relations that hadn't existed up to that point.

But this President has stacked the deck against workers on the National Labor Relations Board.

And now we've seen that balance tipped so far in favor of employers that the Board has lost its credibility with workers and with many Members of Congress.

*The Administration has Failed to Protect Workers' Rights*

At a time when corporate executives enjoy:

- Multi-million-dollar salaries,
- Golden parachutes * * *
- And so many other excesses,

It doesn't seem too much to ask to require fair wages, and safe working conditions for their employees.

Yet the Administration and its political appointees have repeatedly failed to protect workers on the job, while also restricting their ability to collect overtime.

This Administration has worked:

- To undermine the 40-hour work-week,
- Reduced funding for job training,
- And vigorously opposed an increase in the minimum wage for years.

I'm especially concerned that the NLRB now has a pattern of issuing decisions that undermine the ability of workers to collectively bargain—blatantly ignoring Congress' intent under the law.

We're here today because in September, that Board issued a large number of decisions that have received loud criticism.

Our witnesses will discuss these and other questionable Board actions in more depth this morning.

*The NLRB Decisions are More of the Same*

Combined, the Board's decisions attempt to dismantle policies the Administration and its supporters don't like by:

- Allowing a minority of employees to undo the will of the majority;
- Sending mixed messages about the value of Board elections;
- Weakening already inadequate remedies for bad faith employers;
- And changing the rules of the game for workers who try to exercise their right to organize in good faith.

I find these decisions troubling because they simply don't make sense.

They seem to be designed more to carry out the Administration's agenda rather than to follow the intent of the law.

Of course, Chairman Battista thinks otherwise. But his approach flies in the face of what scholars from around the country have said.

In response to the Board's decisions, more than 50 distinguished labor law professors wrote a letter to Congress, criticizing its reasoning under the National Labor Relations Act.

I ask unanimous consent that this letter be included in the hearing record. In their letter, these professors state that: "the board has regularly denied or impaired the very statutory rights it is charged with protecting—the rights of employees to join and from unions and to engage in collective bargaining."

*Protecting Workers' Rights Should be a Priority for the NLRB*

As Chair of the Senate Employment and Workplace Safety Subcommittee, protecting workers' rights is a critical priority for me.

And it should be a priority for those government agencies charged with promoting the well-being of workers and their families.

Unfortunately, it seems that many Administration appointees have decided that following the intent of the law isn't important.

I can't tell you how many times I've had to remind the political appointees at the Labor Department that their mission is to stand up for workers—not tip the scale even further toward the interests of powerful employers.

Maybe the NLRB needs a reminder, too.

I understand that the Board has a tough job. Finding the right balance between employers and workers can be challenging.

But that just doesn't seem to be the issue here.

*Voters Called for Change*

In last year's election, America's voters called for change. And the Democratic-controlled Congress has responded by sending the Administration a clear message:

• That the working families of our country are priority number one.

Still, this Administration has continued down the same old path.

I hope we will soon have a new Administration and a new Board that are genuinely committed to protecting workers' rights and putting working families first.

But today, I look forward to hearing from our witnesses about the impact the Board's decisions are having on workers' rights

And I look forward to hearing how they think this Board is measuring up to the mission stated in its charter—which is:

• To encourage collective bargaining by protecting workers' rights to negotiate the terms and conditions of their employment.

Thank you.

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*December 12, 2007.*

DEAR MEMBERS OF CONGRESS: Recent decisions by the National Labor Relations Board reflect an ominous new direction for American labor law. By overturning precedent and establishing new rules, often going beyond what the parties have briefed or requested, the Board has regularly denied or impaired the very statutory rights it is charged with protecting—the rights of employees to join and form unions and to engage in collective bargaining. The Board's persistent efforts to undermine NLRA protections also have dramatized the need for Congress to enact serious labor law reform after nearly half a century with no substantial legislative change.

Since it was constituted in late 2002, the current Labor Board has mounted an aggressive campaign to curtail worker rights under the statute. In periodic waves of closely divided, highly partisan decisions, the current Board majority has effectively removed whole categories of workers from the Act's coverage;[1] stripped away protections promised by the Act;[2] and further diluted the strength of already inadequate remedies.[3] The Board's decisions are remarkable for their anti-union bias, and in that regard remarkably out of touch with the desires of American workers. A recent Hart Research poll shows that as many as 60 million workers want a union but do not have one.[4]

A key reason why employees are thwarted in their desire for a union is the Board's inability or unwillingness to protect genuine employee free choice. The NLRB-supervised elections process too often invites employer coercion or interference, and encourages employers to create delays that frustrate and discourage workers. The current Board has given employers even greater leeway during organizing campaigns—to threaten and intimidate workers for union activities,[5] and to impose onerous and ambiguous workplace rules that deter union support and chill workers' exercise of their rights.[6]

As a result of the failure of the NLRA's representation process to guarantee free and fair elections, workers and unions have turned to other organizing strategies. One important approach involves securing voluntary recognition through majority sign-up, when a majority of workers sign cards indicating their preference for a particular union and the employer decides not to contest the card majority. This form

of organizing was recognized by Congress in the Act itself and has been endorsed by the Board for decades, as well as by the Supreme Court.[7]

In response to the increasing reliance on majority signup by workers who want a union, the current Board majority has erected substantial new hurdles to voluntary recognition. More than 70 years ago, section 9 of the Act established that a union will be recognized as exclusive representative if "designated or selected" by a majority of employees. But the Board has now made clear that it will not protect new bargaining relationships created through majority signup and voluntary recognition until a minority of workers who oppose the union have a second chance to defeat the majority's choice of union representation.[8] Indeed, the Board now insists that employers who voluntarily recognize their workers' free and uncoerced majority choice for a union must post an NLRB notice telling workers how 30% of them may force the union to demonstrate majority support a second time.[9] In stark contrast, the Board does not require any employer-posted notice that explains to workers how to exercise their rights to form, join, or organize a union for the purpose of engaging in collective bargaining.

In addition to its decisions restricting workers' rights during an organizing campaign and burdening union efforts to achieve voluntary recognition, this Board has repeatedly undermined remedies for employer misconduct. Although the NLRA's remedial scheme has long been criticized as inadequate, the current Board majority has rebuffed various initiatives from past Boards aimed at enhancing compensation for victimized employees and overcoming the effects of unlawful employer activity. This Board has rejected remedial bargaining orders, broad cease-and-desist orders, and so-called "special" organizing remedies;[10] absent such relief, the penalty for serious employer wrongdoing is too often simply to post a notice and promise not to do it again. These notices do far too little to dispel the intimidation and fear created by an aggressive, illegal anti-union campaign, and far too little to discourage employer illegality in the first place.

Finally, the current Board has made it more difficult for workers to recover even the modest backpay remedy to which the law entitles them when they are fired, laid off or denied employment because of their union support. Once such a violation is found, the burden has always fallen on the adjudicated lawbreaker to present information that would constitute grounds to reduce the backpay owed an illegally fired worker. This Board, however, has turned the remedial process on its head. Recent decisions have required employee victims to produce evidence that they searched for particular new jobs[11] even while engaged in picketing to get their old jobs back,[12] or that they would have worked for the employer for the entire backpay period following their having been illegally denied a job.[13] Board resources must now be directed away from investigating and prosecuting labor law violations and devoted instead to reducing the backpay liability of the lawbreaker. The Board's new direction further weakens remedies and makes it less expensive to violate workers' rights.

The Congresses that enacted and amended the NLRA from 1935 to 1959 viewed collective bargaining as an essential way to maintain and expand America's middle class. This Board's decisions, significantly eroding workers' ability to gain the right to bargain with their employer for a better future, highlight the need for legislative reform and for a return by the current Board to its statutory mandate. We call upon Congress to address both of these urgent needs.

Sincerely,

JAMES J. BRUDNEY, *The Ohio State University Moritz College of Law.*

CYNTHIA ESTLUND, *New York University School of Law.*

JAMES ATLESON, *University at Buffalo Law School, the State University of New York.*

DIANNE AVERY, *University at Buffalo Law School, the State University of New York.*

MARK BARENBERG, *Columbia University School of Law.*

CARRIE GRIFFIN BASAS, *Penn State-Dickinson School of Law.*

ROBERT M. BASTRESS, JR., *West Virginia University College of Law.*

SUSAN BISOM-RAPP, *Thomas Jefferson School of Law.*

CHRISTOPHER DAVID RUIZ CAMERON, *Southwestern Law School.*

SUSAN CARLE, *Washington College of Law.*

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CARIN ANN CLAUSS, *University of Wisconsin Law School.*

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LAURA J. COOPER, *University of Minnesota Law School.*

MARION CRAIN, *University of North Carolina at Chapel Hill.*

CHARLES B. CRAVER, *George Washington University Law School.*
ELLEN DANNIN, *Pennsylvania State University, Dickinson School of Law.*
HENRY H. DRUMMONDS, *Lewis and Clark/Northwestern School of Law.*
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CATHERINE FISK, *Duke University.*
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RUBEN J. GARCIA, *California Western School of Law.*
JULIUS GETMAN, *University of Texas School of Law.*
PROFESSOR MICHAEL J. GOLDBERG, *Widener University School of Law.*
JENNIFER GORDON, *Fordham University School of Law.*
ROBERT A. GORMAN, *University of Pennsylvania Law School.*
MICHAEL GOTTESMAN, *Georgetown University Law Center.*
JOSEPH R. GRODIN, *U.C. Hastings College of the Law.*
SETH HARRIS, *New York Law School.*
MICHAEL HAYES, *University of Baltimore School of Law.*
DOROTHY HILL, *Albany Law School.*
ANN C. HODGES, *University of Richmond School of Law.*
KARL KLARE, *Northeastern University School of Law.*
THOMAS C. KOHLER, *Boston College Law School.*
HOWARD LESNICK, *University of Pennsylvania Law School.*
ARIANA LEVINSON, *Louis D. Brandeis School of Law, University of Louisville.*
ANNE MARIE LOFASO, *West Virginia University College of Law.*
DEBORAH MALAMUD, *New York University School of Law.*
CARLIN MEYER, *New York Law School.*
MARIA ONTIVEROS, *University of San Francisco School of Law.*
JAMES G. POPE, *Rutgers University School of Law—Newark.*
ROSEMARY QUEENAN, *Albany Law School.*
JOEL ROGERS, *University of Wisconsin Law School.*
MITCHELL H. RUBINSTEIN, *St. John's Law School and New York Law School.*
GEORGE SCHATZKI, *Sandra Day O'Connor College of Law at ASU.*
JOSEPH E. SLATER, *University of Toledo College of Law.*
THEODORE J. ST. ANTOINE, *University of Michigan Law School.*
KATHERINE STONE, *UCLA School of Law.*
CLYDE SUMMERS, *University of Pennsylvania Law School.*
JOAN VOGEL, *Vermont Law School.*
PAUL WEILER, *Harvard Law School.*
MARLEY S. WEISS, *University of Maryland School of Law.*
MARTHA S. WEST, *University of California Davis School of Law.*
STEVEN L. WILLBORN, *University of Nebraska College of Law.*
DONNA YOUNG, *Albany Law School.*

ENDNOTES

[1] See e.g. Oakwood Healthcare, Inc., 348 NLRB No.37 (2006); Brown University, 342 NLRB No.42 (2004); Oakwood Care Center, 343 NLRB No.76 (2004); Brevard Achievement Center, 342 NLRB No.101 (2004).

[2] See e.g. Delta Brands, Inc., 344 NLRB No.10 (2005); Waters of Orchard Park, 341 NLRB No.93 (2004); Holling Press, Inc., 343 NLRB No.45 (2004); IBM Corp, 341 NLRB No.148 (2004).

[3] See e.g. Albertson's, Inc., 351 NLRB No.21 (2007); Desert Toyota, 346 NLRB No.3 (2005); First Legal Support Services, 342 NLRB No.29 (2004).

[4] See Richard B. Freeman, Do Workers Still Want Unions? More Than Ever, Economic Policy Institute (Washington D.C. 2007). See also Upfront, Business Week, Sept. 16, 2002, at 6.

[5] See e.g. Airport 2000 Concessions, LLC, 346 NLRB No.86 (2006); Alladin Gaming, 345 NLRB No.41 (2005); Crown Bolt, 343 NLRB 776 (2004).

[6] See e.g. Guardsmark, LLC, 344 NLRB No.97 (2005), enf't denied, 475 F.3d 369, 378-80 (DC Cir. 2007); Palms Hotel and Casino, 344 NLRB No.159 (2005); Lutheran Heritage Village-Livonia, 343 NLRB No.75 (2004)

[7] See e.g. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Franks Bros. v. NLRB, 321 U.S. 702 (1944); NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318 (1940).

[8] Dana Corp, 351 NLRB No.28 (2007).
[9] Id.
[10] See cases cited at note 3 above; see also Intermet Stevensville, 350 NLRB No.94 (2007); Abramson, LLC, 345 NLRB No.8 (2005); The Register Guard, 344 NLRB No.150 (2005).
[11] See St. George Warehouse, 351 NLRB No.42 (2007)
[12] See The Grosvenor Resort, 350 NLRB No.86 (2007)
[13] See Oil Capitol Sheet Metal, Inc., 349 NLRB No.118 (2007). See also Toering Electric Co., 351 NLRB No.18 (2007).

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Senator KENNEDY. Mr. Chairman, I hope that—I guess our time will be up—we will have an opportunity to talk to this panel a little bit about the nature of the penalties. But we will come back to that. My time has run out on this now. But we will come back to that, I guess.

Chairman ANDREWS. I am sure that we can. Let me make a suggestion. The House has three votes. The members of the House can leave.

We are going to continue the hearing with Senator Isakson. And, frankly, during the absence of the House members, if Senator Kennedy or Isakson would like more questions, we will come back to you, just to be fair.

So, Senator Isakson, you are recognized.

Senator ISAKSON. Thank you, Mr. Chairman.

I have two questions really. The questions apply to both of you. In the new rule with regard to the 45-day open period, it seems to me that if a card check system is an accurate reflection of the will to organize, then a timely election would verify that. And it seemed like the rule change allowed a timely verification of the card check. Am I correct in that?

Mr. BATTISTA. I think you are, Senator. The thing that we were concerned about, the majority was concerned about in Dana-Metaldyne was that where you have an agreement between the employer and the union initially on a neutrality card check arrangement, that there is the tendency to believe that this is what the employer and the union want. And what we have got to focus on is what the employees want.

Do they want this union or not? We did not do away with the recognition bar. We just said that you have got a 45-day period to, if you don't want the union, get 30 percent of your colleagues to sign a petition. We will conduct an election to determine whether the union stays in place or not.

If you are happy with the union, do nothing. And after 45 days, that will be a factor of life.

It is a little like what the priest did to me when I got married 20 some years ago. The priest said is there anyone in this church that knows why this marriage shouldn't go forward. If, now speak, or forever hold their peace. And maybe that is an analogy that can be used to discuss the way we handled this marriage the union and the employer in the Dana-Metaldyne case.

Senator ISAKSON. Member Liebman?

Ms. LIEBMAN. The difference is that after your wedding was concluded, you weren't given a 45-day window period to get out. And I think that is a difference. It is conceivable certainly that after 45 days if there is an election held that it will confirm the results. But there are several things going on here.

First of all, let me point out that the Dana decision did overrule precedent that was not a decision of the Clinton board. It was a decision that went back until about 1960.

Secondly, what the Dana decision does is quite unprecedented. It requires the posting of a notice in the workplace telling employees that they have a right to get rid of the union that a majority of them have just signed cards for. That is completely unprecedented. We don't have similar kinds of notice postings under our current procedures.

It is also quite unusual and quite contrary to the principle of majority—exclusive majority representation in the statute to allow a minority of employees—namely, 30 percent—to undo what the majority has just expressed a preference for. That just doesn't happen under this statute.

You can't change your mind right after an election, even though some people might change their mind. You can't get out of it as soon as the election has been conducted.

And so, even though some cases have said that the election is the preferred means, that is not in the statute. There is no statutory requirement for an election. And I would add just as a final point that a case like Wurtland or Shaw's reflects again the double standard about this reverence for elections. The same reverence for elections has not been shown in the situation where employers seek to come out of bargaining relationships, as the majority has indicated, for getting into a relationship.

Senator ISAKSON. Thank you. I have one little question, if it is all right, Senator Kennedy.

I am told in the MGM case that MGM voluntarily recognized a card system and then after the recognition, the 1-year ban period takes place, but 1,900 workers petitioned for an election. And NLRB denied those 1,900 workers the right to that election under the 1-year ban. Am I correct?

Ms. LIEBMAN. We didn't actually call it a 1-year ban. We called it a voluntary recognition ban. But it essentially came to about 1 year. That is correct. And that is consistent with the regular recognition bars that have been in place for years and the assessment of all the circumstances, the progress of the negotiations.

In MGM Grand, the parties were using a pretty sophisticated method of negotiating the contract, which the board majority at that time felt allowed for a little greater time to give the parties a chance to work out their differences. That is the concept really behind these bars, whether it is a contract bar or certification bar or voluntary recognition bar, to give the union a chance to negotiate an agreement with an employer, particularly a first contract, which is much more difficult to negotiate than successor agreements. Give them a chance.

Employees may get frustrated during the bargaining process and may sort of become skeptical. And so, at any one point of time they might say this isn't worth it. But that is not the concept of the law. And these principles have been endorsed by the Supreme Court. These rules are not based on any certainty that the union still retains the majority, but that the process should be given a chance to work for a reasonable period of time.

Senator ISAKSON. Well, my only comment is it made sense to me that you would change a rule if you actually had a circumstance under the old rule where 60 percent of the employees wanted an election and couldn't get one.

But again, if I am correct in the information I have been given, if 60 percent want it, I am thinking the decision NLRB made under the old rule in the MGM case, this would have at least provided the majority with a timely election to see if it reflected the views. That would be my only point.

Ms. LIEBMAN. Yes, could I just say in response to that that these rules do not exclude the right of employees to have an election to, in essence, decertify the union? It just postpones it for a reasonable period of time.

There are reasonable intervals during which we will not conduct elections so the process can work. And I could point out also that if the majority had been unhappy with a case like MGM, it could have dealt with that situation under the existing rules by reaching a different conclusion as to whether a reasonable time for bargaining had elapsed.

But instead it completely gutted the entire principles of law about this reasonable period for bargaining, an insulated period during which we will not allow challenges to the union's majority status. What they did was a much more radical step. Whereas they could have dealt with it just within the existing case law.

Senator ISAKSON. Thank you, Mr. Chairman.

Senator KENNEDY [presiding]. Congressman Holt?

Mr. HOLT. Thank you, Mr. Chairman. I must hurry to the floor, so let me be very brief.

I am not a lawyer, not a labor lawyer, but I frequently use the phrase that workers have the right to organize.

Chairman Battista, you said the board is not tilted toward labor unions and not toward companies, but rather toward the worker. But as I look at the recent decisions about inside organizing or salting or the Dana decision or the St. George Warehouse where an employee has to prove that he is seeking another job or the BE&K Construction that allows employers to punish employees for exercising their rights, it really sounds to me like this is all for anti-union corporations.

And so, my quick question is should I strike the phrase right to organize from my talks, from my vocabulary?

Mr. BATTISTA. I certainly don't think so, Mr. Holt. And I certainly protect and encourage employees to organize if that is what they wish to do.

Mr. HOLT. Well——

Mr. BATTISTA. And our decisions are the same. I would be more than happy to discuss each one of those cases with you. But——

Mr. HOLT. I would like to pursue that. I must go vote now, but it certainly is troubling. And I don't know enough about the role of precedent in NLRB. But I hope that these are not decade-long precedents that have been established. This is very troubling.

Senator KENNEDY. Thank you very much.

Ms. Liebman, let me ask you this question. Isn't it true that early in the act's history, the card check on majority sign up was the law and then the board changed the law to require elections

if the employer wouldn't agree to accept the cards? Now isn't it true the board has even further undermined the majority signup process?

Ms. LIEBMAN. Yes, I think that is correct. There was a proposed amendment during the Taft-Hartley process which would have required a board election in order for a union to become the representative. That was not enacted by the Congress. And so, it is true that—and especially now it is long construed by the board——

Senator KENNEDY. So describe then the state of the law.

Ms. LIEBMAN. The state of the law is that voluntary recognition is legal, is certainly legal. One court has said it is a favored element of national labor policy. The board, I think, has made clear most recently that in its view it is not a favored element of national labor policy.

And it has clearly constructed obstacles to voluntary recognition, clearly removing any incentive for employers to agree to voluntary recognition processes. But the law does not require an election in order for the union to become the majority recognized representative.

Senator KENNEDY. We hear a good deal about the dangers of going back to the old days. What were the conditions in the old days—did we have the massive corruption of the whole process and the system? Was this system abused?

Ms. LIEBMAN. The election system or the voluntary recognition system?

Senator KENNEDY. Both.

Ms. LIEBMAN. No, I am not aware of abuses of the election process. But what clearly has happened is that unions have become disillusioned with the election process. And I would add here that whether they are right or wrong almost doesn't make a difference because it is the perception that really matters.

Senator KENNEDY. Okay.

Ms. LIEBMAN. If their perception is the process doesn't work, then it doesn't work.

Senator KENNEDY. Okay.

Ms. LIEBMAN. We have got a problem. And clearly, what happens is the elections do not occur in quick order. In Canada in some provinces, for example, the elections are within 7 days. We don't have anything like that.

And during this period, employers are permitted to campaign against the union, and employees can become intimidated and lose interest over the course of time. And then there are the delays of the legal process while various issues can be challenged and appeal processes take place.

And then there is the ability to challenge the process at the end, even if the union does win and is certified. The employer can refuse to bargain and further delays can occur while the case proceeds to the court of appeals.

So it may not happen in every case. It may not happen in even half of the cases. But it certainly is not impossible for years to go by before the union sits down to negotiate a first agreement with the employer. That, I think, is an abuse of the system when that occurs.

Senator KENNEDY. Let me move toward the issue of penalties. And I would like to ask Ms. Liebman. In your testimony you criticized the board for creating new obstacles to back pay awards. And I was particularly struck by the Grosvenor Resort case where the board said the workers who wait more than 2 weeks to start their job search should be penalized for their idleness.

And the issue is what impact do these cases of weakening the remedies have on the board's ability to meaningfully enforce the law. We all know if you don't have an effective enforcement that that undermines the integrity of the law.

We are going to hear later from Feliza Ryland, who is going to testify, who in 1996 went out on strike with 44 coworkers to protest employers' refusal to bargain in good faith. Fired several days later. Her discharge is the subject of the board's decision, in Grosvenor Resort issued in September 2007.

And we saw that in 1998 the judge agreed that the employer had acted in bad faith and had illegally fired her, ordered the management to offer the jobs back and give back pay. She never got the back pay. In 2001, 5 years after the illegal firing, the NLRB agreed with a judge who ordered the same thing but never received any back pay.

In 2002, the federal court enforced the NLRB, didn't get any back pay. In 2005, the judge held back pay hearings and ordered the Grosvenor to pay up to $10,000 in back pay, never got any back pay. In September 2007, the NLRB issued a decision reducing the back pay to $2,400 because, according to them, she didn't leave the picket line and get a new job fast enough.

