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EMERGING TRENDS AT THE NATIONAL LABOR RELATIONS BOARD

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

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EMERGING TRENDS AT THE NATIONAL LABOR RELATIONS BOARD

Friday, February 11, 2011
U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:00 a.m., in room 2175, Rayburn House Office Building, Hon. Phil Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Thompson, Walberg, DesJarlais, Rokita, Bucshon, Barletta, Noem, Roby, Heck, Ross, Andrews, Kucinich, Loebsack, Kildee, Hinojosa, McCarthy, Tierney, Holt, and Scott.

Also Present: Representative Kline.

Staff Present: Kirk Boyle, General Counsel; Ken Serafin, Workforce Policy Counsel; Marvin Kaplan, Professional Staff Member; Loren Sweatt, Professional Staff Member; Joseph Wheeler, Professional Staff Member; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Ryan Kearney, Legislative Assistant; Brian Newell, Press Secretary; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Aaron Albright, Minority Deputy Communications Director; Tylease Alli, Minority Hearing Clerk; Daniel Brown, Minority Staff Assistant Jody Calemine, Minority General Counsel; Denise Forte, Minority Director of Education Policy; Brian Levin, New Media Press Assistant; Celine McNicholas, Minority Labor Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority Labor Counsel; Julie Peller, Minority Deputy Staff Director; Meredith Regine, Minority Policy Associate, Labor; Michele Varnhagen, Minority Chief Policy Advisor and Labor Policy Director; and Mark Zuckerman, Minority Staff Director.

Chairman ROE. I call the meeting to order. Good morning everyone. Let me take a moment to welcome my colleagues to our first subcommittee hearing of the 112th Congress. This subcommittee covers a broad range of programs and policies that have a direct impact on the lives of millions of workers and their families. There are a number of challenges facing the American workforce, including high unemployment and rising health care costs. Both will be at the forefront of our subcommittee's agenda in the weeks and months ahead.

I look forward to working with our senior Democratic member, Rob Andrews, who brings his own depth of knowledge and ideas to these critical issues. I know we will work together in areas where we can find common ground and where we can't, I hope we are able to reflect upon this committee and uphold our long tradition of agreeing to be agreeable without being disagreeable.

I would also like to thank or witnesses for taking time out of their busy schedules for being with us today and as always, our witnesses provide important insight and expertise on the issues this subcommittee addresses, and we are grateful all of you are here today to share your views with us.

As we begin the work of this subcommittee, we are mindful that for 21 consecutive months, unemployment in this country has been at or above 9 percent. The Department of Labor reports nearly 14 million workers are unemployed. Business leaders, and especially small business owners express concerns about the uncertainty they face and the politics out of Washington that continue to exacerbate that uncertainty. That is why today's discussion about the National Labor Relations Board is so important.

The NLRB was created more than 75 years ago to perform two functions: First, to determine by free democratic choice whether workers desire union representation and if so, by which union; and second, to prevent and remedy unfair labor practices by employers and unions. The Board serves as a quasi judicial body. Its five members are chosen by the President, and the majority of members share the President's views on labor policy. As a result, the Board has generated a lot of debate over the years. However, that debate has recently been elevated to new heights since the Board has abandoned its traditional sense of fairness and neutrality and instead embraced a far more activist approach.

Numerous actions by the Board suggest it is eager to tilt the playing field in favor of powerful special interests against the interests of rank and file workers.

Last August, the Board decided to weaken protections for employers by redefining secondary boycotts allowing unions to banner in front of neutral employers. During that same month, the Board expanded its jurisdiction beyond what some argue is defined in the law asserting its authority over religious institution's child care centers. It also has moved to restrict free speech rights of employers as well as increase employer penalties.

Recently, it threatened legal action against a number of States that tried to protect workers' rights to a secret ballot. And it has signaled an interest in revising a decision critical to preserving the sanctity of the secret ballot.

The Board plays an important role in the strength of our workforce. At a time of high unemployment, every agency, department and board of the Federal Government must set its own agenda aside and work toward accomplishing the agenda mandated by the American people. Getting this economy back on track and getting the employed back to work, I hope today's hearing will help determine whether the NLRB is a partner in that effort.

I would like now to yield to Mr. Andrews and ranking member for his opening comments, and I think Mr. Andrews needs to move over to the House floor so I will yield to the ranking member.

[The statement of Mr. Roe follows:]

Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor and Pensions

Good morning everyone. Allow me to take a moment to welcome my colleagues to our first subcommittee hearing of the 112th Congress.

This subcommittee covers a broad range of programs and policies that have a direct impact on the lives of millions of workers and their families. There are a number of challenges facing the American workforce, including high unemployment and rising health care costs. Both will be at the forefront of our subcommittee's agenda in the weeks and months ahead.

I look forward to working with our ranking Democratic member, Rob Andrews, who brings his own depth of knowledge and ideas to these critical issues. I know we will work together in areas where we can find common ground, and where we can't, I hope we are able to reflect well upon this subcommittee and uphold our long tradition of disagreeing without being disagreeable.

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Numerous actions by the board suggest it's eager to tilt the playing field in favor of powerful special interests against the interests of rank-and-file workers.