What is going on here? If that doesn't sound like a system that is broken, I don't know one that is.

Ms. LIEBMAN. I would agree, Mr. Chairman. This statute, of course, was the first of—really, the first of the workplace statutes to be enacted. And it has historically been considered to have very weak remedies. It has got the weakest remedies of any discrimination cause of action of all the workplace statutes.

All the board is permitted to do by statute is to award back pay and order reinstatement. The back pay remedy itself has been weakened, though, because of the duty to mitigate back pay damages. No compensatory damages are possible under this statute.

And so, in the best of circumstances what the employees get by way of back pay is a weak remedy. The purpose of a remedy, of course, is to compensate the victim of discrimination and to deter wrongdoers. These remedies do nothing, certainly, to satisfy either element of the remedial principle.

The difficulties, of course, are compounded by the long, long delays that these proceedings take. So by the time a discriminatee actually receives back pay, it is probably fairly meaningless to them. In the meantime, they have had to go on with their lives.

And so, a situation like Grosvenor—and I was not on that case. Member Walsh dissented in that case, but I find his dissent persuasive in that I think it is very unfortunate that the majority used the language that they did where they said that to delay—if a person delayed for 2 weeks in seeking interim employment, that would reward idleness.

That is very unfortunate language. And I guess I would conclude by agreeing with you that I think this is a symbol of the fact that the system is broken or the law is quite ineffective.

Senator KENNEDY. Mr. Battista, when you hear that kind of chronology and over that period of time, what does it mean to you?

Mr. BATTISTA. I, frankly, Senator, am appalled by that kind of chronology. I am thankful that 98 percent of our cases are disposed of very quickly. And this is sort of an aberration.

I am also proud of the fact that this year we got 48 of the 50 oldest cases at the board out, including Grosvenor. And we were able to get the case out. But, you know, I am very much opposed to having cases languish at the NLRB. And I have done my best in 5 years to try to get those cases out.

Senator KENNEDY. Well, this happens. I mean, this goes on. This happens. I mean, what is your understanding of what the average back pay award is?

Mr. BATTISTA. I have not got an average back pay award.

Senator KENNEDY. Well, would you be surprised that it is $3,650?

Mr. BATTISTA. I don't know, Senator.

Senator KENNEDY. Well, you must know as the chairman what the penalties are. I mean, this is rather startling that the head of the board doesn't know what the penalties are.

Mr. BATTISTA. In terms of penalties, we have never looked at them as penalties. Back pay has really been viewed as a remedy. And in terms of——

Senator KENNEDY. Well, what the remedies are.

Mr. BATTISTA. In terms of the remedies, though, it is dependent on a number of things: how long the person has been off, whether or not the person has attempted to mitigate the losses, which the law requires. And so, I don't have any average number at my fingertips. I will be more than happy to attempt to get that for you, though, sir.

Senator KENNEDY. Well, each year 30,000 workers receive back pay, 30,000 workers receive back pay after the NLRB found that employers had violated their rights. Now I just asked you what the average back pay award was—$3,600. Does that sound to you as an adequate kind of remedy?

Mr. BATTISTA. It doesn't, and it sounds low. But I, again, don't have any—I know that this past year in 2007 we collected $110 million of back pay. So that number that you have sounds low, but I don't have the facts at my disposal to answer the question.

Senator KENNEDY. Well, I think it is worthwhile to investigate because I think that they are not even—in terms of trying to have the general kinds of awards to individuals, both in terms of back pay and for other violations of rights—sufficient. Your characterization of those—do you think that they should be increased? Do you think they are doing the job?

Do you find that your door is beaten down by employers saying "don't be considering these kinds of penalties because we can't take it?" Or do you think it is more of a slap on the wrist to these corporations, $3,600 as a cost of doing business? What is your experience? What are they telling you?

Mr. BATTISTA. Back pay is what the statute——

Senator KENNEDY. How many complaints do you have from corporate America about these penalties being too high?

Mr. BATTISTA. I don't believe I have gotten any complaints from corporate America.

Senator KENNEDY. Well, what does that say to you, that they are too high or too low? They are not complaining about it. What does it say to you?

Mr. BATTISTA. I guess I wouldn't expect to get complaints from either corporate America or anyone else. I don't make the law. I just enforce it, Senator.

Senator KENNEDY. Let me move on to the balance between the employer and workers' rights. I think through the history, the board has had to balance the employers' interest and the rights accorded to the workers under the law. And, for example, the board had to balance employers' free speech rights with workers' rights not to be threatened or intimidated during a union organizing campaign and employers' private property rights with workers' right to have access to union organizers.

Ms. Liebman, do you want to just comment about the change and the shift as you perceive it? We have commented earlier, I think, about the legislation and the balance between engaging in union activity, and refraining from union activity. I am interested in your assessment, both the historical and the present balance in this area.

Ms. LIEBMAN. Yes, thank you, Mr. Chairman. As I mentioned in my opening statement, the recent board's decisions have quite frequently held that employee rights to engage in union or other concerted activity must yield to a variety of business interests. And those include employer free speech rights.

Senator KENNEDY. It is ironic when the same board also trumpets the primacy of employee free choice in this statute because employee free choice cannot really be free if employers are free to intimidate their workers in connection with their selection of a representative or in connection with their engaging in concerted activity. And more and more this board has said that employer free speech rights trump the statutory rights and allow employers to engage in conduct and to make statements to engage in communications that under previous law clearly would have been considered unlawful.

They have done this not by reversing precedent, but essentially just ignoring or sidestepping longstanding precedent under this part of the law. And this clearly stifles the right to engage in free choice and free exercise of statutory rights.

Senator KENNEDY. On related, sort of subject matter—and that is the board has been criticized for providing fewer rights to fewer workers. For example, the board took away the right of nonunion workers to have a witness or some kind of representative with them when they are being investigated by their employer. Also the board has issued a number of decisions excluding broad categories of workers, especially many nurses and construction workers from the law's protections.

What effect do you believe these decisions have had on the workplace? And what steps do you believe are necessary to ensure the board fulfills its statutory duty to ensure collective bargaining?

Ms. LIEBMAN. Thank you for the question. I think it is quite clear the trend has been to apply the statutory coverage provisions in a very narrow way. Earlier this morning someone mentioned the San Manuel decision. And that is the one notable exception to this trend. And that is where the board held that the statute applied to employees working for tribal casinos.

But other than the San Manuel case, the trend has been to narrow the coverage of the law, particularly with respect to different kinds of employees, different kind of workers that are emerging in the workplace, including contingent workers or the increasing use of graduate teaching assistants in universities as universities feeling the economic pinch have turned more and more and more to using graduate teaching assistants instead of professors.

And so, wherever there seems to be some new kind of worker looking for representation, it seems that the board majority has applied a very narrow construction of the statutory provisions and excluded them from the coverage of the act, which means that the act really is not applying to people who work for a living who give their services in turn for some kind of compensation, which really is the common law definition of an employee.

Senator KENNEDY. I don't know how long our colleagues are going to be tied up over there, but I am enjoying it. I admit. I never thought I would be chairing a House hearing. I don't know quite that I had that in mind but it is a great honor. Let me add that very quickly.

I am interested, if you would, Ms. Liebman, to respond to the questions about reversing precedents. I think that this is important, the Clinton board versus the Bush board. I think Chairman Battista gave a very strong statement on that. I think it is important that we have in the record your view.

Ms. LIEBMAN. Yes, I appreciate the opportunity to reply to that. I haven't had the time to study the figures cited by Chairman Battista, who quotes from Roger King a management lawyer's speech. But the real issue is not the number of precedents that have been overruled. The real issue is the reason for the overruling and the substance of the change in the law.

I would point out, by the way, that there are other ways of deviating from established law besides honestly and openly overruling precedent. For example, there is narrowly construing existing precedent or distinguishing cases away or simply ignoring them if they stand in the way of a desired result. And that we have seen quite a bit. I just mentioned some with respect to employer free speech rights.

In addition, if you look at the board's cases of the last 5 years and if you are able to read the footnotes in those decisions, you will see dozens and dozens of footnotes where existing precedent, many of it very longstanding, is questioned by one or more members of the majority in a way probably signaling to practitioners that these issues are open and certainly sowing confusion and uncertainty about the state of the law.

As the Supreme Court has made clear, there is nothing inherently wrong with an administrative agency overruling precedent. In fact, it can certainly be appropriate. When changes in the economy or the workplace show that an old legal rule is outdate or

where experience shows that an old rule is unworkable, where there are conflicts within the case law that need to be resolved, or when more careful examination shows that a prior board's reasoning was flawed. In all those kinds of situations, overruling precedent is acceptable and even justified. This is an administrative agency, not a court.

In my view, when the Clinton board reversed precedent, it did so for these kinds of reasons that I have just outlined. And the affect of the reversals was to bring the board's law into closer harmony with the goals of the statute, which I have articulated before, to promote collective bargaining freely chosen.

In my view, the Bush board has done the opposite with respect to overruling precedent. And Member Walsh and I have tried carefully to explain why we think that in our dissenting opinions.

Senator KENNEDY. Okay.

Ms. LIEBMAN. Thank you.

Senator KENNEDY. I am going to give you both a chance. You have referred to it, but I think it is important to get your individual views about what you think the overall impact of the past 5 years have been on the collective bargaining process. Do you think that it has been enhanced? Do you think it has been diminished?

Chairman Battista?

Mr. BATTISTA. I think, Senator, that the past 5 years we have attempted to decide cases on the basis of the law, apply the facts to the law, and reach a decision. I think there has been an emphasis on free choice for employees in our decisions. Once that choice is made, we certainly encourage collective bargaining. But I think that that is true.

I think where we have moved precedent it has generally been back to the precedent that was long-recognized before the Clinton board overturned it. I think that perhaps the pendulum just moved a little bit from the left to the right and maybe into the center. And I hope that that is what these 5 years are looked at.

Senator KENNEDY. Yes, I am never sure what these left and right references really mean. I think I understand your comment, but I am not sure that they are good or necessarily accurate measurements when you are certainly talking about workers' rights.

Ms. Liebman, I know you have referred to this in other answers. Perhaps you would just summarize your view.

Ms. LIEBMAN. Yes. Let me start by saying that I think the most—perhaps the most notable thing about the last 5 years is the increasing disenchantment with the board, with the board's decisions, but not just with their decisions, with the decision-making process, with the perception of the integrity of the process and a disenchantment with the law itself, the law's ability to actually protect workers' rights. I think that has been the most significant impact of the last 5 years.

A significant policy choice of this board has been to elevate free choice. And in these cases, it has always been the choice to reject union representation over the promotion of collective bargaining. To my knowledge, this is the first board to articulate the ranking of statutory policies in this way. In fact, the only authority I have found in the board's case law for articulating the policy weighing

that way was in a dissenting opinion in, I think, 1983 or 1984 by former Chairman Donald Dotson.

So in so doing, I think the board has presented its own dramatic policy decision as a simple matter of statutory interpretation. And this fifth dramatic policy decision, I think, colors everything that this board has really done by elevating essentially the right to refrain over promoting collective bargaining.

This statute is not neutral about collective bargaining. It says expressly that the purpose of this—or the policy of this nation is to promote collective bargaining. The agency is neutral with respect to the parties that come before it. But it is not neutral as to the policy goals, which are to promote collective bargaining freely chosen.

And last, I would say—and I made this point in my opening statement—that when the decisions and the policy choices so consistently seem to favor employer interests or oppose unionization or impede collective bargaining, I think there is a problem. Thank you.

Senator KENNEDY. Let me——

Mr. BATTISTA. Senator, if I could——

Senator KENNEDY. Yes.

Mr. BATTISTA [continuing]. I would like to make one comment. With regard to encouraging collective bargaining, I would like to note from the paper that I have submitted for the record that Archibald Cox stated that the Taft-Hartley Act "represents a fundamental change in philosophy which rejects outright the policy of encouraging collective bargaining." That is on a 1961 Harvard Law Review volume.

The fact of the matter is I think that the Taft-Hartley Act did work changes and did result in a more neutral stance by the board. But I disagree with Professor Cox. Once employees make clear their decision to be represented, then I think the agency has an obligation and does encourage collective bargaining.

Senator KENNEDY. Well, we will come back. Didn't you sign on to the Terracon case, the 2003 Terracon case that said that the purpose of the act is to promote collective bargaining?

Mr. BATTISTA. I don't disagree that it is.

Senator KENNEDY. Okay.

Mr. BATTISTA. It is when that promotion begins.

Senator KENNEDY. All right. Let me just ask finally because then I know the others are here.

Ms. Liebman, just the final question. The Supreme Court has held that workers who work for nonunion employers in order to organize from within, sometimes called salts, are entitled to full protection of the National Labor Relations Act. The Supreme Court has held that.

Yet in several cases this year, the board's decisions seemed designed to do an end run around that Supreme Court's decision and to treat these union salts as second-class citizens. Aren't the cases like the Oil Capital Sheet Metal and the Toering Electric Company contrary to the spirit of the Supreme Court's protection for union salts?

Ms. LIEBMAN. I would say so, Mr. Chairman. The Supreme Court in the Town and Country case made clear that a salt, as they are

known, employees seeking to be hired in order to both uncover anti-union discrimination and to organize the workforce when hired, have the full rights of statutory employees.

In the Toering decision, the board, I thought quite startlingly, said that people who don't prove that they have a genuine interest in going to work are not statutory employees. That seems directly contrary to what the Supreme Court has said.

I might add also that the Oil Capital decision and Toering departed from a decision of the Clinton board entitled SES which set out the framework for approving and litigating cases involving salts and hiring discrimination. That was a bipartisan decision at that time and seemed to work well. It was approved by the courts.

And they took that both Toering and Oil Capital has deviated from that precedent as well in a way that I would suggest to you just represents a hostility toward the practice of salting.

Senator KENNEDY. Thank you.

I relinquish the gavel to my friend and colleague, Mr. Andrews. I have enjoyed this thoroughly. I mean, it is unique. I don't have this opportunity over in the Senate, unlimited time, no Republicans here to correct me around. This is a dream come true. It has taken 45 years to get here.

But thank you. You have been very responsive and courteous.

I thank the chair.

Chairman ANDREWS [presiding]. Well, I would like to thank the chairman for his filling in for us here. Senator Kennedy can now write in his memoirs that he got to chair a House subcommittee. And I can tell my children that Senator Kennedy was my understudy. Not bad, not bad.

I do want to ask just a couple of questions before we go to the next panel. I have not had my chance to question this panel.

I want to thank the witnesses for their patience and their participation here this morning.

Mr. Chairman, in discussing the Dana and Wurtland decisions, you indicated they were both about cards. That is obviously true. But I wanted to walk through my perception that there is a pretty significant contradiction.

In the Dana decision, if I am not mistaken—correct me if I am—the majority decision draws a distinction between representation decision by majority signup and representation decision by ballot. If I read that decision correctly, the reasoning is that the bar on reconsideration of recognition does not apply now to circumstances where the union was recognized by a majority signup. Is that right?

Mr. BATTISTA. I am sorry, I didn't hear the question.

Chairman ANDREWS. For 40 years we have had a precedent where there is a bar on reconsideration of the recognition decision for a "reasonable period of time," which has, I think, been broadly interpreted as 2 years or 3 years by the case law.

Mr. BATTISTA. Right.

Chairman ANDREWS. That bar no longer applies under this precedent in the case of majority signup leading to the recognition of the union. Is that right?

Mr. BATTISTA. No, there is a recognition bar. And that is for a reasonable period of time.

Chairman ANDREWS. Right.

Mr. BATTISTA. It is not for any particular period of time.

Chairman ANDREWS. Okay. Does that bar now apply in the case of majority signup equally as it does with the secret ballot recognition?

Mr. BATTISTA. No, it just applies to a card check situation where there is a majority signup.

Chairman ANDREWS. Okay. Okay.

Mr. BATTISTA. And there is a recognition. Then there is a recognition bar. Where there is an election, the law has a certification bar. The union is then certified as the collective bargaining representative. And that bar is irrebuttable for a period of 1 year and then rebuttable after that.

Chairman ANDREWS. But isn't it fair to say that before the Dana decision, the same bar applied to majority signup and secret ballot elections?

Mr. BATTISTA. No.

Chairman ANDREWS. It didn't?

Mr. BATTISTA. The recognition bar, which is a reasonable period of time, would apply to a situation where an employer recognized the union on the basis of a card check. The certification bar would be the bar that resulted as a result of the union winning an election.

Chairman ANDREWS. But at the very least, the Dana case stands for the proposition that as little as 22 days can be a reasonable period of time before decertification can be considered. Right? Wasn't that the facts of that case—22 days after the employer voluntarily recognized the bargaining unit, there was an effort to decertify, and the petition was heard. Right? So isn't there a much shorter period of time now before something is——

Mr. BATTISTA. I don't believe so. I think what you have is with Dana there was a petition that was filed. That petition was dismissed by the regional director. And that is how the case got up to us.

Chairman ANDREWS. But then the petition was——

Mr. BATTISTA. Under our decision——

Chairman ANDREWS. Right.

Mr. BATTISTA [continuing]. We said that where you have a recognition, you are to notify the National Labor Relations Board, the regional office, of the fact of the recognition. And then there is a notice that is posted that gives the employees 45 days to petition if they wish. And if they don't wish, the recognition bar kicks in after the 45-day period and goes on for a reasonable period.

Chairman ANDREWS. Member Liebman, do you think that the decision is as narrow as the chairman just characterized it?

Ms. LIEBMAN. Is that narrow? No, it is not as narrow because, well, the decision itself upsets what had long been the principles about voluntary recognition and the insulated period that would follow a voluntary recognition to allow the parties a chance to bargain collectively.

Now, there is 45 days that, for one, kicks in where there is no insulated period. Campaigning can go on against the union. The employer may be reluctant to even begin bargaining with the union

during that time because of the uncertainty of what is going to happen.

The union may be subject to attack to its majority status during that 45-day period. And so, there is just the opposite of an insulated period that occurs. And if an election is actually scheduled and occurs, the open-endedness could go on for far more than 45 days.

So to say that this is just—I don't remember exactly how the chairman put it—but a postponement is really much too simplistic and much too—well, it doesn't do justice to what their decision did in the dramatic change in the whole process that this decision brought about, plus the notice itself. Right after a majority of employees have freely indicated they want union representation, the notice goes up in the workplace that says that you have a right to get rid of the union. That is unprecedented.

Chairman ANDREWS. Thank you very much.

We are going to proceed to two members that have questions for this panel and then quickly to the next panel.

And we begin with Mr. Tierney. Mr. Tierney is recognized for 5 minutes.

Mr. TIERNEY. Thank you, Mr. Chairman.

I thank our witnesses for being here today.

Attorney Liebman, just direct your attention to the Worcester, Massachusetts case for a moment. And we talked a little bit earlier. I think somebody mentioned that they were looking at precedent that had been set during the Clinton administration. But in that case, precedent was set back in the 1960s, I think 1962, about the idea of balancing the interest of employees to self-determination and the interest of labor stability.

And it was in the middle of a 5-year contract, the 3rd year in when I understand that that employee decided that they would like to get out of that representation. And the board instead of going along with general counsel's recommendation, which was to adhere to the integrity of the contract or the life of the contract, decided that at this point in time the employer could just pack up and move on.

Can you describe to me, you know, what damage that does to that balance of interests that have been going on for some 40 odd years?

Ms. LIEBMAN. Yes, I believe you are speaking of the Shaw's case.

Mr. TIERNEY. Exactly, exactly.

Ms. LIEBMAN. I dissented in that case. And I believed that the decision was wrong for a number of reasons. First of all, it allowed an employer who had agreed to a 5-year contract to withdraw recognition from the union after 3 years. Under board procedures, the employer would not have been permitted to file for an election, what we call an R.M. petition.

The employer couldn't do that. But the board majority said the employer could exercise its option just to unilaterally withdraw recognition.

And that was even though the employees themselves had filed a petition which could be entertained by the board after 3 years of a contract. There is a 3-year contract bar that after 3 years, the

board does entertain petitions filed by employees or by a rival union. It just won't entertain a petition filed by an employer.

So clearly, the decision upsets the balance that I spoke about and also impairs the integrity of collective bargaining and the integrity of contracts. This employer agreed to a 5-year contract, presumably got something for that agreement, in return for that agreement. And we are allowing now that employer to walk out.

As I mentioned earlier, again, I think the rhetoric of the majority's decision was a terribly unfortunate because they said that to not justify, to not allow the withdrawal of recognition would force people to endure union representation that they didn't want. I have never seen comparable language used with respect to employees who have to wait for years to enjoy the benefits of union representation.

Mr. TIERNEY. Mr. Chairman, Chairman Battista, I have got to tell you that, you know, when I read the decision, I get the same inference from that. You are just taking an unsolicited whack away on that.

How do you reconcile dumping 40 years of precedent in a case like that?

Mr. BATTISTA. I don't believe that that issue had come up before. I believe there was a 5-year agreement. And the employees, without any employer instigation, presented the employer with a petition to get rid of the union. The question was what should we do with that.

From a contract bar standpoint, the employer is certainly barred from acting in terms of for the 5 years. The question is how do you then give vent to or give meaning to what the employees want to do.

Mr. TIERNEY. Well, what do you say——

Mr. BATTISTA. And what they did was withdraw recognition.

Mr. TIERNEY. What do you say to the fact that they could have had an election, which was authorized?

Mr. BATTISTA. Well, they could have had an election. I believe there were blocking charges filed in that case. And if an unfair labor practice charge is filed, it will block the election until such time as the investigation is finished.

Mr. TIERNEY. Which would seem appropriate. But, I mean, what do you say about the whole idea of labor stability, about the integrity of the contract? I mean, it just seems that you went to unusual lengths to destroy both of those principles.

Mr. BATTISTA. I think from the integrity of the contract there is a 5-year bar for the parties. For the board, we had to make the board majority, and we just had to make a decision between employee choice and stable bargaining relationships. And here the stable bargaining relationship was over 3 years, and the employees wanted to make a change.

Mr. TIERNEY. Well, see, you could have let them have an election, but you chose not to go through the board's own process of election.

Mr. BATTISTA. It wasn't the board that made the choice. It was the employer that made the choice.

Mr. TIERNEY. Well, you allowed the employer to make the choice. I mean, now we are doing semantics here.

Mr. BATTISTA. And we——

Mr. TIERNEY. You had the option as the board to say there is a process here and there is a balance to be struck, they are going to have an election. If that is what they want, they can go through that process, but we are not just going to unilaterally come in here and dump 40 years of precedent on this thing.

Mr. BATTISTA. Well, I——

Mr. TIERNEY. Just let them have the election, have them go through that process and go through the whole procedure.

Mr. BATTISTA. I don't believe that there was any precedent that required an election.

Mr. TIERNEY. Well, precedent or not, why didn't you just let them go through the normal process?

Mr. BATTISTA. Because I think we made an evaluation as a board and as a board majority that looking at employee free choice in this instance, they are wanting to make a change. And contract stability—the 3 years had passed. There was a period in which the——

Mr. TIERNEY. I have to tell you, Mr. Chairman, given the language, the unfortunate language that you used, I find it hard to think that the three of you were being champions for unions and labor in that case.

Chairman ANDREWS. The gentleman's time——

Mr. TIERNEY. I yield back.

Mr. BATTISTA. Well, maybe we were being champions to the employees. And it might not be champions to unions, but certainly to the employees, Mr. Tierney.

Chairman ANDREWS. The gentleman's time is expired.

The chair recognizes the gentleman from Georgia, Dr. Price, for 5 minutes.

Dr. PRICE. Thank you, Mr. Chairman. I appreciate you holding this hearing. I guess it is fitting that at this time of year in this session, at this time in the session that we are sitting here in a hearing that I think would be charitably called political. I guess one could draw other conclusions. But I appreciate the opportunity, hopefully, to shed a little light on some principles.

Ms. Liebman, you have in some way in your comments seemed to connote or imply that freedom ought not be the paramount principle by which we act as a nation in employer and employee relations. You also mentioned curiously—I had to write it down—that private property rights ought not—they ought to be subservient to something else and that free speech ought to be subservient.

I just find it curious and troubling that we want to fall back on principle for the NLRB, but the principle upon which we want to fall isn't the Constitution, the rule of law, freedom, and what Americans across this nation hold dear, which is, I guess, why I find it amusing at best that we are here in December talking about these issues when we know that this majority began the year removing the right to a secret ballot for employees to form a union.

Mr. WU. Will the gentleman yield?

Dr. PRICE. So the desire—I beg your pardon?

Mr. WU. Would the gentleman yield?

Dr. PRICE. Who is asking?

Mr. WU. The gentleman from Oregon is asking.

Dr. PRICE. Absolutely.

Mr. WU. Has the gentleman ever seen an election in the way that it is contested?

Dr. PRICE. Reclaiming my time, clearly, you see the politics of the nature from the other side. So I think that principles of freedom, principles of free speech, principles of private property rights ought to be paramount, ought to be paramount.

When I hear the chairman talk about the progress that has been made on the board—and I am not intimately familiar with the activities of the board. I have attempted to bone up on that. But when I hear that the caseload has significantly decreased by hundreds, that the delay in cases has significantly decreased by hundreds and that the number of cases that were overturned by the previous administration's NLRB that overturned precedent and the number of years of precedents compared to this, I think it belies any true accusation on this board that it is not living up to the appropriate standards that it was and that it has not been fair in its process.

So I think that it is important to appreciate why we are here. And it is important to remember that in the context of previous boards, I would suggest that somebody looking from the outside who didn't have any ax to grind at all would say that this was a board that was working relatively well and maybe even better than in the past and was being respectful of precedents to a greater degree.

I represent the 6th District Georgia, which is Northern Suburban Atlanta, a lot of small businesses, lots of small businesses and folks who are very concerned about cases in which salting occurs.

And so, I would like to ask, Mr. Chairman, if you would please comment on the issue of salting, comment on the board's stance as it relates to salting and whether or not any changes you believe would be recommended to this committee and vis a vis salting.

Mr. BATTISTA. While, I have no legislative changes, I can tell you certainly what we have done from a decisional basis. We follow FES, which is a Clinton board decision dealing with whether or not someone has been improperly terminated and the burden of proof in that insofar as a salt goes. We have made a couple of changes.

We have looked at where a salt is unlawfully terminated. We have looked at the length of the back pay period. And the salt, unlike another employee who might be seeking indefinite employment, is there for a fixed period of time to organize the employees or, if they are unsuccessful, then to move on to another employer where they can organize the employees.

And so, we have said that the normal presumption that back pay would continue on indefinitely doesn't apply in the case of the salt. And you have got to look to the——

Chairman ANDREWS. Excuse me, Mr. Chairman, if I could ask you just to wrap up quickly because the time is expired. So if you would finish your thought.

Mr. BATTISTA. We fine tuned it really with Oil Capital and our decision in Toering, really.

Dr. PRICE. Thank you.

Mr. Chairman, may I inquire of the chairman just a question regarding this panel?

Chairman ANDREWS. Sure.

Dr. PRICE. It is my understanding that the minority wasn't allowed a witness on this panel. Is that correct?

Chairman ANDREWS. I don't believe that is correct at all, no.

Dr. PRICE. So the minority was solicited and had an opportunity to see the panel member here? Is that correct?

Chairman ANDREWS. Well, I would note that the chairman of the National Labor Relations Board was appointed by the president—NLRB was appointed by the president.

Dr. PRICE. I would note as well that the member is appointed by the president as well, has been on two occasions.

Chairman ANDREWS. My understanding is the minority was consulted about the witnesses at this hearing.

Dr. PRICE. And I appreciate that. I would just ask you to check with your staff regarding that. Thank you.

Chairman ANDREWS. The chair recognizes the gentleman from Illinois, Mr. Hare.

Mr. HARE. Thank you, Mr. Chairman.

And let me just say with all due respect to my friend from Georgia, I don't think it really matters what month we have these hearings. I don't see these hearings as political at all. I think we have an obligation to have people come before this committee and to be able to ask questions.

Mr. Chairman, let me just respectfully disagree with that assessment of the NLRB. I guess I am one of those people you referred to as—I am trying to remember the term, and it will come back to me. But I served 13 years in a union. And I worked for a member for 24 years. I have been here for a year.

So I think I have 28 years of being able to look at labor boards and working with them and seeing decisions. I will be very candid with you from my perspective. We are just going to have to agree to disagree. I don't think I have ever seen a labor board so tilted against unions, against working people and more in favor of employers than this board in the 28 years.

I think it was special interest you said. So with all due respect to the people in organized labor and unions, I consider them special interest because they are special people.

I am looking at some of the decisions that have been made here where large groups have been excluded from NLRA protection, including—excuse me—graduate teaching assistants, disabled individuals working as janitors, faculty members, newspaper carriers and haulers, temporary employees working jointly for a supplier-employer and a user client unless both employers consent, and hundreds of thousands of professional technicians and skilled employees by radically broadening interpretation of the NLRA term of supervisor.

The other thing I am very disturbed about is you have given employers greater leeway to intimidate course workers during organizing campaigns, from my perspective, also for people to—one of the other loopholes that this board has decided to create—and by the way, the trouble that I have with this board is you are not just following the law, I think you are trying to interpret it internally and then change it when you can when it fits.

For example, the board held in one of your September cases that employers can condition severance pay on workers' agreement to

waive their rights to report their employer's illegal conduct. And this rule essentially allows employers to buy their way out of breaking the law.

The EEOC treats such coercion as illegal, and it sues employers who make these kinds of threats. So I have a very difficult time understanding why the board would make decisions, you know, other than if we are talking politics here, I think we may be viewing this from a political perspective.

And I would like to ask the member, if I could, you know, do you see partisanship, you know, on this NLRB as contributors to this anti-union sentiment, or it is just merely a symptom of what is happening? And from your viewpoint—I know you have dissented on a number of these things—do you think that this board is, in fact, trying to reinvent the wheel here instead of enforcing what we have?

But I will tell you again having said this, I am very, very concerned that ordinary people and their rights are being adversely affected by decisions that this board makes. And if they don't like them, they just change them. And I don't know if you would concur with that. I would be interested in any thoughts you have.

Ms. LIEBMAN. Is that question for me?

Mr. HARE. Yes. Sorry, a lengthy one.

Ms. LIEBMAN. Thank you. I would be very hesitant to ascribe motivation to my colleagues on the board.

Chairman ANDREWS. I don't believe your microphone is on, Member Liebman. Thank you.

Ms. LIEBMAN. Thank you. I would be hesitant to ascribe motivation to my colleagues on the board. I would prefer rather just to look at the decisions themselves, the process of the decision making and the impact of the decision-making.

And as I said in my opening statement, I think that when you look at the policy choices that have been made over the past 5 years, you see that there is a kind of constant drumbeat, that there is nothing different about the September cases. Maybe they built to a crescendo, but there is really nothing different in the tenor of these cases from throughout.

And when you look at the policy choices, they all tend to create obstacles to collective bargaining, create obstacles to union representation, and elevate employer interests over employee statutory rights. A comment was addressed to me a few moments ago that my statement sounded like I didn't value freedom. That is certainly not the case.

Collective bargaining is to be freely chosen. And that means free from coercion by unions or by employers. And some of the free speech cases decided by this board, in my view, clearly infringe on the right of employees to engage in free choice. Likewise, when employers are given the right to vindicate their employees' free choice rights, that is not free choice.

So you have to look at the question of whether freedom is really free under this statute. When you consistently elevate private property or other managerial interests over statutory rights, something is wrong.

The Supreme Court long ago said that private property rights and employee statutory rights have to be accommodated to some

extent. When an employee goes to work for an employer and goes to work on the premises, the employer's private property rights must yield to some extent so the employees have the right to communicate with each other at work about their terms and conditions of employment and about unionization.

So much of this over the course of 70 some years has been a balancing act. But under this statute, it is just inconceivable that every time a policy choice is made, it is made in the direction it has been made. You can have differences about how you do the balancing. And certainly, over the years, there have been different balances.

But this, really, over the last 5 years, as I said, I think it is something different. It represents a competing or a different view of this statute, a different expression of policy preferences.

Mr. HARE. Thank you. I am glad you were able to answer a question that you didn't get the time to answer. So thank you.

Chairman ANDREWS. The gentleman's time is expired.

The chair recognizes the gentleman from Oregon, Mr. Wu. Is he here? Okay.

The chair will recognize the gentleman from Michigan, Mr. Kildee, for 5 minutes.

Mr. KILDEE. I have no questions.

Chairman ANDREWS. Mr. Wu has reappeared. Do you have questions, Mr. Wu? It is your time.

Mr. WU. I thank the chairman——

Chairman ANDREWS. Okay. Mr. Wu in the holiday spirit has decided that our board members can return to their work.

We thank you for your participation this morning very much. And thank you for your service to our country.

Ms. LIEBMAN. Thank you.

Mr. BATTISTA. Thank you.

Chairman ANDREWS. I would ask the members of the second panel to come forward. We thank them for their patience.

I am going to start to read the biographies now as the members come to the front so we can expedite our hearing. Matt Finkin is the Albert J. Harno and Edward W. Cleary chair in law at the University of Illinois. He teaches labor and employment and directs the college's of law program in comparative labor and employment law and policy.

Professor Finkin has previously taught at Southern Methodist University, Duke University, and the University of Michigan Law Schools. He received his B.A. from Ohio Wesleyan University, an LLB from New York University, and an LLM from Yale University.

Professor, welcome to the committee.

Ms. Feliza Ryland—did I pronounce your name correctly? Ms. Ryland is a former employee of Grosvenor Resort. Ms. Ryland worked as a room attendant at the Grosvenor Resort Hotel from 1984 to 1996 and is one of the many workers directly affected by one of the decisions issued by the NLRB this past December.

She is currently a housekeeper at the Old Star Resort, a Disney Hotel in Disney World in Orlando, Florida and is a proud member of the union Unite Here. Ms. Ryland is married, has one adult son.

Ms. Ryland, welcome to the committee.

Ms. RYLAND. Thank you.

Chairman ANDREWS. Mr. Charles Cohen is returning to the committee. He is a partner at Morgan, Lewis, Bockius law firm where he focuses on representing senior management in labor and employment law in the private sector. From 1994 to 1996, Mr. Cohen served as a member of the National Labor Relations Board.

For the past 3 years, Mr. Cohen has been named one of the leading U.S. lawyers for employment law by Chambers USA. He earned his B.A. from Tulane University in 1967 and his J.D. from the University of Pittsburgh School of Law in 1970.

Mr. Cohen, welcome back.

Mr. COHEN. Thank you very much, Chairman.

Chairman ANDREWS. And finally, Jon Hiatt is the general counsel for the AFL-CIO. He was appointed to that position on November 1st of 1995. Mr. Hiatt previously served for 8 years as general counsel for the Service Employees International Union where he directed that union's legal department.

Before joining SEIU, he was a partner in a labor law firm in Boston. Mr. Hiatt graduated from Harvard College and the Boalt Hall School of Law at the University of California, Berkeley.

Mr. Hiatt, welcome to the committee.

Professor Finkin, I think the witnesses heard the ground rules. Your written statements have been accepted without objection for the record. We would ask you to summarize your written statement in about 5 minutes.

When the yellow light appears, you have 1 minute to wrap up. When the red light is on, we would ask you to finish. And then we will go to questions from the members.

So, Professor Finkin, welcome, and we look forward to your testimony.

## STATEMENT OF MATT FINKIN, PROFESSOR, UNIVERSITY OF ILLINOIS

Mr. FINKIN. Thank you, Mr. Chairman. It is truly a privilege to appear before this body. As someone who has taught, researched, and published in labor law for 33 years to finally meet face to face with people who have the capacity to make the raw material out of which I make my living. You have my written remarks. I will try very briefly to summarize the four leading points.

First, since 2004, the National Labor Relations Board has embarked upon an historically unprecedented course rendering decision after decision, some overturning doctrine of short duration, some overturning doctrine of more than 40 years, which combined to make it more difficult for employees to institute or maintain a collective bargaining relationship or that curtail or eviscerate the rights of nonunionized employees the right to engage in concerted activity for mutual aid or protection. This much I submit as simply beyond dispute.

The chairman used the phrase special interests. I do not think I represent any special interests. I merely represent an honest academic laboring in the vineyard of labor law. But I note that a petition has been submitted and entered on the committee record signed by what I believe is a majority of the full-time teachers of labor law in American law schools.

I did not have the benefit of that petition at the time I wrote my own remarks. But I note that the sentiments that I express here are completely concordant with what a majority of my colleagues in the academy think to be true.

Second, none of these decisions, none of them, are statutorily commanded. They are the product of policy choices made by the board. That, too, is beyond dispute and, indeed, is confirmed by the previous discussion.

Ironically, given the intense politicization of the board in recent years, a differently constituted board majority could in future reconsider each of these decisions and reach an opposite effect well within the ambit of administrative discretion.

Third and related to that, the board has the power to fashion national labor policy interstitial to the labor act. That is the function of an administrative agency, to find tune and adjust the statute to changing circumstances to unforeseen conditions in the economy or in larger trends in society. That is its function.

For reasons that my remark explain, my final point and really an answer to your opening question, Mr. Chairman, the board's decisions are not responsive to any discernible trend in society or any discernible economic demands or need. On the contrary, they work in a quite opposite direction.

I submit that they are oblivious to the unfolding realities of the American workplace on many of the kinds of questions that Senator Kennedy remarked upon as he opened. I believe my views are shared, as I said, widely within the academic community, those of us who teach, research, and worry about the direction of American employment law.

[The statement of Mr. Finkin follows:]

**Prepared Statement of Matthew W. Finkin, Harno-Cleary Chair in Law, University of Illinois College of Law**

My name is Matthew W. Finkin. I hold the Harno-Cleary Chair in Law at the University of Illinois College of Law in Champaign, Illinois. For more than three decades I have researched, published, and taught labor and employment law in both the domestic and international context. A brief biographical entry is appended to these remarks.

I have been invited to address the impact of recent decisions of the National Labor Relations Board on worker rights. That, to paraphrase Justice Frankfurter, is a horse soon curried.[1] I should think it might be helpful to this body if I situate the Board's decisions on the larger legal, social, and economic landscape; and respectfully to suggest at the close what areas have call for legislative correction.

*I. The Pattern of NLRB Decisions 2004–2007*

The current Labor Board has charted an historically unprecedented course, overturning doctrine—some of long standing, some of recent vintage—and charting new legal ground altogether, limiting the scope of those to whom the protections of the Labor Act extend,[2] making it more difficult for employees to institute or maintain a collective bargaining relationship with an employer,[3] limiting the remedies that otherwise might be due to persons whose statutory rights have been violated,[4] limiting the rights of economic strikers,[5] limiting the General Counsel's ability to vindicate the Act,[6] and narrowing or eliminating other statutory protections.[7]

As the latter is of particular professional interest, please bear with me as I draw the Committees' attention to the Board's readoption of the rule that an individual faced with disciplinary interrogation in a non-unionized workplace has no right of accommodation to the requested presence of a coworker.[8] In much the same spirit, but in a case of first impression, the Board held that an employee on his break time on a customer's parking lot can be forbidden by his employer to talk to a union organizer when the organizer's presence in the parking lot was unauthorized by the customer, i.e., to refashion the customer's property-based right to exclude union orga-

nizers from speaking into a contractor's non-property based right to forbid its employees from listening.[9] The Board has held that an employee who seeks the aid of a co-worker in pursuing a complaint of sexual harassment was not acting for "mutual aid or protection" because her individual claim advanced no group interest, despite the unmistakable weight of authority to the contrary.[10] And the Board has held that a collective protest by school bus drivers, to save their unionized jobs by adverting to a non-union competitor's record of hiring unsafe drivers, was unprotected—indeed "disloyal" to a company to whom no common law duty of loyalty is owed[11]—because the text of their protest "implicate[d] the safety of children, not the common concern of employees,"[12] i.e., that school bus drivers have no work-related interest in the safety of the children they transport. The Board could rest on this counter-intuitive proposition because the text of the drivers' protest drew no connection to their interest in saving their unionized jobs; but that their petition had to do so was not heretofore the law, a fact the Board neglected to mention.[13]

The Board has also proven itself capable of maintaining two inconsistent policies simultaneously. In BE&K Construction Co.,[14] the Board held that an employer's maintaining an eventually unsuccessful lawsuit for no purpose other than one violative of the Act, e.g., simply to impose high litigation costs on a union, is nevertheless not an unfair labor practice if the suit was "reasonably based." The Board justified this rule out of its professed commitment to the First Amendment. But that commitment has not manifested itself in a similar protective solicitude toward the display by unions of an inflated rat in conjunction with a labor dispute or to union performance of "street theater" critical of an employer even though the teaching of the Supreme Court that such is free speech seems beyond peradventure.[15]

The Chairman of the NLRB has defended the Board's decisions by adverting to the availability of judicial review as a corrective to any administrative excess[16] and by adverting to the role of the Board as a "neutral arbiter of disputes."[17] The former supplies no justification for the course the Board has charted. The latter obscures the Board's decisions by a profound mischaracterization of its role.

*II. The Context of Administrative Law*

Let us first consider judicial review. The United States Supreme Court has repeatedly stressed the role of the Labor Board in the making of national labor policy;[18] and general principles of administrative law require the courts to defer to an agency's policy decisions so long as they are within the area of discretion reserved. The Board may modify antecedent doctrine or abandon it altogether; it may fashion novel doctrine interstitial to the Act, that is at its margins even if it is at the margins where the law might most importantly be felt in the face of changed circumstances. In principle, an agency may not alter the basic focus or function of its organic law,[19] but that principle fails to address the systematic narrowing of the organic statute's mission by a combination of numerous decisions no one of which, taken only on its own, can be said to lie outside the ambit of administrative decision. The appearance of legal continuity is thus maintained even as the Act's stated purpose, of "encouraging the practice * * * of collective bargaining,"[20] is transformed or the rights of employees are curtailed or eviscerated. That is just what has happened in the course of the past few years. Accordingly, it will not due to refer to judicial review—and rate of judicial affirmance—as any indication that the Board is performing responsibly.

*III. The Politicization of the Labor Board*

The Board's activist posture has been explained in part by the failure of Congress to attend to national labor policy which vacuum has accordingly been filled by the Board's refashioning of it. That potential has long existed but, as Professor Joan Flynn has observed, it was muted in early practice:[21] Presidents Roosevelt and Truman drew their appointees from the ranks of the Board's bureaucracy and from the academy. President Eisenhower appointed persons who had represented management, but from professional backgrounds completely comfortable with the institutional role of unions. Thereafter, Presidents Kennedy, Johnson, and Carter continued the tradition of appointing only career bureaucrats and academics; Presidents Nixon and Ford continued the Eisenhower practice of also appointing established management lawyers.

Even so, the change from the "Eisenhower Board" to the "Kennedy Board" was accompanied by a swift recasting of the Board's doctrinal gloss on the then newly-enacted provision of the Landrum-Griffin Act dealing with organizational picketing. This shift, which the late Bernard Meltzer referred to as Five on a Seesaw, was thought extraordinary at the time and elicited his critical observation that, "The Board's changes were too rapid to be ascribed to institutional developments or to

new insights produced by a maturing expertise; they reflected the different value preferences of new appointees interacting with loose statutory provisions."[22]

The Reagan administration broke with the past: "Whereas his predecessors had appointed management lawyers from well-known law firms—solid members of the labor-management 'club'—Reagan went wholly outside the mainstream labor relations community in his early appointments." He appointed persons known as "anti-union crusaders," putting, as Professor Flynn put it, "'the proverbial fox [or foxes] in the chicken coop.'"[23] Scholars debated the magnitude and significance of the shifts in policy the Reagan Board effected;[24] but these shifts pale in comparison with the current Board's record.

President Clinton was the first Democratic President to appoint a union lawyer to the Board and its politicization has now become institutionalized. A Canadian observer put the current situation in a nutshell. "In the United States where, because of legislative paralysis, there has been no major labour law reform for 50 years, the government in power influences the direction of labour relations policy through its appointments."[25] Consequently, as Professor James Brudney has pointed out, this Labor Board, now heavily freighted politically, is at a remove from constructive engagement with the Act's application in the contemporary context.[26]

Note that the Board's decision in Dana Corp.[27] abandoned Board policy of almost forty years duration, remaking voluntary recognition of a union into an unstable decision. Note that Oakwood Care Center[28] abandoned a Board decision of only a few years' duration and returned to a state of the law making bargaining rights unavailable to an increasing number of workers who are caught up in trilateral employment networks. To echo Bernard Meltzer, the former was the product of no new insight produced by a maturing expertise; nor was the latter a reaction to some institutional development that challenged the prior policy predicate. Indeed that predicate—the growth of trilateral employment networks—remains and the decision the Board abrogated was too new to for the Board to learn whether it was responsive to enabling those workers to be represented. To draw on Meltzer's observation, these and the like decisions reflect nothing more than the value preferences of those who decided them.

*IV. The NLRB as a Political Institution*

It would blink at reality to ignore the fact that the Labor Board is embedded in a political matrix. Nor were those who fashioned the Act so foolish as to believe otherwise. In my research in the National Archives on the drafting of the Act I encountered an exchange between Philip Levy, a young New Deal lawyer fresh out of the Harvard Law School, and Calvert Magruder, on leave from the Harvard Law School as General Counsel of the "old" National Labor Relations Act to whom Levy reported, both deeply engaged in the drafting of the Act. The Act's provision allowing the Labor Board the power to certify a representative without a secret ballot election had been criticized as giving the Board the power by that choice to "freeze out independent or progressive groups," given the display of radical labor organizations contending with established, politically conservative unions. Levy defended the draft, which became law, on two grounds:

[F]irst, it is extremely important that the Board have the power to certify or to determine representation in any manner it sees fit, and secondly, if the Board is going to be pro-employer, the jig is up.

Nevertheless, the Board Chairman has maintained that the Board's "intended statutory role [is] as [a] neutral arbiter of disputes."[29] As Clyde Summers observed more than fifty years ago, responding to the very same profession of neutrality made by a sitting Board Chairman:

The critical issues before the Board represent underlying disputes between unions and management. No matter how the Board decides these issues, it can not avoid aiding one and hindering the other. Impartiality is impossible. There can be no impartial rules governing the relationship between a tree and the woodsman's ax, even though we let the chips fall where they may.[30]

Summers defended the need for administrative discretion: legislation is always imprecise, new or unforeseen circumstances always arise, the sentiment of the country shifts, times change; and it is impractical for the legislature to sit in constant readjustment of labor policy. Thus,

The duty of the agency is to discern the threads of purpose which run through the statute and to feel the thrusts of policy which the statute represents. These should then become the chief guideposts for the exercise of discretion, and policy making should be confined within these broad bounds.[31]

But, just as an agency may be valuable because it is responsive, "it can be dangerous because it is not responsible."[32] The danger of irresponsibility, the danger of administrative legislation lies not in the open flaunting of statutory language. It

lies rather in the failure to adhere to the underlying purposes of the statute. Through lack of either insight or self-restraint, the members of the agency may unconsciously substitute their personal judgment of values for those premised by the statute.[33]

And the premise—the stated premise—of the statute is the protection of unionization and the promotion of collective bargaining.[34]

Although there is deep-seated disagreement as to the worth and rightness of unionization, that issue has been decided by the statute. The government is not neutral in the establishment of collective bargaining, but has charged the Board with the function of lending the power and prestige of government to protect the process of unionization. To "make a fetish of impartiality" in this area is to compromise one of the central purposes of the statute.[35]

I do not believe that any disinterested reader of the contemporary Board's record could characterize the pattern of Board decisions as the product of impartiality or could conceive of the Board as a neutral arbiter.

To reiterate: the Board is summoned to fine tune national labor policy, consistent with the purpose of the law, in the face of changed circumstances and demonstrable need. But the Board's recent decisions are antithetical to the statutory end and are oblivious to both changed circumstances and demonstrable need.

*V. The Need for Legislation*

The Canadian observer's point bears re-emphasis: we address the workplace of the 21st century with a labor relations law fashioned in the 1930s and which received its last major legislative reconsideration almost a half century ago. At that time, the United States' economy stood astride the world as a dominant supplier of manufactured goods; unions had achieved their highest historical density, of 35% to 37% of the civilian non-agricultural labor force; and a major concern was of whether unions had "too much" economic and even political power even as the legitimacy of collective bargaining was a given.[36]

Today, the United States is overwhelmingly a service economy. Work is being performed in a variety of ways that resonate against the model of a full-time worker with an expectation of a lifetime career with a single employer—by part-time workers, leased workers, temporary workers, and workers categorized as independent contractors or "own account" workers. A much larger percentage of the workforce are professionals who function not as true independent contractors but as employees in highly bureaucraticized work settings. Corporate managers are under global competitive pressure and pressure from investors for a return that constrains their ability to reward labor commensurate even with its contribution to increased productivity, as a result of which the nation is experiencing an ever widening inequality of income;[37] and the risk of medical need during employment and of maintaining a decent level of income after employment is being shifted inexorably on to the employee.[38] But today, union density in the private sector is below 8% and employers commonly, and aggressively, challenge the legitimacy of collective bargaining.[39]

The adaptation of our labor market institutions to the economy of this and the immediately ensuing decades has occupied many serious scholars.[40] They put large questions; but, fortunately, we need be concerned here with only one more manageable aspect—how employees can secure representation and effective enforcement of their statutory rights. These questions have drawn the attention of labor law scholars for decades[41] and I believe there to be a consensus that the most pressing problems are of coverage, ready access to representation, and remedies to effect the law's purpose, which problems have only been exacerbated by the Board's recent decisions.

1. Coverage. The Board has constrained the Act's reach by excluding persons found to be independent contractors, oblivious to the economic realities of their relationship to the employer,[42] or otherwise to be statutory non-employees under the guise of being supervisory, managerial, or in some other exempting category. These exemptions call for statutory readjustment to the unfolding realities of the modern labor market.

2. Ready Access. What was thought a matter of routine, almost a matter of course, in the 50s and 60s has now become a struggle for institutional legitimacy. The impressive Freeman-Rogers study indicates that at least 23% of American workers want union representation as such.[43] I.e., about 14% of the workforce, at least fifteen million workers, want but do not have union representation. The Labor Act was meant to facilitate that demand but the Board's recent decisions are to an opposite effect.

3. Remedies. The Act depends almost entirely on voluntary compliance, especially in its imposition of a duty to bargain in "good faith." In other unfair labor practices, Congress chose to give the Board limited "make whole" power to avoid the delay

of jury trials: swiftness of redress was the trade-off for the lack of full compensatory relief.[44] Today, justice is not swift,[45] relief is not compensatory, and the law has little or no deterrent effect. Something needs to be done.[46]

ENDNOTES

[1] Olberding v. Ill. Cent. Rr. Co., 346 U.S. 338, 340 (1953).

[2] E.g., Brown University, 342 NLRB No. 42 (2004) overruling New York University, 332 NLRB 1205 (2000). See also Pennsylvania Academy of Fine Arts, discussed in note 42, infra.

[3] E.g., Dana Corp., 352 NLRB No. 28 (2007) overruling Keller Plastics Eastern, Inc., 157 NLRB No. 55 (1966); Oakwood Care Center, 343 NLRB No. 76 (2004) overruling M.B. Sturgis, 331 NLRB 1298 (2000); Truserve Corp., 349 NLRB No. 23 (2007) overruling Douglas-Randall, Inc., 320 NLRB 431 (1995); Crown Bolt, Inc., 343 NLRB No. 86 (2004) overruling General Stencils, 195 NLRB 1109 (1972). Cf. Haborside Healthcare, Inc., 343 NLRB 906 (2004) limiting Stevenson Equipment Co., 174 NLRB 865 (1969).

[4] St. George Warehouse, 351 NLRB No. 42 (2007) overruling Lloyd's Ornamental & Steel Fabricators, Inc., 211 NLRB 217 (1974) (and its predecessors). The decision shifts the burden of proof on to the General Counsel to show due diligence in the employee's obligation to mitigate back pay for an employee dismissed for exercising her statutory rights. The Board relies on the proposition that the employee, not the employer, is in possession of that information. The Board does not note that in labor arbitration, where back pay for a wrongful discharge is the universal remedy and where it, too, is limited by a duty to mitigate, "the burden of proving lack of diligence or an honest, good faith effort on the employee's part is on management." ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1225 (Alan Ruben ed., 6th ed. 2003) quoting HILL & SINICROPI, REMEDIES IN ARBITRATION 216 (2d ed. 1991). I.e., that the Board's longstanding rule merely reflected the accepted norm of industrial justice.

[5] Jones Plastic & Engineering Co., 351 NLRB No. 11 (2007) overruling Target Rock Corp., 324 NLRB 373 (1997).

[6] In Toering Electric Co., 351 NLRB No. 18 (2007), breaking new ground, the Board held that "an applicant for employment is entitled to protection as a * * * [statutory] employee is someone genuinely interested in seeking to establish an employment relationship with an employer." Accordingly, in order to prove that an employer had a policy or practice of refusing to hire on the basis of union membership or activity the General Counsel must prove that an identifiable applicant would in fact have accepted to work. See supra note 29.

[7] See, e.g., William Corbett, The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability, 27 BERK. J. EMP. & LAB. L. 23 (2006).

[8] IBM Corp., 341 NLRB No. 148 (2004) overruling Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000). The disposition of this issue has reflected the political shifts in the composition of the Board since 1980. See Matthew Finkin, Labor Law by Boz—A Theory of Meyers Industries, Sears Roebuck & Co., and Bird Engineering, 71 IOWA L. REV. 155 (1985).

[9] North Hills Office Services, Inc., 345 NLRB No. 107 (2005).

[10] Holling Press, Inc., 343 NLRB No. 45 (2004). The dissent noted that the majority's reasoning confronted unequivocal precedent to the contrary, i.e., NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503 (2d Cir. 1942) (per Hand, J.) cited as authority in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). The majority responded to this criticism by ignoring these precedents.

[11] See generally Matthew Finkin, Disloyalty! Does Jefferson Standard Stalk Still?, 28 BERK. J. EMP. & LAB. L. 541 (2007).

[12] Five Star Transp. Inc., 349 NLRB No. 8 (2007).

[13] See, e.g., Petrochem Insulation v. NLRB, 240 F.3d 26 (D.C. Cir. 2001). To similar effect, see Wurtland Nursing & Rehab. Center, 351 NLRB No. 50 (2007), in which the Board held that a petition signed by over half the employees stating their "wish for a vote to remove the [incumbent] Union" justified the employer's withdrawal of recognition of the union. The Board majority acknowledged that under well established precedent the demand for an election would not be sufficient to justify withdrawal; but here the demand was conjoined with a desire to remove the union—and that, the Board maintained, was dispositive. Why it should be so is not explained—for what would a demanded vote be about if not to remove the union?

[14] 351 NLRB No. 29 (2007).

[15] Sheet Metal Workers' v. NLRB, 491 F.3d 429 (D.C. Cir. 2007); Overstreet v. United Brotherhood of Carpenters, 409 F.3d 1199 (9th Cir. 2005).

[16] Susan McGolrick, Battista Says NLRB Did "Very Credible Job" of Meeting Goals During His Five-Year Term, DAILY LABOR REPORT No. 218 (Nov. 13, 2007).

[17] Toering Electric Co., 351 NLRB No. 18 (2007) discussed further in the text accompanying notes 29—30, infra.

[18] NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786 (1990) ("This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy." (citing Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500—01 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)). In Beth Israel Hospital the Court states:

Because it is to the Board that Congress entrusted the task of "applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms," that body, if it is to accomplish the task which Congress set of it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.

Beth Israel Hosp., supra, at 500—01 (quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945)). In Curtin Mathenson Scientific, the Court declared:

This Court therefore has accorded Board rules considerable deference. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987); NLRB v. Iron Workers, 482 U.S. 335, 350 (1978). We will uphold a Board rule as long as it is rational and consistent with the Act, Fall River, supra, at 42, even if we would have formulated a different rule had we sat on the Board, Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404, 413, 418 (1982). Furthermore, a Board rules is entitled to deference even if it represents a departure from the Board's prior policy. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265—66 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking.") Accord, Iron Workers, supra, at 351.

Curtin Mathenson, supra, at 786—87 (internal citations abbreviated) (emphasis added).

[19] Cf. Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 SUP. CT. REV. 429, 495 ("It is not merely the largeness of the change being effected, but also that accepting it will entail accepting that an agency can be empowered to change its mandate.").

[20] 29 U.S.C. § 151 (2000).

[21] Joan Flynn, A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935—2000, 61 OHIO ST. L. REV. 1363 (2000).

[22] Bernard Meltzer, Organizational Picketing and the NLRB: Five on a Seesaw, 30 U. CHI. L. REV. 78, 78 (1962).

[23] Flynn, supra note 21, at 1384.

[24] Compare Terry Bethel, Recent Decisions of the NLRB—The Reagan Influence, 60 IND. L.J. 227 (1984) with Lee Modjiska, The Reagan NLRB, Phase I, 46 OHIO ST. L.J. 95 (1985).

[25] Kevin Burkett, The Politicization of the Ontario Labour Relations Framework in the 1990s, 6 CANADIAN LAB. & EMP. L.J. 161 (1998).

[26] James Brudney, Isolated and Politicized: The NLRB's Uncertain Future, 26 COMP. LAB. L. & POL'Y J. 221 (2005).

[27] Supra note 3.

[28] Id.

[29] Toering Electric Co., supra note 6. The characterization was made in the context of his stating that the Board does not serve its intended statutory role as neutral arbiter of disputes if it must litigate hiring discrimination charges filed on behalf of disingenuous applicants who intend no service and loyalty to a common enterprise with a targeted employer. [Emphasis added.]

The Board also rejected any analogy to Title VII which is sometimes vindicated by "testers" who have no actual interest in the job. "Hiring discrimination under the [Labor] Act simply cannot occur unless the individual actually was seeking an employment opportunity with the employer."

This makes two fundamental mistakes. First, the Board's prosecutorial function is instigated by any person, including a morally repugnant person; it does not require that the charging party be injured in any way. The Board acts on the public's behalf, not on behalf of the charging party even if morally miscreant. Second, it is quite possible for an employer to maintain a policy or practice of discrimination in hire without there being an identifiable discriminatee, just as it is possible for an employer to have a policy against the hiring of women or minorities without the EEOC being able to identify an individual discriminatee. Consequently, Toering Electric Co. would hinder the General Counsel's ability to pursue § 8(a)(1) complaints where testers have revealed an anti-union hiring policy that no disappointed applicant has been found to complain of.

[30] Clyde Summers, Politics, Policy Making, and the NLRB, 6 SYR. L. REV. 92, 97 (1954).

[31] Id. at 101.

[32] Id. at 100.

[33] Id. at 101.

[34] Id. at 102:

Section 1 of Taft-Hartley, like the Wagner Act before it, finds that "protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury," and declares it "to be the policy of the United States to eliminate the causes of certain substantial obstructions from commerce * * * by encouraging the practice and procedure of full freedom of association." Section 7 still guarantees the "Right to self organization * * * to bargain collectively through representatives of their own choosing."

[35] Id. at 103, (quoting NLRB Chairman Farmer, "We intend to make a fetish of impartiality.").

[36] DEREK BOK & JOHN DUNLOP, LABOR AND THE AMERICAN COMMUNITY 25 (1970) (references omitted):

Despite the determined campaigns by many managements to keep labor unions out of their plants, businessmen do not proclaim hostility toward the principle of unionism. Quite the contrary. If anything, executives are slightly more inclined than is the public as a whole to accept the legitimacy of unions and the employee's right to join the organization of his choice. * * *

In part this attitude may reflect the strong belief among businessmen in individual freedom and the right to associate for lawful purposes. But many executives now concede, as they rarely did several decades ago, that unions can play a valuable role in protecting employees against abuses. To quote Lemuel Boulware, of General Electric, a management representative renowed for developing a "hard line" toward unions:

We believe in the union idea. We think unions are here to stay. We think some among even the best of employers might occasionally fall into short-sighted or careless employee practices if it were not for the presence or distant threat of unions.

[37] E.g., Note, for example, the data set out below:

ANNUAL GROWTH IN U.S. PRODUCTIVITY AND WAGE LEVELS

[1967–2002; Percentile]

| Year | Annual Productivity Growth | Average Annual Wage Growth |
|---|---|---|
| 1967–73 | 2.5 | 2.5 |
| 1973–79 | 1.2 | 0.1 |
| 1979–89 | 1.4 | 0.9 |
| 1989–95 | 1.5 | 0.5 |
| 1995–2000 | 2.5 | 2.4 |
| 2000–02 | 3.6 | –0.3 |

Source: Lawrence Michel, Jared Bernstein & Sylvia Allegretto, The State of Working America 2004/05, tbl. 2.1 (2005).

[38] Matthew Finkin, Bearing the Burden of Decisions Made by Others: The Corporate Reallocation of Employee Risk in the United States, in PERSPEKTIVEN DER CORPORATE GOVERNANCE 501 (Ulrich Jurgens et al. eds., 2007).

[39] RICHARD BLOCK, JOHN BECK & DANIEL KRUGER, LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE CHOICE (1996). When the Canadian industrialist, Frank Stonach, urged his 18,000 employees to join the Canadian Auto Workers Union, the event was news-making. Ian Austen, Industrialist Urges Workers to Join Union, N.Y. TIMES, Oct. 16, 2007, at C-10.

[40] Most recently, THOMAS KOCHAN, RESTORING THE AMERICAN DREAM: A WORKING FAMILIES' AGENDA FOR AMERICA (2006). See also PAUL OSTERMAN, SECURING PROSPERITY: THE AMERICAN LABOR MARKET HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT (1999).

[41] Among the more recent and thoughtful are Stephen Befort, Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment, 63 B.C. L. REV. 351 (2002) and Charles Carver, The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy, 34 ARIZ. L. REV. 397 (1992); collections of papers in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION (Matthew Finkin ed., 1994); RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Friedman et al. eds., 1994); and the earlier work of Paul Weiler summarized in his GOVERNING THE WORKPLACE (1990). As these remarks were being written I was informed that a petition was being drafted by Professors James Brudney and Cynthia Estlund to be circulated to the academic labor law community and presented to the Congress. I expect that their summary of the current state of affairs and their call for legislative reform would be concordant with the views expressed here.

[42] I doubt the Board was correct in holding the artists' models of the Pennsylvania Academy of Fine Arts to be ineligible to bargain collectively. Pennsylvania Academy of Fine Arts, 343 NLRB No. 93 (2004). But surely something is fundamentally amiss when that question turns on whether they supply their own loin cloths and have discretion on how to position their arms. Id.

[43] RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 178—79 (2006). This rises to 31% if the word "union" is omitted and respondents are asked if they want to be represented by an independent employee organization that negotiates with their employers.

[44] This is explored by Michael Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 YALE J. ON REG. 355 (1990).

[45] In FY2006, on average it took over two years for the Board to dispose of contested unfair labor practice cases.

[46] Over thirty years ago, the Committee on Labor and Social Security Legislation of the Association of the Bar of the City of New York, composed of leading practitioners on both the labor and management sides as well as academics, and chaired by one of the country's most prominent labor arbitrators, recommended the greater utilization of section 10(j) injunctions and the strengthening of the remedial power of the Board "especially with respect to discriminatory discharge and refusal to bargain" by authorizing the Board to impose civil money penalties. Committee Report, National Labor Relations Board Remedies: 10(j) Injunctions, Make-Whole Orders and Civil Monetary Penalties, 29 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 674, 686 (1974). That was thirty-three years ago and the committee's proposals remain as immanently sensible and even more urgently needed today.

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Chairman ANDREWS. Thank you very much, Professor. We appreciate that.

Ms. Ryland, welcome to the committee. You are recognized.

## STATEMENT OF FELIZA RYLAND, HOUSEKEEPER, OLD STAR RESORT

Ms. RYLAND. Good morning, committee chair. I apologize if I don't pronounce everybody's name. And my name is Feliza Ryland. Today I think I have my testimony, and I work as a housekeeper at the Old Star Resort at Disney World in Orlando, Florida. But

for 12 years since 1984 until 1996, I worked as a room attendant at the Grosvenor Resort.

I thank you for this opportunity to bring my testimony to all of you about what happened, you know, when my coworkers and I tried to—I am sorry about that—win a fair deal at work. More of the point is what did happen.

I complained to the National Labor Relation Board. Our case, the Grosvenor Resort is a matter of public record. More than 11 years ago we had a problem with our employer on September 27, 1996 after many months of fighting for a fair contract and getting nowhere, my coworkers and I went out on unfair labor practice strike and began picketing to protest our employer's refusal to bargain in good faith.

Just a few days later on September 30th, 44 of us were fired. We continued picketing to protest the firing and get our jobs back and get a fair deal in our contract. It takes a lot of you to walk out.

But after several weeks, it became clear that the hotel was refusing to rehire us. And it was a hardship to go so many weeks without a paycheck or benefits.

I needed that paycheck, that income for my family. So most of us looked and found a new job.

I applied and soon found work at another hotel. Then about 8 weeks after that, went to work for Disney.

Government records showed what happened to our complaints about our employer's unfair labor practice. In 1988, the judge agreed our employee had acted in bad faith in illegally firing us and ordered management to offer us our jobs back and to give us back pay. I did not receive any back pay.

In 2001, 5 years after the illegal firing, the NLRB agreed with the judge and ordered the same thing. I did not receive any back pay.

In 2002, a federal court enforced the NLRB's decision. I did not receive any back pay still.

In 2005, the judge held back pay hearing and ordered Grosvenor to pay me $10,000 in back pay. I did not receive any back pay.

In September 2007, the NLRB issued a decision reducing my back pay by about $2,400 because, according to them, I didn't leave the picket line and get a new job fast enough. That is my case. And my other coworker—according to them, he is not eligible to get anything, not a single penny because he went too quick to work and makes too much money. So he doesn't qualify to receive any benefits.

It has now been more than 11 years since I was unlawfully fired. And I am still waiting to see the back pay, still waiting to see the justice.

This is wrong. Workers who are fired for trying to organize and bargain for a better life have been mistreated for exercising their rights. It should not take so long to get justice.

And the government should be protecting workers, not punishing them for exercising their rights. Because that is how I feel at this moment, to be punished for what I have done and the employer—they are taking their side.

I don't know if I will ever see that back pay. It all happened so long ago. It doesn't feel quite real, but I still hope that bringing our

complaints to the government might help some of my fellow workers in the future by making employers treat their employees more fairly. For that to happen, my government needs to do a lot better and a lot more.

Thank you very much for the chance to be here today. And I will be happy to answer any questions to the best of my knowledge. Thank you.

Chairman ANDREWS. Thank you, Ms. Ryland, very, very much for your excellent statement. Very well done.

Ms. RYLAND. Thank you.

[The statement of Ms. Ryland follows:]

**Prepared Statement of Feliza Ryland, Member, UNITE HERE**

Good Morning, Chairman Kennedy, Chairman Miller, Subcommittee Chairs Murray and Andrews, and Members of the Subcommittees. My name is Feliza Ryland, and I am a proud member of UNITE HERE. Today, I work as a housekeeper at the Old Star Resort, a Disney hotel at Disney World in Orlando, Florida, but for twelve years, from 1984 until 1996, I worked as a room attendant at the Grosvenor Resort hotel. I thank you for this opportunity to tell the Subcommittees about what happened when my coworkers and I tried to win a fair deal at work, and what happened—or more to the point what did not happen—with our complaints to the National Labor Relations Board.

Our case, The Grosvenor Resort, is a matter of public record. More than 11 years ago we had problems with our employer. On September 27, 1996, after many months of fighting for a fair contract and getting nowhere, my coworkers and I went out on an unfair labor practices strike and began picketing to protest our employer's refusal to bargain in good faith. I was a shop steward, so I knew our rights.

Just a few days later, on September 30, 44 of us were fired. We continued picketing everyday, to protest the firings, get our jobs back, and get a fair deal in our contract. It takes a lot out of you. But after several weeks, it became clear that the hotel was refusing to rehire us, and it was a hardship to go so many weeks without a paycheck or benefits. I needed that paycheck, that income for my family. So most of us looked for and found new jobs. I applied for and soon found work at another hotel, then about eight weeks after that, went to work for Disney.

Government records show what happened to our complaints about our employer's unfair labor practices:

- In 1998, the judge agreed our employer had acted in bad faith and illegally fired us. It ordered management to offer us our jobs back, and to give us backpay. I did not receive any backpay.
- In 2001, five years after the illegal firings, the NLRB agreed with the judge and ordered the same thing. I did not receive any backpay.
- In 2002, a federal court enforced the NLRB decision. I did not receive any backpay.
- In 2005, the judge held backpay hearings, and ordered Grosvenor to pay me about $10,000 in backpay. I did not receive any backpay.
- In September, 2007, the NLRB issued a decision reducing my backpay by about $2,400, because according to them, I didn't leave the picket line and get a new job fast enough.

It has now been more than 11 years since I was unlawfully fired, and I am still waiting to see the backpay, still waiting to see justice.

This is wrong. Workers who are fired for trying to organize and bargain for a better life have been mistreated for exercising their rights. It should not take so long to get justice. And the government should be protecting workers, not punishing them for exercising their rights under the law. It is wrong for me to be penalized for exercising my rights while my employer, who broke the law, is rewarded. Requiring a worker who has been fired to look for a new job instantly, without trying to get their job back, is like surrendering without a protest, without a fight. It is like having no rights in the first place.

I don't know if I will ever see that backpay—it all happened so long ago, it doesn't feel quite real—but I still hope that bringing our complaints to the government might help some of my fellow workers in the future by making employers treat their employees more fairly. For that to happen, my government needs to do a lot better.

Thank you again for the chance to be here today, and I will be happy to answer any questions you may have.

Chairman ANDREWS. Mr. Cohen, welcome back to the committee. It is good to see you.

**STATEMENT OF CHARLES COHEN, PARTNER, MORGAN, LEWIS AND BOCKIUS, LLP, FORMER MEMBER, NATIONAL LABOR RELATIONS BOARD**

Mr. COHEN. Thank you very much, Mr. Chairman. And thank you very much for the kind introduction.

Mr. Chairman and Ranking Member Kline, I appreciate the opportunity to be here and to testify today. I might note that in my background also immediately after law school, I worked at the National Labor Relations Board for 9 years in numerous capacities and had the privilege of holding elections, investing unfair labor practice cases, trying unfair labor practice cases, et cetera. It was invaluable experience to me.

Of course, I am not currently a board member and have not had occasion to study the arguments in the records and the cases currently under scrutiny. I, therefore, do not know how I might have voted on any particular case. What I hope to add to this hearing is perspective on the board's decision-making processes and on how it is that we have reached this juncture where the rhetoric has gotten, in my estimation, out of proportion.

At the outset, I think it is important to note that concerns expressed by organized labor over NLRB decision-making are not new. In the 1980s, unions similarly complained about decisions issued by boards composed of a majority of Republican nominated members. Organized labor claimed that the board's decisions led to the destruction of well-established employee rights.

Likewise, in the 1990s, it was business that complained about the pro-union tilt of the decisions of the majority Democratic nominated members. Based on my decades of experience in this field, I do not believe that the board's recent decisions constitute the sea of change that has been claimed.

Reversals of precedent are, indeed, destabilizing. But that has not become more common in recent times.

Recognizing that this board is more conservative than the Clinton board, it has carried out its responsibilities in a manner consistent with the established practice over the last few decades. Further, the board's decisions have continued to hold true to the intent of the act.

I believe the notion that the board issued an extraordinary numbers of decisions in September designed to punish unions has been sufficiently debunked, and I won't spend any additional time on it. By far, the most significant decision in the September grouping is Dana Metaldyne. This is an illustration of the board reacting to a very significant change in union organizing, card check, and neutrality agreements.

Dana Metaldyne did not proscribe voluntary recognition of unions. It did not prohibit employer and the union from bargaining while individuals are waiting for an NLRB secret ballot election. While some might quibble over the need for and the wording of the notice that the NLRB has prescribed, it is certainly true that this procedure provides a mechanism for employee free choice by a gov-

ernment-conducted secret ballot election if the employees then petition the NLRB and ask for that election.

This concludes my prepared oral testimony. I look forward to any questions you might have.

[The statement of Mr. Cohen follows:]

**Prepared Statement of Charles I. Cohen, Partner, Morgan, Lewis & Bockius LLP**

Chairwoman Murray, Ranking Member Isakson, Chairman Andrews and Ranking Member Kline, and Members of the Subcommittees, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, I was appointed by President Clinton, confirmed by the Senate, and served as a Member of the National Labor Relations Board from March 1994 until my term expired in August 1996. Before becoming a Member of the Board, I worked for the NLRB in various capacities from 1971 to 1979 and as a labor lawyer representing management in private practice from 1979 to 1994. Since leaving the Board in 1996, I have returned to private practice and I am a Partner in the firm of Morgan, Lewis & Bockius LLP. I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce, and Chair of its NLRB subcommittee. I am testifying today in my personal capacity.

As I understand it, the purpose of today's hearing is to provide a forum to examine certain recent Board decisions and organized labor's concerns that these decisions have adversely impacted employees' rights.

Of course, I am not currently a Board member and have not had occasion to study the arguments and the records in the cases currently under scrutiny. I, therefore, do not know how I might have voted on any particular case. What I hope to add to this hearing is perspective on the Board's decision-making processes and on how it is that we have reached this juncture where the rhetoric has gotten, in my estimation, out of proportion.

At the outset, I think it is important to note that concerns expressed by organized labor over NLRB decision-making are not new. In the 1980's, unions similarly complained about decisions issued by Boards comprised of a majority of Republican-nominated members. Organized labor claimed that the Board's decisions led to the destruction of well-established employee rights. Likewise, in the 1990's, it was business that complained about the pro-union tilt of the decisions of the majority Democrat-nominated members. In fact, a serious attempt was made to severely diminish the budget of the NLRB.

The National Labor Relations Act, as amended, includes two competing principles which invite considerable tension. Employees have the right to organize and to engage in collective bargaining. Once a union has been freely chosen, the practice and procedure of collective bargaining is to be encouraged. But, since 1947, employees also have had the right to refrain from union or concerted activities. This additional right puts a premium on how unions come to be recognized as the exclusive representative of all bargaining unit employees—whether they want a union or not.

Based on my decades of experience in this field, I do not believe that the Board's recent decisions constitute the sea change claimed by unions. Reversals of precedent are destabilizing, but that has not become more common in recent times. Recognizing that this Board is more conservative than the Clinton Board, it has carried out its responsibilities in a manner consistent with the established practice over the last few decades. Further, the Board's decisions have continued to hold true to the intent of the Act.

*The NLRB's Operation, Practice and Procedure*

Organized labor has taken issue with the number of decisions issued by the Board in September 2007. The unions seem to suggest that the issuance of 61 September 2007 decisions is evidence of an attempt by certain Republican-nominated Board members to rush to issue business-friendly decisions. In reality, the number of September decisions was not extraordinary and largely is attributable to such benign factors as the Board's decision-making processes, the close of the Board's fiscal year, and the possible near term loss of three Board members.

The Board, like all federal government entities, operates on a fiscal year basis, which ends on September 30 of each year. Traditionally, the Board sets goals at the beginning of the year for the number of cases it hopes to decide in any given year. Although the Board has the entire year to issue decisions, the most significant amount of activity often occurs at the end of the fiscal year, in a final push to meet the previously established goals. Cases posing relatively routine issues are decided

and released sooner. Difficult and older cases take longer simply because they are more difficult. Thus, the frenzy of activity at the end of the fiscal year in September is not unusual. This Board has issued more than 100 decisions in three of the four previous Septembers. Nor is it unique to Republican-majority Boards. For example, a Democratic-majority Board issued approximately 70 decisions in September 1999 and approximately 68 decisions in September 2000.

The potential loss of three Board members, in the near future, also may have influenced the Board's September productivity. As you know, at its full complement, the Board is comprised of five members. Being at full strength—which does not occur as frequently as it should given the difficulties in the nomination and confirmation process—aids the orderly issuance of decisions. New Board members typically take an extended period of time before they issue decisions in difficult cases. The term of Chairman Battista expires on December 16, 2007, and Members Kirsanow and Walsh are currently serving recess appointments that will expire when this session of Congress adjourns. It is prudent, therefore, to seek to issue as many decisions as possible while still at full strength.

*The Board's Alleged Destruction of Employees' Rights*

Organized labor has complained that the Bush Board has issued an inordinate number of reversals of prior Board decisions. The unions contend that these reversals disproportionately favor employers to the disadvantage of employees. As I stated before, reversals of precedent are troubling. The number of reversals, however, is not extraordinary. Under the Clinton Board, for example, the Democratic-majority reversed more than 50 prior Board decisions compared with the less than 25 reversals issued by the Bush Board.

Organized labor also has directed its complaints at the merits of the Board's recent decisions, claiming that these decisions favor employers and not employees—or better said, favor employers and not unions. Again, this is not necessarily the case. Rather, these decisions tend to be, with one important exception, extensions of well-established labor law principles formed long before the Bush Board took control.

*The Board's Decision in Dana Corp. and Metaldyne Corp.*

By far, the most significant decision of the group is the Board's recent decision in Dana Corp. and Metaldyne Corp., 351 NLRB No. 28 (September 29, 2007). In this case, a 3-2 majority of the Board modified its recognition-bar doctrine and held that an employer's voluntary recognition of a union does not bar a decertification election petition or rival union election petition filed within 45-days of a notice of recognition. Previously, the Board had held that voluntary recognition barred a decertification election petition or a rival union's election petition for a "reasonable period of time"—in reality, a one year period. Although this holding is a change in a highly technical area of the law, some background is necessary.

Historically, voluntary recognition by an employer of a union has been lawful, but organizing had not been a top down process emanating from employer agreements. This changed in the last decade as a result of unions pressuring for, and often receiving, card check and neutrality agreements. Indeed, one of the highest priorities of unions today is to obtain agreements from employers that would allow the union to become the exclusive bargaining representative of a group of employees without there ever being an NLRB-supervised election. As a consequence, the Board's relevance through its traditional role of conducting secret ballot elections has been on the wane. See Charles I Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Labor Lawyer (Fall 2000); Charles I. Cohen & Jonathan C. Fritts, The Developing Law of Neutrality Agreements, Labor Law Journal (Winter 2003); Charles I. Cohen, Joseph E. Santucci, Jr., & Jonathan C. Fritts, Resisting Its Own Obsolescence—How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements, 20 Notre Dame Journal of Law, Ethics & Public Policy 521 (2006), available at *http://www.morganlewis.com/pubs/NotreDameJournalResistingObsolescence.pdf.* Despite considerable rhetoric to the contrary, it is the view of the Supreme Court, and my own personal view as well, that Board-conducted secret ballot elections remain the most reliable indicator of employee choice. Against this backdrop comes the Dana Corp./Metaldyne Corp. case.

As another preliminary matter, it is important to note what the Board's decision in Dana Corp./Metaldyne Corp. did not do. It did not proscribe voluntary recognition of unions. And, it did not prohibit immediate bargaining between the employer and the voluntarily recognized union.

In determining that a 45-day window was appropriate for the filing of competing petitions, the Board majority found that an immediate insulation period for employees seeking to have an election was not necessary when an employer voluntarily rec-

ognized a union. During this 45-day time period, employees can decide whether they prefer to participate in a Board-conducted election, instead of relying on the voluntary recognition alone. Ultimately, the Board concluded that the recognition bar doctrine did not provide sufficient protection for employees' right to a free choice of a representative—or no representative. As a result of this decision, for the recognition and contract bars to be effective, employers must now notify the Board in writing of any voluntary recognition, receive an official Board notice, and post it for the 45-days. While some might quibble over the need for, and the wording of, the notice, it is certainly true that this procedure provides a mechanism for employee choice on this issue.

It is beyond the scope of this testimony to re-argue the merits of the Employee Free Choice Act—which failed to pass Congress earlier this year. See Charles I. Cohen, Statement on "Employee Free Choice Act: 'Strengthening America's Middle Class Through the Employee Free Choice Act," before the House Committee on Education and Labor: Subcommittee on Health, Employment, Labor, and Pensions (Feb. 8, 2007). But the irony is nonetheless present. At a time when a major push was made to eliminate secret ballot elections, the Board has reaffirmed the importance of those elections.

Regardless of one's view of the wisdom of the Board's Dana Corp./Metaldyne Corp. decision, it would be a mistake to brand it pro-employer. The decision did not prohibit voluntary recognition agreements; it merely guaranteed employees the right to a secret ballot election to overturn those agreements. Unions and employers are still free to reach these agreements and engage in collective bargaining absent an employee vote to the contrary. Some employers support voluntary recognition agreements and are disappointed by the Board's decision to deny bar quality unless they comply with the posting requirements. In any event, it is important to recognize that Section 7 rights belong exclusively to employees—not to unions or employers.

*Other Decisions*

From the outcry over the September 2007 decisions, one would think that the Board that the Board issued 61 anti-union decisions. This is not the case. In fact, in a majority of the unfair labor practice decisions issued in September, the Board found at least one violation of the Act by the employer involved.

Lost in the labor criticism of the Board is a significant pro-union decision issued in August 2007. The Board's decision in Provena Hospitals, 350 NLRB No. 64 (Aug. 16, 2007) is important to employers whose employees are already represented by a union. There, the Board continued to disregard the decisions of the Court of Appeals for the District of Columbia and the Seventh Circuits that require use of the "contract coverage standard," and instead continued to apply its unworkable "clear and unmistakable waiver" standard. Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992); Dept.of the Navy v. FLRA, 962 F.2d 48 (D.C. Cir. 1992); and NLRB v. United States Postal Service, 8 F.3d 832 (D.C. Cir. 1993). Simply stated, this issue relates to whether a collective bargaining agreement must "clearly and unmistakably waive" a union's right, or whether the employer, having bargained a contract, can argue that the language in the collective bargaining agreement demonstrates that the parties have bargained about a subject and have a subsequent dispute resolved by an arbitrator. It is well accepted that the "contract coverage" standard is an easier burden for employers to meet. Yet, notwithstanding the clear opportunity to make a favorable change for employers, the Bush Board notably declined to adopt this change.

In another recent decision, Kravis Center for the Performing Arts, 351 NLRB No. 19 (Sept. 28, 2007), the Board reached another pro-union outcome. In Kravis, the Board relied on the U.S. Supreme Court's decision in NLRB v. Fin. Inst. Emp. of Am., Local 1182 (Seattle-First), 475 U.S. 192 (1986), and concluded that a lack of a vote by union members to be represented by a successor union did not alleviate the employer's duty to bargain with the union. Applying the new Seattle-First standard, the Board determined that a union merger or affiliation does not have to be approved by a vote and the lack of a vote does not create a question concerning representation sufficient to support a withdrawal of recognition. Given the fact that union mergers have become commonplace these days, this is a significant case.

*Conclusion*

This concludes my prepared oral testimony. I look forward to any questions you might have, but before that, I would again like to thank the Subcommittee for inviting me here today.

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Chairman ANDREWS. Thank you, Mr. Cohen.

Mr. Hiatt, welcome to the committee. It is good to have you here.

**STATEMENT OF JONATHAN HIATT, GENERAL COUNSEL, AFL–CIO**

Mr. HIATT. Thank you very much, chairs and members of the subcommittees. In my written testimony, I tried to show why the Bush administration's stripping of worker protections over the past several years with its latest decisions in September doesn't simply reflect the proverbial swing of the pendulum that at times in the past has characterized NLRB case law from one administration to the next. So I would like to use my time now to offer just a few examples of what the impact of these cases is likely to be on the ground among the workers.

Let me start with the Dana case and the board's rewriting of the rules on voluntary recognition, which, as you know, has been on the books since the law was enacted and has until now been viewed by the board and the courts as a perfectly acceptable alternative to NLRB certification. Indeed, in 2003, Chairman Battista himself stated in a case called Terracon that Senator Kennedy referred to that its holding in that case was consistent with the board's established objective of promoting voluntary recognition in order to effectuate the act's purpose of promoting collective bargaining.

Because the board's election procedures have become so confrontational, so easily manipulated by any well-advised employer, and so delay-ridden, more and more unions and workers have indeed been avoiding the board entirely and seeking voluntary recognition. This incidentally explains a good deal about Chairman Battista's selective use of statistics.

Little wonder that the board is closer to meeting its quotas on deciding cases when you consider the enormous reduction in both unfair labor practice cases and election cases that are brought to the board anymore. In any event, recognizing this trend and noting that workers were having increased success with the alternative means of achieving unionization, this board is now determined to make it as hard as possible to obtain union recognition, even where a union and employer and a majority of the workers are all in agreement. So much for the avowed philosophy of nongovernmental interference and deferral to private dispute resolution.

Add to this the shameless hypocrisy when majority petitions or cards are described by the board in the Dana case as inherently unreliable, as susceptible to group pressure, as admittedly inferior to the election process when workers are trying to bring in a union, but then on the very same day are told by this same agency in the Wurtland case that none of these concerns—none of these are concerns when the question is getting rid of their union, that the signature method there constitutes "objective proof of the employees' withdrawal of support for the union and that an NLRB election is not necessary."

And how do we explain why the government will now start posting notices informing a minority of the workforce of their rights to seek to undo the voluntary recognition and how to go about it without any corresponding posting of affirmative rights to join or form unions under the act? Mr. Cohen may call this quibbling. I suggest this will have a major impact.

As a second example, consider the area of remedy. It is already hard enough to give assurances to workers that if they stick their necks out in a union campaign and get fired for it, they will be reinstated with back pay. Reinstatement typically comes 2 to 3 years later and with an average, as Senator Kennedy said, of about $3,600 in back pay.

But now after the board's Grosvenor Resort's and St. George Warehouse decisions, even these explanations are put in question. In the former, when workers were unlawfully fired and picketed for 2 weeks in Ms. Ryland's work place in order to get their jobs back, the board ruled that no back pay should be awarded for those 2 weeks because to do so would be to reward idleness.

And in the second case, the board has reversed decades of precedent and said that from now on the burden will be on the worker, that is the discrimination victim to prove adequate mitigation in seeking alternative employment in order to collect back pay. Until now the wrongdoer employer had the burden of showing that those efforts were not sufficient.

Already one in four employers faced with union campaigns fire lead workers for the chilling effect that it has on other workers contemplating getting involved. What more incentive does the average employer now need to see this anti-union tactic as a miniscule cost of doing business, one that comes with the Bush board's seal of approval?

Finally, a third example of real world impact will be on workers' rights to bargain collectively and strike when necessary. In Jones Plastic, the board has handed employers a roadmap to deny employment to returning strikers. In the past, it was well-settled that to be considered permanent replacements who would be allowed to continue working in place of strikers after a strike had ended there would have to be a mutual understanding ahead of time that the replacements were, in fact, permanent.

With this new decision, the board has now declared that even if an at-will employee signed an agreement acknowledging that he or she can be terminated at any time with or without cause, they can still be considered permanent for purposes of denying reinstatement to returning strikers. Given Chairman Battista's assertion that the act's central purpose no longer calls for the board to facilitate employees' opportunity to organize unions in order to promote collective bargaining, notwithstanding pronouncements directly to the contrary by the U.S. Supreme Court in the American Hospital Association v. NLRB case in 1991 and by numerous courts of appeal as well, it is sadly not surprising that this board has moved the law in a direction so hostile to worker rights. It is time, however, for Congress to step in and correct the course.

Thank you very much.

[The statement of Mr. Hiatt follows:]

**Prepared Statement of Jonathan P. Hiatt, General Counsel, American Federation of Labor and Congress of Industrial Organizations (AFL–CIO)**

Chairmen and members of the subcommittees, thank you for inviting me to testify before your committees on the impact of recent decisions by the National Labor Relations Board on the working men and women of this country.

My name is Jonathan Hiatt, and I am General Counsel to the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), which is a vol-

untary federation of 55 national and international labor unions. Members of unions affiliated with the AFL–CIO teach and care for our children, build our country's infrastructure and construct its skyscrapers, nurse us in hospitals and rehabilitation centers, drive the buses we travel on and the trucks that bring us food and other essentials, entertain us with music and Broadway shows, keep us safe in our communities and come to our rescue in emergencies, report our news, grow our food, take care of the planes—and us—when we fly to our destinations safely, expand our telecommunication capabilities, and provide our public services. The AFL–CIO was created in 1955 by the merger of the American Federation of Labor and the Congress of Industrial Organizations.

Since its founding, the AFL–CIO and its affiliate unions have been the single most effective force in America for enabling working people and their families to build better lives and futures. The U.S. Census Bureau data shows that workers with unions still make on average 29% more than their non-union counterparts; they still have a 73% to 16% advantage in having access to a guaranteed employment based pension; they still have a 92% to 68% advantage over non-union workers in access to at least some employer-paid health insurance. It is widely recognized that giving workers the right to bargain collectively is the best way to establish and maintain a middle class—and that this is in the economic interests of society as a whole. For these reasons, the National Labor Relations Act ("the Act") was enacted in 1935 to protect the rights of workers to form and join unions and bargain for better working conditions.

Indeed, the explicit purpose of the Act is to "encourag[e] the practice and procedure of collective bargaining and * * * protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. §151. The Act further charges the Members of the National Labor Relations Board with adjudicating cases in accordance with this expressed policy.

Meanwhile, however, the current Labor Board is no longer serving these noble goals. Shamefully, it has departed from its statutory responsibility and utterly abdicated its role as protector of worker rights. In decision after decision, the Board has denied workers the very protections it is supposed to guarantee.

Since its installation in 2002, the Bush Administration's Labor Board has embarked on a systematic and insidious effort to radically overhaul our federal labor law and its regulation of labor relations in the private sector. Its decisions are not merely a pendulum swing or a course correction at times characteristic of changes in political administrations. Rather, they evince a calculated effort to make fundamental changes to our nation's national labor law—changes that it is aggressively accomplishing without any Congressional action whatsoever.

In case after case, this Board has turned the Act on its head by narrowing its coverage, withdrawing its protections, and weakening its already ineffective remedies. These efforts attracted national attention in September of this year when the Board issued 61 decisions, approximately 20% of its annual total, most of which reflect a transparent anti-worker, anti-union and anti-collective bargaining bias, as described in the case summaries attached to my testimony.

These September decisions were by no means the first time this Board has been accused of deciding cases in order to undermine workers' rights. Noted labor scholar Theodore St. Antoine warned in 2005 that this Board was "resolving the doubts in borderline cases in the wrong direction" and voiced his concern that the "cumulative effect" is that "[a] multitude of smallish nibbles can add up to a large bite and eventually to a badly chewed—if not eviscerated—organism."[1] His warning was echoed by Professor James J. Brudney, Moritz College of Law at Ohio State University, who observed that the Agency's autonomy has "been associated not with making the NLRA effective or adaptable to changed circumstances but rather with the Act's diminished relevance or applicability to the modern American workplace."[2]

Now, however, this Board's rulings can no longer be described as "smallish nibbles." Indeed, its decisions have significantly narrowed worker protections while expanding the scope of anti-union conduct lawfully available to management; seriously limited the Act's coverage by directly and indirectly eliminating whole segments of the workforce from its definition of "employee;" and restricted its notoriously weak remedies by making it even less expensive and less burdensome for employers to violate the law. The bottom line is that fewer workers have fewer protections as this Board strips away the rights guaranteed by the National Labor Relations Act and squanders the national policies it enshrines.

Through its decisions, this Board has redirected the course of the Act away from its original purposes of fostering workplace democracy and redressing economic inequality and, instead, toward a regulatory regimen that elevates the rights of em-

ployers seeking to establish union-free workplaces over the rights of workers who want to have a voice on their job and a seat at the bargaining table.

In September alone, in a number of highly divided, partisan decisions, dubbed the "September massacre," the Board has:

• Made it significantly harder for workers who were illegally fired or denied employment to recover backpay. St. George Warehouse, 351 NLRB No. 42 (2007); The Grosvenor Resort, 351 NLRB No. 86 (2007); Domsey Trading Corp., 351 NLRB No. 33 (2007)

• Made it a certainty that employers who violate the Act will incur only the slightest monetary loss and be required to undertake as little remediation as possible. Intermet Stevensville, 351 NLRB No. 94 (2007); Albertson's, Inc., 351 NLRB No. 21 (2007)

• Made it harder for workers to achieve union recognition without being forced to endure the hostile, divisive, delay-ridden NLRB representation process, Dana Corporation, 351 NLRB No. 28 (2007), while at the same time doing just the opposite for employers who wish to get rid of an incumbent union. Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50 (2007)

• Made it easier for employers to deny jobs to workers who have exercised their legal right to strike. Jones Plastics & Engineering, 351 NLRB No. 11 (2007)

• Made it easier for employers to file lawsuits in retaliation for protected union activities and to punish workers and their unions for their lawful, protected conduct. BE&K Construction, 351 NLRB No. 29 (2007)

• Made it easier for employers to discriminate against employees and job applicants who are also union organizers even though the U.S. Supreme Court has specifically held that such worker are employees entitled to the Act's protections. Toering Electric Co., 351 NLRB No. 18 (2007); Oil Capital Sheet Metal, Inc., 349 NLRB No. 118 (2007)

These and other recent Board decisions attack the most fundamental aspects of workers' rights under the Act. By overruling precedent, changing the rules, and misapplying existing precedent, this Board has made it considerably more difficult for workers to form unions and bargain collectively to improve their working conditions; has withdrawn basic protections from workers who seek to strike or engage in other protected activities with their co-workers; has excluded yet more workers from the Act's coverage; has reduced its protections by giving employers more leeway to spy on, coerce and interfere with workers' union activities while restricting workers' ability to solicit union support; and has emboldened employers to violate workers' rights by weakening the Act's already miserably inadequate remedies.

*Undermining Worker Organizing*

This Board's efforts to dismantle worker protections come at a time when the right to organize is more and more under attack and they further entrench the "culture of near-impunity that has taken shape in much of U.S. labor law and practice."[3] The numbers paint a stark and compelling picture of what workers face when they try to form a union. During organizing campaigns, more than one-fourth of employers discharge workers for union activity; more than half threaten a full or partial shutdown of their company if the union effort succeeds; and between 15 and 40 percent make illegal changes to wages, benefits, and working conditions, give bribes to those who oppose the union, and/or spy on union activists.[4]

As a direct result of this Board's failure to protect workers' participation in its representation process, unions have moved away from the NLRA's delay-ridden procedures, with its endless opportunities for employer coercion and interference, in favor of voluntary recognition by employers.[5] The Board's response has been to take aim and fire. In the crosshairs is the decades-old practice of voluntary recognition,[6] a path to unionization that has been approved by the both U.S. Supreme Court and Congress and that is ensconced in the very language of the Act.[7] This effort to dismantle the voluntary recognition process has been advocated and funded almost exclusively by the National Right to Work Legal Defense Foundation; its goal is to force workers back to the Board if they want a voice on the job, mandating a procedure that manifestly does not work for workers—where employers control the process and where their intense, unrelenting resistance to organizing efforts is either condoned or, because of delay and weak remedies, effectively tolerated.

On September 29 the Board stripped voluntary recognition of long-standing legal protections in a decision which punishes, rather than supports, private dispute resolution.[8] In the Dana decision, the Board tosses out a decades-old rule that allows an employer and union, following voluntary recognition, a reasonable period of time to negotiate a collective bargaining agreement without challenge to the union's majority status. Instead, the Board has crafted an entirely new set of rules which are triggered when an employer voluntarily agrees to honor the choice of its workers

for union representation. A mere 30% of the workforce can now override the expressed desire of the majority of the workers, sabotage the majority's support for a union and force all workers into the NLRB's bureaucratic, delay-ridden, and divisive representation process. A sharp dissent accused the majority of "cutting voluntary recognition off at the knees."[9]

In the Dana decision, the Board elevates the rights of a minority of workers who do not support a union over the rights of a majority of workers who do. Notification to the Board when voluntary recognition is granted is now required in order to secure a period of time to engage in collective bargaining without challenge to the union's majority status—a period of time automatically granted to unions certified under the NLRB's representation process. Notification that the workers' union has been voluntarily recognized by their employer will trigger a mandatory NLRB notice posting at the workplace. This Notice to Employees requirement was first formulated in this decision, even though no party urged a government-issued notice. The notice that now must be posted in the workplace instructs employees on how 30% of them may file a petition for an election to undo the majority-supported recognition.

This notice requirement follows the recent implementation of another required notice involving the NLRA. Also instituted during the Bush administration, it informs workers how to withdraw financial support from a union.[10] That notice and the Dana notice are both aimed at informing workers of their rights to refrain from union activity. No mandatory NLRB Notice advises employees of their affirmative rights under the Act, except when an employer settles—or loses—an unfair labor practice case against it or during the 3-days prior to an NLRB conducted election when a notice detailing the polling locations and requirements must be posted.[11]

For the Board to require notices on how to refrain from unionization, while not requiring a corresponding posting of a workplace notice to inform workers of their rights to "join, form or assist" unions—rights specifically protected by Section 7 of the Act—is especially egregious in view of a pending petition filed with the Board by Charles Morris, Professor Emeritus of Law at Southern Methodist University. This petition, filed over 14 years ago and supported by the AFL–CIO, has yet to be acted upon. The petition requests that the Board craft a rule providing for the posting of notices in all workplaces subject to the jurisdiction of the Board to advise employees of their general rights under the Act—both their rights to participate and their rights to refrain from participating in union activity.[12]

The notice required by the Dana decision, informing employees of how to negate their co-workers' choice to unionize, is novel in two other respects. It is the only required NLRB Notice which includes the location, address and phone number of the nearest NLRB office, a toll-free number for the NLRB, and the NLRB's website address. And, shockingly, it does not even include the recitation of workers' core rights under the Act, which is "boilerplate" language in the Board's remedial and election-related notices. Rather, the formulation of the notice is yet another stunning example of this Board elevating the rights of workers who do not support a union over the rights of workers who do.

As if its Dana decision were not transparent enough evidence of this Board's outright bias, on the very same day that Dana case was decided the Board issued another case involving workers' signatures, this time with the petition used to support an employer's attempt to withdraw recognition from a union.[13] A comparison of these two cases illustrates the Board's grossly disparate and hypocritical treatment of employee rights. Shedding all pretense of scholarly analysis and legal precedent, the decisions are based simply on whether the outcomes favor forming or eliminating the union.

In Dana, the union supported its majority status on the basis of cards signed by a majority of the workers. The Board attacked and criticized the signed cards for a whole host of reasons: card signing is a "public action, susceptible to group pressure. * * *;" "misrepresentations about the purpose for which the card will be used may go unchecked;" employees "may not even understand the consequences of voluntary recognition * * *;" "card signings take place over a protracted period of time;" and "[t]here are no guarantees of comparable safeguards [compared with an NLRB election], in the voluntary recognition process."

Meanwhile, however, not one of these concerns was raised by the Board in the companion case involving an employer's efforts to get rid of a union. In Wurtland, even though a petition signed by a majority of workers stated that they wished "for a vote to remove the union," the Board concluded that no election need be conducted because the "more reasonable interpretation" was that the workers wanted to remove their union, not that they wanted to vote to remove the union."[14] Instead of challenging the legitimacy of the signed cards, as in Dana, the Board in Wurtland presumed that "signatory employees rejected union representation" without address-

ing any of the concerns that they claimed troubled them about the signatory employees in Dana.

In Dana, when workers wanted to gain union representation, the Board held that the choice of a majority of workers for collective bargaining can be held hostage—legally—by a small minority of anti-union workers while the NLRB's representation process lumbers ponderously through its bureaucratic maze. Why? Because, according to the Board, although its election process "may result in substantial delay in a small minority of Board elections," this is preferable "for resolving questions concerning representation."[15] Yet in Wurtland, where the employer wanted to withdraw recognition, the Board expressed the opposite concern—that requiring an NLRB election would unduly prolong the time during which the union would remain the workers' representative, i.e., "until the election results were certified, including any period required for the resolution of challenges and objections."[16]

And in another Board decision this past August where the employer wanted to withdraw recognition from a union on the basis of "slips" signed by workers, the Board never questioned the "comparable safeguards" of using signed slips to record worker sentiment; forgot all about its preference for elections to determine questions concerning representation; and suddenly worried that an election process would not yield a prompt result. Far worse was its fear that "employees will be forced to endure representation that they have unquestionably rejected."[17] Could a rationale be more result-oriented? This case provides another astonishing example of the disparate rules this Board applies depending on whether the outcome of the case will result in employees selecting or rejecting union representation.

*Excluding Workers from the Act's Protection*

Narrowing the Act's protections and thwarting workers' organizing efforts can be easily accomplished by simply excluding them from the Act's protections altogether. And this Board has done exactly that. Decisions by this Board have overturned precedents to deny representation and bargaining rights to tens of thousands of the nation's workforce who were previously covered, including teaching and research assistants,[18] and, effectively, temporary employees working jointly for a supplier employer and a user client, unless both employers consent.[19] Existing precedents have been artificially construed and applied in order to characterize workers as "non-employees," "managers," and "independent contractors" in order to exclude such categories as disabled individuals working as janitors,[20] faculty members,[21] artists' models,[22] and newspaper carriers and haulers.[23]

In a trilogy of cases with enormous impact, the Board radically expanded the statutory definition of "supervisor."[24] This re-drawing of supervisory lines affects the continued organizing and collective bargaining rights of hundreds of thousands of professional, technical and skilled employees who rely on less highly trained or experienced personnel to help them accomplish their work.[25] The impact of these cases is currently being debated in Congress through its consideration of the RESPECT Act which would eliminate the current ambiguity regarding supervisory status and ensure that thousands of workers are not denied their labor law rights by being wrongfully classified as supervisors.[26]

In its zeal to convert otherwise covered employees into "supervisors," the Board sua sponte reconsidered an earlier decision involving a nurse at a long-term care facility in Missouri who was fired, according to her employer's own admission, because she circulated a petition and solicited employee signatures to protest certain working conditions.[27] Reclassifying the nurse as a supervisor, the Board thus withdrew her protection from the otherwise unlawful firing. On review, the Court of Appeals for the District of Columbia rejected the Board's decision, concluding that "the Board's judgment in this case rests on nothing."[28] Undeterred, the Board employed virtually the same theory in a case decided on September 26. It dismissed a union's election petition for nursing home LPNs on the grounds that all of them were supervisors because they completed "employee counseling forms," which the Board claimed were a precursor to disciplinary action.[29]

*Restricting and Narrowing Already Inadequate NLRB Remedies*

The decisions of this Board have undermined the Act's already meager remedies for employer abuse and interference with protected rights. Coupled with the substantial delays in Board proceedings that in many instances are aggravated by employers' procedural maneuvering, these rulings will eliminate any deterrent effect and in practice will further encourage employers to violate workers' rights.

NLRB remedies are notoriously weak and ineffective. An employer who has engaged in misconduct during a union organizing campaign, such as threatening and spying on workers, is typically required merely to post an NLRB Notice to Employees promising not to engage in further violations. Workers who are illegally dis-

charged are entitled to reinstatement and back pay, but to no other form of damages. Most employees never return to their jobs and none receive compensation for the economic or psychological devastation that they and their families typically have to endure.[30]

Moreover, the employer is rarely held accountable for the damage done to the organizing campaign, itself. In some cases, if the employer's misconduct has affected the results of the election, the Board may order a rerun election. But delays often make even these remedies wholly ineffectual as the "remedy" generally comes long after the workers have tried to organize their union and the campaign has been thwarted. By then, the damage has been done: the workers have seen how weak their so-called protections really are. Illustratively, one of the Board's September cases involves back pay determinations for 202 workers who were denied reinstatement in 1990; 17 years later, none have received any back pay.[31]

Human Rights Watch has concluded that "many employers have come to view remedies [under the NLRA] * * * as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts."[32] Professor Cynthia Estlund echoed this pessimistic view in observing that the Act is "widely flouted by employers who perceive" the discharge of union adherents as an "easy and cheap [] response" to an organizing campaign.[33] These recent decisions will not only further embolden labor law-breakers, they vividly demonstrate to workers that the NLRB can do little to protect their rights and that their employer can act with impunity.

For example, the Board has now made radical changes in long-standing rules regarding back pay eligibility. On September 30, the Board rewarded employers who violate the law, by making it yet more difficult for workers ever to collect back pay for unlawful discrimination. Reversing 45 years of established precedent,[34] it held that the General Counsel and illegally terminated workers will now carry the burden, in a proceeding to determine back pay following a finding of illegal conduct, to come forward with evidence that the illegally terminated workers took reasonable steps to look for work after being fired.[35] If a worker does not present evidence of an adequate search for work, the employer will have no back pay obligation.

In another decision issued on September 11, 2007, the Board had already undercut the likelihood of back pay by announcing a new rule that employees who wait more than two weeks before seeking interim work, what the Board characterizes as "an unreasonably long time," will be denied back pay for that period because to do otherwise would "reward idleness."36 In this case, workers were denied back pay even for the time that they were picketing the employer to try to get their jobs back and for the period between the time they were advised they had been hired for interim employment and the time they actually started their new, interim jobs.[37]

Another new rule announced in September shifts the burden to the General Counsel and workers to prove that applicants who were denied employment had a "genuine interest" in working for the employer who illegally refused to hire them.[38] This builds on a prior burden shifting case in which the Board created a second class of discriminatees—those illegally denied employment because the employer suspected they were union organizers, seeking work to organize its workforce.[39] Despite the historical presumption, still applicable to all other discriminatees, that an applicant would have continued working indefinitely if not for the employer's illegal conduct in denying them employment, this new subclass of discriminatees is now required to present affirmative evidence to prove that, if hired, they would have worked for the employer for the entire backpay period. According to the dissent, in promulgating this new rule, the Board rejected "precedent endorsed by two appellate courts and rejected by none, without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis." The dissent points out that the rule being changed by the Board was established "in the Board's first reported case" in1935.[40]

These recent decisions will not only reduce the back pay obligations of adjudicated labor law violators, they will have a profound effect on how cases involving back pay are investigated and litigated. Not only has it become cheaper for employers to violate the law as a result of these new decisions, but the Agency, itself, is now required to help the wrongdoer determine how it can lessen the back pay it is required to pay its victims. Workers who file unfair labor practice charges will now spend less time with Board Agents on the circumstances of the unlawful termination, and correspondingly more time, what they did or did not do regarding a bona fide application for interim employment and subsequent mitigation of damages. These radical changes divert the Board's resources away from enforcing the Act and, instead, toward saving money for law-breakers, who on average have paid back pay awards amounting only to $3,500 even before these burden-shifting new rules took effect.[41]

The end result of these new rules is that this Board is making it cheaper for employers to violate the law and using Agency resources to do so.

Recent decisions have also created an extremely restrictive and narrow view of what constitutes remedial action and the necessity for such relief. Broad cease-and-desist orders have been abandoned,[42] only mass discharges qualify for a bargaining order remedy,[43] the so-called extraordinary remedies in cases involving brutal tactics by employers to crush union organizing activities have all but disappeared,[44] and Section 10(j) injunction action has "fallen into virtual disuse."[45]

Past efforts by the NLRB to craft effective remedies have focused on alternative means to mitigate the impact of an employer's unlawful anti-union campaign, such as ordering a high ranking company official and/or an NLRB agent to read aloud the Notice to Employees to workers and/or mail it to workers' homes, rather than simply burying it on the company bulletin board or simultaneously making it clear to employees that it does not agree with the information it was forced to post. In the past, the Board has also ordered that unions be allowed to address workers at the workplace, something that the supremacy of the employer's property rights typically precludes. Other remedial initiatives have included access by the union to a list of employee names and addresses in order to contact workers to educate them about the benefits of collective bargaining; and awarding the union its organizing, negotiating or litigation costs.[46] Such special remedies, even in cases of egregious violations of law, have virtually disappeared under the Bush Board.[47] In fact, the Board has rejected requests for far more modest remedial steps. In a case involving virtually all Chinese speaking workers with limited proficiency reading English, the Board rejected as "not warranted" a request that management read aloud its Notice to Employees at an assembly and even a request to translate into Chinese the final decision in the case.[48]

The Board has also virtually eliminated the bargaining order as a remedial tool.[49] In cases where an employer's illegal conduct has destroyed the union's majority support, the Board has the authority to issue what is known as a Gissel bargaining order, which directs the employer to bargain with the union on the basis of its earlier, actual and demonstrated majority support.[50] Yet this Board has refused bargaining order remedies despite recommendations from its own Administrative Law Judges who hear these cases.[51] The Board apparently believes that employees' rights can be restored by a promise not to violate their rights again and that a notice posted on a bulletin board will erase fear and intimidation and allow a fair and free election.[52] This approach to the NLRA's remedial scheme demonstrates not only a disconnect with what workers face when they try to form a union but a profound ignorance of workplace realities. What remains of the bargaining order remedy? Apparently, the Board has restricted its application to mass discharges[53] where the unit size is small[54] and the employer's highest-ranking officers are involved.[55] Absent such decimation of the workforce in the most limited of circumstances, the Board has turned its back on yet another of its very few available, effective remedies.

Similarly, Section 10(j) injunctive relief has all but disappeared under the Bush Labor Board.[56] This remedial tool exists to empower the NLRB to petition a U.S. district court for immediate, temporary injunctive relief pending final disposition of the underlying unfair labor practice case by the Board. Congress enacted this provision in recognition of the harm caused by delay. Section 10(j) relief "is designed to fill the considerable time gap between the filing of a complaint by the Board and issuance of its final decision, in those cases in which considerable harm may occur in the interim."[57] If granted, a 10(j) injunction can force an employer to rehire unlawfully terminated workers or to bargain with a union that it has unlawfully refused to recognize.

However, seeking 10(j) relief lies within the discretion of the Board. The NLRB General Counsel receives 10(j) requests from its regional offices, decides in which of these cases it will seek authorization from the Board, and must then be granted authorization by majority vote of the Board.[58] The past five years has witnessed a precipitous decline in the Board's use of this important and highly effective remedy. The yearly average of 40-50 Board authorizations during the 1990's has plummeted to an average of 17.4 since 2002.[59]

*Workers Have Fewer Protected Rights, Especially Pro-Union Workers*

Recent Board rulings have overruled precedent, announced new rules, and applied existing law in ways that significantly alter prior policy and strip workers of their rights. Seemingly in concert with increased employer resistance,[60] this Board's decisions have diminished employees' rights. During organizing campaigns, employers are permitted greater leeway to intimidate and coerce workers through threats and surveillance of workers' union activities.[61] Employers are allowed to institute and

maintain onerous and ambiguous workplace rules that discourage union support and chill employees' exercise of their legal rights to support a union.[62] Significantly, a Board decision upholding a work rule that prohibited workers from "fraterniz[ing] on duty or off duty * * * with * * * co-employees" was denied enforcement by the Court of Appeals for the District of Columbia, which characterized the Board's view as "unreasonable," and observed that "employees could hardly engage in protected activity without fraternizing with each other."[63] Even non-coercive pro-union conduct by a low level supervisor, which the Board acknowledged was not objectionable under the law as it existed at the time the election was conducted, was used to invalidate workers' votes to form a union despite the vigorous and openly aggressive anti-union campaign conducted by the employer.[64] These decisions condone anti-union intimidation and interference by employers and further strip workers of the Act's protections.

In case after case, workers' rights are forced to yield—to employer property interests however miniscule,[65] to employer discretion,[66] to national security,[67] to deferral to arbitration,[68] and to other statutes.[69] As Board decisions continue to shrink workers' rights both the "protectedness" and the "concertedness" of employee conduct are viewed more narrowly. Examples include this Board's rulings that nursing home workers were not engaged in protected conduct when they called a state patient care hotline to report excessive heat;[70] that an employee's solicitation of a coworker to testify before a state agency in support of her sexual harassment complaint was not protected because she was advancing only her own cause;[71] and, in explicitly overruling precedent, that non-union workers had no right to be accompanied by a fellow worker when they were called into an employer meeting that could lead to their discipline.[72]

Employer property interests, however tenuous, have been more valued and far more aggressively protected than workers' rights. Workers must engage in concerted activity at their peril despite the supposed protections of the Act. An employer's property rights in its parking lot were more important than the rights of workers who waited there in hopes of bringing their work complaints to their company president's attention.[73] In another case involving an employee who used company scrap paper to write a union notice to replace one that a supervisor had unlawfully torn down from a bulletin board, the Board ruled that that single piece of scrap paper constituted a property interest more deserving of the Act's protection than an employee's federal labor law rights.[74]

Workers have also lost ground on evidentiary rulings. Although the Board was willing to infer that statements made by a pro-union supervisor to three employees were likely repeated other employees so as to require setting aside an election in the union's favor,[75] it refused a similar inference where objectionable pre-election conduct by an employer was at issue.[76] Indeed, five decades of precedent were swept aside in a Board ruling that an employer's threats to close its workplace if employees voted for union representation would no longer be presumed to have been disseminated throughout the workforce.[77] The prior rule, which this Board overturned, was based on the logic that discussion of this most serious of threats among employees was "all but inevitabl[e]" and that to think otherwise was "totally unrealistic" and "the ultimate in naivete."[78] Yet that is exactly what this Board did.

*Workers' Rights to Bargain Collectively and to Strike Are Under Attack*

In a pair of cases involving partial lockouts, the Bush Board seriously undermined the fundamental right to strike by sanctioning lockouts in which the employers discriminated among their workers solely on the basis of union membership and union support. In one, the Board allowed an employer to lock out strikers who had offered to return to work while it continued to employ those who had crossed the picket lines and abandoned the strike. The Court of Appeals for the Seventh Circuit, in a unanimous decision, denied enforcement, harshly chastising the Board that its decision was "in derogation of nearly four decades of employee protection."[79]

Relying on this earlier decision (and prior to the Seventh Circuit's refusal to enforce it), the Board upheld another employer's decision to lock out only its non-probationary employees, "all of whom were union members," while allowing its probationary employees, "all of whom the * * * [employer] believed were not union members," to continue working.[80] The majority justified the employer's selective lockout on the basis that non-probationary employees had a more 'vital interest' in the outcome of the contract negotiations than probationary employees. As in the prior case, these were rationales that even the employer had not proffered during the litigation of the case.[81] The partial lockout caused the union to lose support and provided the employer with an opportunity to stop bargaining and withdraw recognition from the union. In an unpublished decision, the U.S. Court of Appeals for the District of Columbia similarly refused to enforce the Board's decision.[82]

As part of this September massacre, the Board made it even easier for employers to deny employment to returning strikers.[83] It has been well-settled that, in order to be considered "permanent replacements" who will be allowed to continue working in the place of returning strikers after the strike has ended, the replacement workers must have "a mutual understanding with the [employer] that they are permanent." The Board nonetheless held that at-will employees who had signed agreements stating that their employment could "be terminated by myself or by [the employer] at any time, with or without cause" could still be considered "permanent" replacements if the employer elected to deny reinstatement to its workforce at the end of the strike.

Recent Board decisions evince a willingness to relieve employers of their collective bargaining obligations and allow them greater discretion to make unilateral changes. When employers make changes in employees' working conditions in violation of their legal obligations to bargain with the workers' union representative, the traditional remedy has been to order the employer to restore the status quo, bargain with the union, and rescind any actions taken as a result of the illegal unilateral changes, including disciplinary actions. Long-standing Board precedent has recognized that even if workers are fired, "[n]o otherwise valid reasons asserted to justify discharging the employee can repair the damage suffered by the bargaining representative as a result of the application of the changed term or condition."[84] With a decision on September 29, the Board eliminated this critical remedy and overruled almost two decades of Board precedent.[85] The Board had originally upheld the lawfulness of the discharges in 2004, then reinstated this same decision following a remand from the Court of Appeals for the District of Columbia, relying on an interpretation of the Act which the court had specifically and tellingly refused to endorse.[86]

*Conclusion*

Instead of shrinking the Act's coverage, protections and remedies, this Board should be addressing the reality that virulent anti-union campaigns are still the norm, that workers face extreme forms of intimidation when they try to form a union, and that the rights guaranteed by the Act are still outside the grasp of inordinate numbers and categories of American workers.

Instead, workers are losing fundamental rights and protections through thinly-veiled result-oriented split decisions. These decisions illustrate how the Bush Administration Labor Board has completely abdicated its statutory responsibilities, and why legislative change is so critically needed. Workers deserve a Board that will uphold the statutory mandate of the National Labor Relations Act and protect their rights to organize and bargain for a better life. They deserve a pathway to collective bargaining that brings workers into the middle class and allows them to stay there, a statute that provides meaningful remedies for violations of their rights, and a statute that deters labor law violators and precludes their viewing such violations as a mere "cost of doing business."

The AFL–CIO calls for the Labor Board to be returned to its role as protector of the rights set forth in the National Labor Relations Act and for this Congress to enact legislative change that will insure that all workers who wish to be represented by a union to negotiate for their future have that opportunity. We ask Congress to safeguard workers against a Labor Board that is attacking their rights instead of protecting them and we call on Congress to strengthen those rights by passing the Employee Free Choice Act.[87]

ENDNOTES

[1] After 70 Years of the NLRB: Warm Congratulations—and a Few Reservations, 48 Law Quadrangle Notes 98, 101 (2005).

[2] James J. Brudney, "Isolated and Politicized: The NLRB's Uncertain Future," 26 Comp. Labor Law & Pol'y 221, 224 (2005). See also, Steven Greenhouse, Labor Board's Critics See a Bias Against Workers, NY Times, Jan. 2, 2005, at A-20, *http://www.theocracywatch.org/gov—labor—times—jan2—05.htm.*

[3] Lance Compa, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (Human Rights Watch 2000) at 10.

[4] Chirag Mehta and Nik Theodore, Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns, American Rights at Work, (2005),available at *http://www.americanrightsatwork.org/docUploads/UROCUEDcompressedfullreport%2Epdf*; see also Kate Bronfenbrenner, Uneasy Terrain: The Impact of Capital Mobilization on Workers, Wages and Union Organizing, Cornell University (Sept. 6, 2000).

[5] Gordon Lafer, "Free and Fair: How Labor Law Fails U.S. Democratic Standards," American Rights at Work (2005) available at *http://araw.org/docUploads/FreeandFair%20FINAL%2Epdf; http://www.americanrightsatwork.org/docUploads/UROCUEDcompressedfullreport%2Epdf.*

[6] The Board granted review in a series of cases which challenge various aspects of voluntary recognition, including Dana Corp. and Metaldyne Corp., 341 NLRB 1283 (2004) (Dana I) (reconsidering the voluntary recognition bar policy of Keller Plastics Co., 157 NLRB 583 (1966) that a decertification petition may not be filed for a reasonable period of time following voluntary recognition); Dana and UAW, Case Nos. 7-CA-46965 and 7-CB-14083, JD-24-05 (2005) (Dana II) (considering whether and to what extent a union and employer may engage in prerecognition bargaining); Shaw's Supermarket, 343 NLRB 963 (2004) (challenging the continuing validity and application of the after acquired stores doctrine set forth in Kroger Co., 2l9 NLRB 388 (1975). Of these, Dana I was decided on September 29, 2007, 351 NLRB No. 28; Dana II is still pending and Shaw's Supermarket settled.

[7] The National Labor Relations Act requires employers to recognize and bargain with unions "designated or selected" by a majority of their employees; the Act does not specify the method by which employees are to select their representatives. Section 9 of the Act provides that employees can petition for an election only if "their employer declines to recognize their representative." See, General Box Co., 82 NLRB 678, 683 (1949); United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62, 72, n. 8 (1956).

[8] Dana Corp., 351 NLRB No. 28 (2007).

[9] Slip op. 14. "Today's decision * * * undercuts the process of voluntary recognition as a legitimate mechanism for implementing employee free choice and promoting the practice of collective bargaining. It does so at a critical time in the history of our Act, when labor unions have increasingly turned away from the Board's election process—frustrated with its delays and opportunities it provides for employer coercion—and have instead sought alternative mechanisms for establishing the right to represent employees * * *. If disillusionment with the Board's election process continues, while new obstacles to voluntary recognition are created, the prospects for industrial peace seem cloudy, at best." Id., slip op. 12.

[10] Executive Order 13201, issued by President Bush on February 17, 2001 available at *http://www.dol.gov/esa/regs/statutes/olms/eo13201.htm.*

[11] NLRB notices to employees may be posted as a remedy for illegal conduct pursuant to a settlement agreement or NLRB or Court order (NLRB Compliance Manual §10518); and must be posted for 3 days prior to an NLRB-conducted election since it notifies employees of balloting details (NLRB Representation Casehandling Manual §11314).

[12] Charles J. Morris, In the Matter of Rulemaking, February 9, 1993.

[13] Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50 (2007).

[14] Id., slip op. 2.

[15] Dana Corp., slip op. 6-7.

[16] Wurtland, slip op. 3.

[17] Shaw's Supermarkets, 350 NLRB No. 55 (2007).

[18] Brown University, 342 NLRB 483 (2004) (reversing a four-year-old decision in New York University, 332 NLRB 1205 (2000) and eliminating from the Act's protections thousands of graduate student workers who have been actively seeking union representation during the pendency of the Brown case, including those at Columbia University, Yale University, Tufts University, Pratt Institute and the University of Pennsylvania, among others.

[19] Oakwood Care Center, 343 NLRB 659 (2004), overruling Sturgis.

[20] Brevard Achievement Center, 342 NLRB 982 (2004).

[21] LeMoyne-Owen College, 345 NLRB No. 93 (2005), following a remand from the Court of Appeals for the District of Columbia Circuit of the Board's initial decision reported at 338 NLRB No. 92 (2003); faculty are excluded from the Act's protection because they "play a major and effective role in the formulation and effectuation of management policies." Slip op. 11.

[22] Pa. Acad. of Fine Arts, 343 NLRB 846 (2004).

[23] St. Joseph News-Press, 345 NLRB No. 31 (2005).

[24] Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006); Golden Crest Healthcare Center, 348 NLRB No. 39 (2006); and Croft Metals, Inc., 348 NLRB No. 38 (2006).

[25] RNs are the largest occupational group in the healthcare industry, holding 2.2 million jobs in 2000. Almost 1.3 million of these RNs are employed in hospitals, representing fully one quarter of all hospital employees. See 2002-2003 BLS Occupational Outlook Handbook, Registered Nurses, Health Industry, available at *http://www.bls.gov/oco/cg/cgs035.htm.* In addition, there are approximately 420,000 LPNs currently employed in both hospitals and nursing homes. And the impact of these decisions will not be limited to nurses or to the health care industry; they potentially affect all professional employees, who number 27 million. See BLS, 2000-2010 Employment Projections, Table 2.

[26] Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act (HR 1644; S 969).

[27] Wilshire at Lakewood, 345 NLRB No. 80 (2005).

[28] Jochims v. NLRB, 480 F.3d 1161, 1174 (D.C. Cir. 2007), reversing and remanding Wilshire at Lakewood, 345 NLRB No. 80 (2005).

[29] Oak Park Nursing Care Center, 351 NLRB No. 9 (2007).

[30] See Brent Garren, "When the Solution is the Problem: NLRB Remedies and Organizing Drives," 51 Labor L J. 76, 78 (2000).

[31] Domsey Trading Corp., 351 NLRB No. 33 (2007) (reinstatement denied in 1990; original Board decision finding the employer's conduct unlawful reported at 310 NLRB 777 (1993); enf'd 16 F.3d 517 (2d Cir. 1994); Administrative Law Judge Decision on backpay issued October 4, 1999).

[32] UNFAIR ADVANTAGE, supra, note 3 at 10.

[33] Cynthia L. Estlund, The Ossification of American Labor Law, 102 Colum. L. Rev. at 1527, 1554 (2002).

[34] Mastro Plastics Corp., 136 NLRB 1342, 1346 (1962); see also NLRB Compliance Manual §10550.1: "In the event of a dispute concerning interim earnings, it is the respondent's legal burden to prove interim earnings and other facts that may mitigate the loss resulting from its un-

lawful action;" and Compliance Manual §10558.1: "It is the respondent's burden to establish that the discriminatee [illegally terminated worker] failed to make a reasonable effort to seek interim employment."

[35] St. George Warehouse, 351 NLRB No. 42 (2007) (the illegal discharges occurred in 1999; the decision of the NLRB Administration Law Judge finding wrong-doing issued in 2002).

[36] The Grosvenor Resort, 350 NLRB No. 86 (2007) (employees were denied backpay for the period of time that they were engaged in picketing to get their jobs back).

[37] This new rule contradicts instructions in the existing NLRB Compliance Manual, §10558.3 which advises that "the Board has found that a brief period during which the discriminate undertook no activities to seek employment did not constitute a failure to mitigate, citing Saginaw Aggregates, 198 NLRB 598 (1972) and Retail Delivery Systems, 292 NLRB 121, 125 (1988).

[38] Toering Electric Co., 351 NLRB No. 18 (2007) (backpay proceeding in which refusal to hire occurred in 1995-96; NLRB Administrative Law Judge decisions finding illegal conduct issued in 1997 and 2000).

[39] Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (2007) (carving our less favorable rules when employers unlawfully refuse to hire workers intent on organizing the workforce by applying a new evidentiary requirement that in order to be entitled to continuing backpay, the General Counsel and worker have the burden of proving by affirmative evidence that the worker would have continued to work for the employer but for the employer's unlawful discrimination).

[40] Id., slip op. 10, referencing NLRB v. Seven-Up Bottling Co. of Miami, 344 U.S. 344, 347 (1953), citing Pennsylvania Greyhound Lines, 1 NLRB 1, 51 (1935)

[41] Historically, it has been the responsibility of the General Counsel to calculate the amount of backpay owed and the obligation of the adjudicated wrong-doer to present evidence to reduce that amount. See n. 33, supra.

[42] Intermet Stevensville, 350 NLRB No. 93 (2007) (Intermet II)(refusing a broad order where the employer unlawfully laid off four workers because of their union support despite prior case, Intermet Stevensville, 350 NLRB No. 94 (2007)(Intermet I), which found numerous violations by the employer during its anti-union campaign, including threats of plant closure and job losses; demotion, reassignment and reduction in wages for a suspected union supporters, the confiscation of union literature; and other worker abuses.

[43] Compare National Steel Supply, Inc., 344 NLRB 973 (2005) (bargaining remedy granted) with Desert Toyota, 346 NLRB No. 3 (2005), Abramson, LLC, 345 NLRB No. 8 (2005) and The Register Guard, 344 NLRB 1143 (2005) (bargaining order remedies denied).

[44] Albertson's Inc., 351 NLRB No. 21 (2007) (rejecting its Administrative Law Judge's recommendation for a broad order and special remedies despite numerous violations for failure to furnish information, unilaterally changing terms and conditions of employment, bypassing the union, maintaining unlawful rules and unlawfully disciplining workers).

[45] Rick Valliere, Organized Labor Would Fare Better Under State Labor Laws, Professor Says, Daily Lab. Rep. (BNA) at A-7(Jan. 11, 2006) (quoting former NLRB Chairman William B. Gould).

[46] Fieldcrest Cannon, Inc. v. NLRB 97 F.3d 65 (4th Cir. 1996), enf'ing in rel. part 318 NLRB 470 (1995); Dynatron/Bondo Corp., 324 NLRB 572 (1997); Three Sisters Sportswear Co., 312 NLRB 853 (1993), enf'd, 55 F.3d 684 (D.C. Cir. 1995), cert. denied, 516 U.S. 1093 (1996); Monfort of Colorado, Inc., 298 NLRB 73 (1990), enf'd, 965 F.2d 1538 (10th Cir. 1992); S.E. Nichols, Inc., 284 NLRB 556 (1987), enf'd, 862 F.2d 952 (2d Cir. 1988); Avondale Industries, Inc., 329 NLRB 1064 (1999); Unbelievable, Inc., d/b/a Frontier Hotel & Casino, 318 NLRB 857 (1995), enf'd. sub nom. Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C. Cir. 1997).

[47] First Legal Support Services, 342 NLRB 350 (2004) (illegal terminations, threats of discharge in retaliation for their union activities or those of their family members, being required to sign agreements that they were independent contractors and not employees and bribes offered in return for giving up their union support did not justify special remedies such as allowing the union access to the employer bulletin board, an opportunity to address workers on-site, and a list of employees' names so the union could contact them to talk about the campaign).

[48] Chinese Daily News, 346 NLRB No. 81 (2006); John Logan, The Long, Slow Death of Workplace Democracy at the Chinese Daily News, available at *http://www.americanrightsatwork.org/docUploads/burke%20report.pdf.*

[49] Brudney, Neutrality Agreements and Chard Check Recognition, 90 Iowa L. Rev. at 871-872 (footnotes omitted; quoting Gissel, 395 U.S. at 612). See id. n. 262 ("stunning decline of 85% * * * substantially exceeded the 50% decline in election activity over the same period;" increased number of unfair labor practices charges filed belies any inference of "heightened levels of law-abiding conduct by the employer community.").

[50] NLRB v. Gissel Packing Co., 395 U.S. 575, 612 (1969).

[51] Desert Toyota, 346 NLRB No. 3 (2004) (the employer discharged the principal employee organizer and made statements to another employee linking the discharge to the worker's union support; maintained an unlawful no-solicitation rule, created the impression of surveillance, interrogated non-bargaining unit employees and solicited them to report union activities by others); Abramson, LLC, 345 NLRB No. 8 (2005) (a co-owner made repeated threats of plant closure, threatened employees with loss of jobs and benefits, and unlawfully denied recall to the leading union supporter following a post-election layoff); The Register Guard, 344 NLRB 1143 (2005) (employer unlawfully granted a unit-wide wage increase during the union campaign, conducted meetings in which it solicited and addressed employees' grievances and sent workers a letter with a form addressed to the union withdrawing their union authorization cards); Hialeah Hospital, 343 NLRB 391 (2004) (high level officers of the employer embarked on a course of discharge, threats of discharge, spying, and other illegal conduct within hours of learning of a union's organizing effort in a small unit of twelve employees; the employer warned the entire workforce that it would discover the identities and get rid of those employees who had contacted the union and told them that it would "not allow" a union).

[52] This, of course, assumes that the discharged worker will ever return to work, or be able to do so prior to a second election.

[53] California Gas Transport, Inc., 347 NLRB No. 118 (2006); National Steel Supply, Inc., 344 NLRB 973 (2005) (the employer unlawfully refused to reinstate 27 of its 32 workers).

[54] California Gas Transport, Inc., 347 NLRB No. 118 (2006); Center Construction Co., Inc., d/b/a Center Service System Division, 345 NLRB No. 45 (2005).

[55] Evergreen America Corp., 348 NLRB No. 12 (2006); see also California Gas Transport, 347 NLRB No. 118 (2006); Center Construction, 345 NLRB No. 45 (2006); Smoke House Restaurant, 347 NLRB No. 16 (2006); Concrete Form Walls, Inc., 346 NLRB No. 80 (2006).

[56] 29 U.S.C. § 160(j).

[57] S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947).

[58] Although Section 10(l) requires the Board to seek injunctive relief for certain illegal conduct by unions, NO provision of the Act requires the Board to seek immediate, injunctive relief for violations by employers of workers' rights.

[59] These figures are based on NLRB documents obtained pursuant to a request under the Freedom of Information Act, NLRB Annual Reports, and General Counsel Summary of Operations Memoranda GC 08-01, 07-03, 06-01, 05-01, and 04-01.

[60] John Logan, "Consultants, Lawyers and the 'Union Free' Movement in the USA Since the 1970s," 33 Industrial Relations Journal 197 (August 2002).

[61] Crown Bolt, Inc., 343 NLRB 776 (2004) (announcing a new rule that threats that the employer will close its facility if employees choose to unionize are no longer presumed to be disseminated throughout the bargaining unit); Alladin Gaming, LLC, 345 NLRB No. 41 (2005) (permitting managers to closely observe and monitor employees' union discussions and then interrupt their conversations to deliver pro-employer lectures); Airport 2000 Concessions, LLC, 346 NLRB No. 86 (2006) (interrupting a break time conversation between an employee and a union organizer, watching them until they completed their conversation and immediately instructing employees not to speak with organizers did not constitute illegal surveillance).

[62] Delta Brands, Inc., 344 NLRB 252 (2005) (announcing a new policy that maintenance of an unlawful overly broad no-solicitation rule during an anti-union campaign is no longer sufficient to set aside an election); Lutheran Heritage Village-Livonia, 343 NLRB No. 75 (2004) (expanding permissible employer work rules to include those that prohibit "abusive and profane language," "harassment of other employees * * * in any way" and "verbally, mentally, or physically abusing" a fellow employee or supervisor as such employer rules are not unlawful and do not discourage lawful, protected employee organizing activities); Stanadyne Automotive Corp., 345 NLRB No. 6 (2005) (upholding as lawful a ban on "harassment," despite lack of any clarification limiting it to unprotected, harassing conduct or improper behavior and even though the rule was expressly announced in direct response to union activity); Palms Hotel and Casino, 344 NLRB 351 (2005)(a rule forbidding "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members" was ruled to be lawful over the dissent's assertion that it would chill Section 7 rights); see also River's Bend Health & Rehabilitation Services, 350 NLRB No. 16 (2007)..

[63] Guardsmark, LLC, 344 NLRB 809 (2005), enf'd denied, Guardsmark, LLC v. NLRB, 475 F.3d 369, 379 (D. C. Cir. 2007), emphasis in original.

[64] Harborside Healthcare Inc., 343 NLRB 906 (2004) (supervisors' attempts to solicit employees to support the union constitute unlawful coercive conduct requiring that the union's election win be set aside even though the employer conducted an openly aggressive and vicious anti-union campaign); Chinese Daily News, 344 NLRB 1071 (2005) (a supervisor's distribution of union authorization cards and attendance at a union meeting was "inherently coercive" such that the union's election victory must be set aside even though only one supervisor engaged in such conduct and the employer conducted a virulently hostile, open and aggressive anti-union campaign.).

[65] Quietflex Mfg., L.P., 344 NLRB 10555 (2005) (the employer's property interest in a single piece of scrap paper is protected over the lawful union activity of a worker who used the scrap paper to make a notice of a union meeting after the employer unlawfully removed a prior notice).

[66] Guardsmark, LLC, 344 NLRB 809 (2005); Stanadyne Automotive Corp., 345 NLRB No. 6 (2005); Palms Hotel and Casino, 344 NLRB 351 (2005) (employer workrules do not chill Section 7 rights).

[67] IBM Corp., 341 NLRB 1288 (2004) ("because of the events of September 11, 2001 and their aftermath, we must now take into account the presence of both real and threatened terrorist attacks"); ITT Industries, Inc., 341 NLRB 937, 942 (2004) (dissenting from the majority's decision that off-site employees of the employer had Section 7 rights to handbill in the parking lot at a sister facility, Chairman Battista warned that "our nation now faces significant security risks" such that "[e]mployers * * * must be particularly vigilant at this time of our nation's history."

[68] Smurfit-Stone Container Corp., 344 NLRB 658 (2005) (deferral to arbitration award even though the arbitrator upheld the discipline of an employee who was engaged in protected, concerted activities); Aramark Services, Inc., 344 NLRB 549 (2005) (deferral to arbitrator's decision even though the arbitrator's decision "is not a model of clarity," but is "at least susceptible" to an appropriate interpretation).

[69] Krystal Enterprises, Inc., 345 NLRB No. 15 (2005) (employee was lawfully discharged for violation of employer's sexual harassment policy even though his union activity was "a motivating factor" and rampant sexual horseplay and misconduct, the purported reason for his discharge, was generally tolerated); IBM Corp., 341 NLRB 1288 (2004) (the potential for workplace discrimination and sexual harassment are articulated as a factor in denying nonunion workers the opportunity for representation during disciplinary interviews).

[70] Waters of Orchard Park, 341 NLRB 642 (2004).

[71] Holling Press, Inc., 343 NLRB 301 (2004).

[72] IBM Corp., 341 NLRB 1288 (2004), overruling Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000).

[73] Quietflex Mfg. Co., 344 NLRB 1055 (2005); Johnson Technology, Inc., 345 NLRB No. 47 (2005).

[74] Johnson Technology, Inc., 345 NLRB No. 47 (2005).

[75] Harborside Healthcare, Inc., 343 NLRB 906 (2004).

[76] Werthan Packaging, Inc., 345 NLRB No. 30 (2005) (no inference that a manager had similarly and systematically interrogated 25 employees where, on the day before the election, the manager approached a short tenure employee wearing a union button and asked if she had filled out a union card, then wrote something down on a clipboard and was then observed walking up to other employees, talking to them and writing on the clipboard; a process repeated with about 25 employees).

[77] Crown Bolt, Inc., 343 NLRB 776 (2004) (announcing a new rule that threats that the employer will close its facility if employees choose to unionize are no longer presumed to be disseminated throughout the bargaining unit); overruling Springs Industries, 332 NLRB 40 (2000); General Stencils, Inc., 195 NLRB 1109 (1972), enf. denied 472 F.2d 170 (2d Cir. 1972); Coach & Equipment Sales Corp., 228 NLRB 440 (1977).

[78] Crown Bolt, Inc., supra, note 77 at 780 and cases cited therein.

[79] Midwest Generation, 343 NLRB 69 (2004), rev'd and remanded sub nom. Local 15, IBEW v. NLRB 429 F.3d 651, 662 (7th Cir. 2005).

[80] Bunting Bearings Corp., 343 NLRB 479 (2004).

[81] Id. at 481.

[82] United Steelworkers v. NLRB, 179 Fed. Appx. 61 (D.C. Cir. 2006).

[83] Jones Plastic & Engineering Co., 351 NLRB No. 11 (2007).

[84] Great Western Produce, Inc., 299 NLRB 1004, 1005 (1990), citing Boland Marine & Mfg. Co., 225 NLRB 824 (1976), enf'd 562 F.2d 1259 (5th Cir. 1977); see also Tocco, Inc., 323 NLRB 480 (1997).

[85] Anheuser-Busch, Inc., 351 NLRB No. 40 (2007) (workers discharged based on evidence from illegal video surveillance not entitled to reinstatement, overruling Great Western and Tocco, supra.).

[86] Anheuser-Busch, Inc., 342 NLRB 560 (2004); rev'd and remanded sub nom. Brewers & Maltsters Local 6 v. NLRB, 414 F.3d 36 (D.C. Cir. 2005).

[87] The House of Representatives passed the Employee Free Choice Act (HR 800), on March 1, 2007, by a 241—185 vote; the Senate supported the Employee Free Choice Act (S 1041), on June 26, 2007, with a 51-48 vote which was not sufficient to invoke cloture; President Bush promised to veto the bill. The Employee Free Choice Act requires certification of unions supported by a majority of the workforce, interest arbitration for first contracts, and increased remedies for violations of the NLRA.

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Chairman ANDREWS. Thank you, Mr. Hiatt. I would like to thank the witnesses.

Mr. Cohen, one of the points that Chairman Battista made repeatedly is that the law is neutral. It neither favors management nor labor.

In the Dana decision, it is now a legal requirement after a majority signup recognition, voluntary recognition by an employer or a union that the employer has to post a notice telling the employees how much time they have to undo that recognition, how they go about doing it. Is that correct?

Mr. COHEN. Mr. Chairman, I do not believe that that is correct. There is no requirement that the employer post a notice.

Chairman ANDREWS. Well, who has to post it?

Mr. COHEN. If anybody is going to post it, it is, indeed, the employer. But there is no requirement.

Chairman ANDREWS. Well——

Mr. COHEN. As I said before——

Chairman ANDREWS. We won't quibble over whether that is—but clearly, that is the result of that case. Is there any such requirement that the employer post a notice as to how someone can form a union? Are you aware of any?

Mr. COHEN. There is not. The closes to it is once there is going to be an election, a notice of election must be posted by the employer.

Chairman ANDREWS. Okay. Once there is going to be——

Mr. COHEN. And that notice——

Chairman ANDREWS. Yes, once there is going to be an election, which is a long, long way down the process. Someone has already decided there to try to organize something. Does that strike you as neutral, that there is an obligation—you won't say there is an obligation. I will, that there is a precedent in the law that says you have to notify people how to undo the will of the majority to form a union, but there is no obligation or no precedent that says you have to tell people how to form one if they want to. You think that is neutral?

Mr. COHEN. If I might, I am sorry, I have to disagree with the premise, Mr. Andrews. And the reason for that is voluntary recognition is still permissible. If nobody posts a notice and no employees ever challenge——

Chairman ANDREWS. The issue is not permissibility. It is notice. And after Dana, you have to tell people how to undo what has been done. There is no requirement to tell people how they can go about getting voluntary recognition or majority signup, is there?

Mr. COHEN. That is correct. But it is only if there is going to be an enjoinment of the recognition bar and subsequent contract bars——

Chairman ANDREWS. Well, but, frankly, of course, there would want to be a recognition, because once you have gotten a recognition, you want to negotiate a contract. You want the bar so there can be adequate time for the parties consistent with the policy of the statute to identify the issues and resolve them.

I want to move on to a question for Professor Finkin. Mr. Hiatt made reference to some interesting statistics. The chairman earlier, Chairman Battista, talked about reducing the backlog at the board, which is half the story. The other half is the number of cases flowing into the board has dropped rather precipitously.

Representation cases, for example, dropped 26 percent from 2005 to 2006 and by 41 percent compared to 1997. Unfair labor practice cases are now 31 percent lower than they were in 1997.

Given your experience in this field, I want to give you two hypotheses and have you tell me which of the two you think is more likely. The first hypothesis to explain this drop is that there has been an outbreak of labor peace and a lot of people are a lot happier with the way things are going and fewer people think that they need to form a union and fewer people think there has been an unfair labor practice, that things are working really well.

And the second hypothesis I would give you is that word has gotten out that this board is tilted in such a way that if you struggle the way Ms. Ryland did and keep gong back and keep being persistent, you are either not going to win, or when you do, you are not going to get what your remedy is when you win, as Ms. Ryland and, frankly, thousands of others have failed to do.

If you want to add another hypothesis, go ahead. I realize they are both a little extreme. But if you had to choose between those two hypotheses, which of those two do you think is the explanation for this phenomena?

Mr. FINKIN. Well, Mr. Chairman, the question was, in fact, put to me. I was asked by the Korean Institute of Labor to speak to the resolution of labor disputes in the United States in Seoul about a year ago. And I described as part of tout de resolve what is hap-

pening here, the shift onto employees, the increasing shift of the risk of medical injury, of health, cost, and the risk of maintaining post-employment retirement, level of income onto employees. That has been documented. And we can draw on that.

Chairman ANDREWS. Right.

Mr. FINKIN. And one of the Korean specialists stood up and accused me of not knowing what the hell I was talking about because if that were happening in Korea—he said to me, where are your riots in the streets, where are the cars burning, where are the—you know, in Korea there would be enormous labor protests. And I Had to say that in the United States we seem to be persuaded more by Thoreau's observation that most men live lives of quiet desperation.

I can't say that the happy worker syndrome can characterize the bulk of the American workforce, given the decline in purchasing power and all the larger macro-economic events going on. I do think that with respect to representation, Professor Brudney has documented that more workers, in fact, are securing bargaining rights through voluntary recognition than by resort to the board.

If I can take just a second——

Chairman ANDREWS. My time has expired. So I would just ask you to finish your thought.

Mr. FINKIN. The role of an administrative agency to adjust and adapt to changing conditions, particularly when the legislature has been incapable of addressing national labor policy for 50 years is a vacuum. And the labor board has stepped in. I am not arguing the merits of whether that is good or bad. It is simply a political fact.

The function of the board should be to discern those conditions that require the kind of fine tuning or adjustment. Conditions in 1947 were very different from conditions in 2007.

Chairman ANDREWS. Right.

Mr. FINKIN. All right. Now, what has changed to cause the board to abandon the precedent set in the 1960s about the sanctity of a recognition decision? What has changed? Nothing has changed except the fact that many more employees are resorting to self-help in this regard than are resorting to the board and the composition of the current board——

Chairman ANDREWS. I understand. I appreciate that. My time has expired.

I recognize Mr. Kline for 5 minutes.

Mr. KLINE. Thank you, Mr. Chairman.

Thank the panelists for joining us today.

I am just looking at the panel, and I have to comment, Mr. Chairman, that clearly, as is always the case, we have sort of a three-to-one majority to minority witnesses here. And in fairness, it was always that way. When the Republicans were in the majority, it was three-to-one majority to minority witnesses. And I just have to say what a shame. You know?

We have had some very tremendous panelists here. And it would be nice for us to hear some balanced testimony. In this case, I guess carrying the Republican view we have Mr. Cohen with it all on his shoulders. And I am sure he is capable of doing that. He is a terrific witness and been here before.

Let me say, Ms. Ryland, congratulations to you for being here. You are very brave. I am from Minnesota, and about this time every year I start thinking how nice it would be to be at Disney World. My wife told me it was four degrees at home, and it is never four degrees in Orlando.

Mr. Cohen, there has been some mention today—Senator Kennedy and others have mentioned that we have had a drop in union membership. I want to get at a couple of questions here. But one, can you tell us has the rate of success in union elections changed dramatically over the last 30 years? If it hasn't changed significantly, does that support or detract from the arguments that the board's most recent decisions are those that are stifling union organization in this country?

Mr. COHEN. Mr. Kline, there has not been a dramatic change over the last 30 years in the percentage of union election victories. In fact, they are at a relative high period as we speak, in the high 50 percent range.

In addition, elections are taking place under this administration and the act and the general counsel of the NLRB in a very quick pace. The median time for holding an election is 39 days from the filing of the petition. And some 92 percent of elections are held within a 56-day period of time.

Mr. KLINE. It seems fairly fast to me. We may have to go back to the hypotheticals of Chairman Andrews. I sort of thought the first hypothetical was worth exploring a little more. But no, no, I will not. I will not do that.

Again, Mr. Cohen, going to you, now, you just touched on it, but I want to get it clear here for the record. The testimony in the first panel today at least suggested that the board's mechanisms for determining questions of representation, and particularly by way of the secret ballot elections, are broken.

Do you share that view? And in your opinion, does the hard data surrounding the board's supervision of elections support such a conclusion? You just touched on it with the 39 days, but if you would like to expand on that.

Mr. COHEN. I may be old fashioned, but I believed in an NLRB secret ballot election. I know that many in the union side believe that that system is broken. I still believe along with the Supreme Court that that is the best measure of employee sentiment.

A matter which is often overlooked in this area is once the union comes in, they are not just representing the individuals who said I want the union. They are the exclusive representative for all employees in the collective bargaining unit for all wages, hours, and other terms and conditions of employment. That is a heavy responsibility. And it puts a premium on getting the decision right.

I mentioned I am old fashioned. I go back to my days in the 1970s where an assistant regional director career person at the NLRB said when issues would come up, "What is the matter with an election?" I think there is a good deal of wisdom in that admonition.

Mr. KLINE. And as you indicated, the Supreme Court agrees with that, quoting again the court in the Gissel Packing case that the secret ballot election is the "most satisfactory, indeed, the preferred method of ascertaining whether a union has majority support and

that card checks are admittedly inferior to the election process." So your view is entirely in keeping with the Supreme Court.

It looks like my time is about to expire. But let me try to leap in here. We have had some discussion about the board's blocking charge procedures. Can you explain to me the board's blocking charge procedures and how that fosters or inhibits the timely resolution of charges?

Mr. COHEN. I can attempt to do so. When——

Mr. KLINE. It is all I can ask.

Mr. COHEN. Fine. It is easier to ask than explain. When a petition is filed for an election, whether it is a representation election or a decertification election, there is a notion that the election should not be held if there is an atmosphere of unfair labor practice conduct so that when an unfair labor practice charge gets filed, in a general sense, the NLRB will not conduct an election until that unfair labor practice has been resolved, either dismissed, appeal denied or remedied.

We do see in the real world that that is kind of a tactic that gets used to forestall an actual election from taking place either in a representation matter where a union realizes they are not going to prevail in the election or in a decertification election where the union would like to have that election not take place for an extended period of time. So that is my best quick explanation of the blocking charge.

Mr. KLINE. Thank you very much.

Chairman ANDREWS. Thank you.

The chair recognizes the gentleman from Michigan, Mr. Kildee, for 5 minutes.

Mr. KILDEE. Thank you, Mr. Chairman.

Mr. Hiatt, what is the cumulative effect of the Bush board decisions over the past 7 years on the ability of workers to form or join a union? In addition to the effect of specific rulings, is there a chilling or cumulative effect from those rulings?

Mr. HIATT. Representative, I think that the cumulative effect is enormous. And I think you are right. You can't just look at the September cases because these decisions have been coming out for several years now.

As University of Michigan professor and former dean of law school, Theodore St. Antoine said, you may have a lot of nibbles, but they add up to a pretty large bite. And that is exactly what has happened. And indeed, in recent times this crescendo of anti-worker or anti-union decisions have been much more than nibbles.

But cumulatively, over time, these decisions have really been extraordinary and have, indeed, set this board apart from the kind of pendulum swings that one might say characterize the affects of decision-making in prior boards. This board has made it significantly harder for workers who are illegally fired or denied employment to recover back pay. It has made a certainty that employers who violate the act will incur only the slightest monetary loss and be required to undertake as little remediation as possible.

It has made it harder to achieve union recognition without being forced to endure the hostile, divisive, delay-ridden NLRB representation process, which is on the books. And although some courts have said not the preferred method, other courts have said quite

the opposite. You can find support for either case in the—at the board and in the courts over the years.

It has made it easier for employers to deny jobs to workers who have exercised their legal right to strike. It has made it easier for employers to file lawsuits in retaliation for protected union activities and to punish workers and their unions for their lawful protected conduct.

It has made it easier for employers to discriminate against employees and job applicants who are also union organizers, even though the Supreme Court has specifically held that such workers are employees entitled to the act's protections. It has exempted large numbers and categories of workers from coverage under the act, from being able to even enjoy whatever meager the rights and benefits that this act still provides to workers. Huge numbers and numerous categories of workers have been taken out of coverage by this board.

I could go on. I would refer you to the written testimony which provides more examples. But the cumulative effect has been enormous.

Mr. KILDEE. In addition to that, is there a deterrent effect where someone, a group or union may be hesitant to appeal for fear of getting a bad decision and therefore, they do not appeal at a certain time, at least, with a certain board?

Mr. HIATT. Not only that, but the law itself is very much unbalanced in terms of which party has the right to appeal. Certain types of decisions, particularly in the election area, can be appealed only by employers, not by unions or employees. In the Dana case, as Member Liebman indicated before, is a very good example of that.

Chairman Battista says in his written testimony, "Well, if we are wrong on some of these cases, you can take them to the courts." Well, some like the Dana case, which has probably been discussed as much as any other issue here today, could not be appealed by the union or by the workers themselves.

Mr. KILDEE. Thank you very much.

And thank you, Mr. Chairman.

Chairman ANDREWS. Thank you very much.

The chair recognizes the gentleman from Michigan, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman. I want to move back to the issue of salting. And I would ask for a response from Mr. Hiatt and Mr. Cohen basically because it is in the real world of this issue, you deal.

As I understand this, salting is basically the practice where union organizers purposely send in members under the guise of attempting to be hired to work in a plant or an employee base in order to unionize a plant. It has become evident that their tactics can be quite persuasive.

In fact, one organization, IBWE, has described the salting process as a process of infiltration, confrontation, litigation, and disruption of all nonunion contracts. That is fairly explicit.

In light of these revelations, I have difficulty understanding how someone could be surprised as a former panel member at the NLRB ruling to ensure salts are genuinely interested in seeking

work. The Supreme Court has ruled and set precedents that salting is legal. And I agree workers should have the right to organize.

But didn't the Supreme Court's ruling leave room to provide clarification of the legitimacy of workers, first question? Moving on, job applicants with no genuine aspirations to work for an employer are indistinguishable from unpaid union staff members who have been held to be outside protection of the act.

Should employers be forced to hire people that seek only to disrupt a standard work day and a situation through confrontation, litigation, et cetera, especially when that person has no interest in contributing to the company or working side-by-side with fellow employees?

Mr. Cohen, how would you respond?

Mr. COHEN. Mr. Walberg, the notion of salting is one that is controversial. It did go up the Supreme Court. The Supreme Court, as you correctly stated, said that salts meet the definition of employee.

To my knowledge, they did not pass on issues related to the board decision that have issued this term. And the board obviously felt that there was room within the Town and Country Supreme Court case to determine the notion that an individual must have an intent to be working, rather than basically starting a back pay clock ticking and having it run for an extended period of time. That is one of the kinds of cases that will be reviewable in the court of appeals as well, I would note.

In terms of the notion of refusal to hire cases, again, this is a troublesome area. When I served on the National Labor Relations Board, I made it a practice to try to visit regional offices when I could.

And I can tell you I got responses rather uniformly from the people that are out there investigating the cases saying, "I didn't come to work for this agency to deal with salting cases, which are essentially a got you kind of case where the people don't have a desire to actually engage in employment." So it is a difficult area. And the board is working its way through it.

Mr. WALBERG. Mr. Hiatt, would you care to respond?

Mr. HIATT. Thank you, Mr. Walberg. It is easy to take an individual case where an individual organizer or individual employee who wishes to organize once employed, does not intend to stay on the job. But you have to look at the whole picture, which is what the Supreme Court did in saying that you cannot discriminate based on the motive of people who are seeking jobs.

The reason why some unions have undertaken salting, as it were, is because many work places are so inaccessible to organizers and workers and the rules are so stacked against employees on the job from organizing on the job itself. And so, in that context, some unions have had union supporters seek employment.

Whether they then intend to stay for a long time or not, whether they intend to stay for a short time or not simply should not be the issue. And I think the Supreme Court made that clear.

You cannot have two classes of discriminatees. Indeed, under Title 7 under the FLSA, the notion of testers is perfectly accepted.

And what the board has done here is to say that under this law, we are going to recognizes a second class type of discriminatee, one

which because of his or her motive, is not going to enjoy the same type of protections, including whatever protections would be provided, whatever remediation would be provided to individuals who are—to other individuals who are discriminated against because of their support for unionization or their intention to join or organize a union.

It is extraordinary. And it is turning the principle on its head announcing a new rule that an employer who refuses to hire a job applicant because of his union affiliation can't be found guilty of violating the act unless the general counsel provides that the applicant had a genuine interest in employment.

An employer who has salts who are disruptive, who come into an interview and don't answer the questions, the kinds of things that are complained about here, doesn't have to hire them for perfectly legitimate reasons. And they are not going to be found to have discriminated.

Chairman ANDREWS. We will permit the gentleman a quick comment, then his time is expired.

Mr. WALBERG. Well, I guess that would be the question, whether they do have that opportunity. And I guess we will have to leave that for another time. But thank you for your response.

Chairman ANDREWS. Thank you.

There appear to be no further members who wish to question.

Mr. Kline, did you want to make any concluding remarks?

I want to conclude by thanking the witnesses of both panels for their time and effort this morning and in preparation for this morning. I do think there is clearly a range of opinions among the members of the committee. There is no doubt about that.

I think that the fact that these issues are so substantially divisive and that people feel so strongly about them would suggest—far be it for us to suggest—processed to the other body. But that when appointees are nominated for service on the board, we would favor a full and comprehensive process to evaluate their nominations in light of the issues that are raised today.

I again want to thank each of the members for their participation, the witnesses as well. As previously ordered, members will have 14 days to submit additional materials for the hearing record. And any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with the majority staff within 7 days.

Without objection, the hearing is adjourned. Thank you, ladies and gentlemen.

[The statement of Ms. Sánchez follows:]

**Prepared Statement of Hon. Linda T. Sánchez, a Representative in Congress From the State of California**

Chairman Miller, Chairman Andrews, Chairman Kennedy, and Chairwoman Murray, I thank you for convening this very important hearing on the effect of recent National Labor Relations Board Decisions on the American workers and their families.

In a very real sense, this hearing brings us full circle from our first Education and Labor hearing of the year. Back in January, we examined the state of the American Middle Class, highlighting the consequences of years of anti-labor, anti-family legislation combined with an irresponsible economic policy and a consistent failure to invest in our workforce, our children, or our industrial base. Unfortu-

nately, for working and middle class Americans, the Bush economy has presented them with greater obstacles to success than in previous decades.

As we proceeded through the year, we worked together to undo the damage of the Bush years, damage done by legislation that treats workers and their families as unimportant cogs in a corporate machine. The biggest mistake made by the previous majority was that they forgot that historically, America does best when labor and capital cooperate. Together, we can achieve great things. When we invest in families, workers are more secure and more productive. When we invest in children, we are creating the next generation of entrepreneurs, engineers, mangers, and captains of industry. When we forget the importance of the human element, we falter; we squander our most precious resource.

In order to restore the opportunities that working Americans need, we have worked to pass legislation that would:

• help employees receive equal pay for equal work and ensure their right to seek redress when they don't

• give the children of low-income families a leg up by expanding and improving Head Start

• ensure that finances don't ever create a barrier between a student and her college dreams

• help workers exercise their right to organize and work together for improved wages and working conditions.

It is the danger to this last point that brings us together today. The National Labor Relations Act, a Magna Carta of labor law that guarantees basic rights for American workers, is under attack—now more than ever. In one month alone, September 2007, the National Labor Relations Board, the appointed guardians of the right to organize, issued 61 decisions that shake the very foundation of labor law. In one fell swoop, the current majority has undermined not only prior NLRB decisions, but also rights that have existed since the enactment of the National Labor Relations Act.

The NLRB is the only place that workers and their representative unions can vindicate their rights. They cannot take cases to the courts directly. So this latest assault on the right to organize and to seek redress for unfair labor practices is more than bad policy, it's devastating. It turns labor law on its head.

Like the "Clear Skies" and "Healthy Forests" initiatives, labor policy under this Administration doesn't mean what it ought to. Instead, it means anti-labor policy, a set of rules and decisions intended to take away workers' rights, not to protect them.

While it may take us years to undo some of the damage done by this recent spate of NLRB decisions, I have faith that some are so contrary to statute and precedent that they will be overturned in the courts. As for the other decisions, I will continue to work with my colleagues until working families are no longer on the defense. I am enthusiastic to restore meaning to the America's nickname as the "land of opportunity."

America's middle class is working hard and producing more than ever, yet it is faced with an unprecedented burden of costs and expenses. Our success as a country depends on them; their success, right now, depends on us. With that, I look forward to the hearing today and to begin to quickly and effectively restore a traditional path to economic advancement for workers everywhere: the right to organize.

Thank you.

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[The statement of Senator Clinton follows:]

**Prepared Statement of Hon. Hillary Rodham Clinton, a U.S. Senator From the State of New York**

I'd first like to thank Chairwoman Murray and Ranking Member Isakson, as well as Chairman Andrews and Ranking Member Kline for calling this joint hearing.

Since its enactment in 1935, the National Labor Relations Act has played a critical role in safeguarding the rights of workers' rights to form and join unions and bargain for better working conditions. The Act explicitly encourages collective bargaining practices, and calls upon the members of the National Labor Relations Board to adjudicate cases in a manner consistent with these policies.

I am therefore deeply troubled by the NLRB's recent decisions, and remain very concerned about their clear potential to undermine the very rights the NLRB was tasked with protecting. The sheer volume of decisions in recent months that have walked back worker protections or favored employers in labor disputes reflects noth-

ing less than a tidal shift in the Board's long-standings precedents and betrays an effort to rewrite key protections in the Act through Board rulings.

The decisions have touched on a wide range of issues involved workers' rights. They have made it more difficult for employers and workers to establish a collective bargaining agreement through card checks, more difficult for workers who were illegally fired or denied employment to recover back pay; easier for an employer to deny jobs to workers who have exercised their right to strike; easier for an employer to file lawsuits in retaliation for protected union activities; and easier for employers to discriminate against employees and job applicants who are also union organizers.

Congress has an important role to play in reviewing and, if necessary, overriding Board decisions that are inconsistent with the text and purpose of the National Labor Relations Act and the need to protect workers and ensure a fair and constructive relationship between workers and employers in an evolving economy. I stand ready to work with my colleagues to find ways to restore the Act's promise as a bulwark of workers' rights.

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[Whereupon, at 12:43 p.m., the subcommittees were adjourned.]