Last August, the board decided to weaken protections for employers by redefining secondary boycotts, allowing unions to banner in front of neutral employers.

During that same month, the board expanded its jurisdiction beyond what some argue is defined in the law, asserting its authority over a religious institution's child care centers.

It has also moved to restrict the free speech rights of employers, as well as increase employer penalties. Recently it threatened legal action against a number of states that tried to protect workers' right to a secret ballot. And it has signaled an interest in revisiting a decision critical to preserving the sanctity of the secret ballot.

The board plays an important role in the strength of our workforce. At a time of high unemployment, every agency, department, and board of the federal government must set its own agenda aside and work toward accomplishing the agenda mandated by the American people—getting this economy back on track and unemployed workers back to work. I hope today's hearing will help determine whether the NLRB is a partner in that effort.

I would like to now yield to Mr. Andrews, the ranking member, for his opening remarks.

Mr. ANDREWS. Well, thank you, Mr. Chairman, good morning. Congratulations on your election to the chairmanship of this subcommittee, and thank you for the gentile and open spirit with which you conduct yourself with your colleagues. You are a very well respected person, not just around this committee, but around the Congress, and I look forward to working with you. I appreciate very much your contributions to our institution.

I would like to thank the witnesses for their preparation and testimony this morning. I hope that we will learn a lot by listening to you.

As we meet this morning, there are 15 million Americans officially unemployed. And I don't think any of us have lived through a time as difficult as this one in the U.S. economy for our neighbors and for our friends and for many of our own families.

I think that the American people have sounded a clarion call for us to put aside our differences and work together to try to fix this underlying economic problem. And it is for that reason that I don't think that this is the most productive use of the committee or the Congress' time. The operating hypothesis for this hearing, as my friend just stated, is that the National Labor Relations Board has "abandoned its sense of fairness and neutrality," and embarked on a "activist agenda."

The evidence for that proposition appears to rest on three points: The first is that there are a host of controversial decisions that have emanated from the Board in recent months which are shaking the American economy.

I find that to be a curious conclusion given the fact that since the Board was fully reconstituted with a quorum in April of 2010, 83 percent of its decisions have been unanimous. To put that in some historic context, during the Bush years, the percentage of NLRB decisions that were unanimous was 67 percent. So if the standard for abandoning fairness and neutrality is the number of controversial decisions, it looks like there has been more fairness and neutrality, not less, in recent decisions of the Board.

The second piece of evidence appears to be that the Board has embarked on an admittedly unusual but certainly not unprecedented practice of promulgating rules. Most of the decisions, as the witnesses will educate us, of the NLRB are made by adjudication of decisions before the Board rather than by rulemaking. The rule that has triggered today's hearing is a rule which essentially says that employers have to download from a computer a poster and put it on their bulletin board. The poster says, here are your rights as a worker. If you want to join a union, here are your rights vis-a-vis your employer, and if you are in a union and you think that your union has done something illegal to you, here is your rights against your union.

So the activism that has bred this morning's activities consist of employers being required to download a poster and put it on their bulletin board.

Frankly, the activism that I think that we would need would be a bipartisan discussion on how to create jobs in the country, not avoid something as relatively modest as that.

And then the third piece of evidence is that the Board has made evidently a series of decisions with which the majority disagrees. Well, I would submit that the majority has three remedies if it disagrees with the substance of the Board's decision. The first is a political remedy. Obviously, there will be a Presidential election in 2012, and the voters will decide whom the occupant of the White House should be that should make decisions to nominate for advise and consent by the Senate members of the Board. And the public will work its will.

The second remedy for any perceived decision of the Board that is incorrect is judicial. If a party is aggrieved by a decision of the National Labor Relations Board, it has the right to go to the Court of Appeals and have the courts of this country decide whether the Board acted within its purview or outside of its purview.

And then the third remedy is legislative. If, in fact, the committee feels that there has been some interpretation of the labor laws which is harmful to the economy, the committee has within its jurisdiction and authority the ability to file a bill, have hearings, mark up the bill, put it up for a vote on the House floor and the Senate floor and see if the President will sign it.

So it strikes me that what we are doing here this morning really refutes the principle or the hypothesis that the Board has abandoned its sense of fairness and neutrality. I think that what is more accurate is that the majority has abandoned its promise to quote, focus like a laser beam on the problem of unemployment.

And so rather than focusing on these matters this morning, it would be our view that we should work together to try to create jobs as I am sure we will be able to work together on many issues in the future.

Again, I congratulate the chairman. I thank him for his time. Let me apologize to the witnesses in advance for one thing. Our committee is now responsible for time on the House floor for the resolution before the House today, and I am required to be there for a few minutes to participate in that. My departure is by no means a reflection of my lack of interest in your testimony. I have read your statements, and I will be back as soon as I can. I thank the chairman for that.

Chairman ROE. I thank the ranking member for his opening comments.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous materials referenced during the hearing to be submitted for the official hearing record. I appreciate all the witnesses being here.

It is now my pleasure to introduce this distinguished panel to the committee.

Mr. Philip Miscimarra is a partner with Morgan Lewis's labor and employment practice, a senior fellow at the University of Pennsylvania's Wharton Business School and managing director of the Wharton Center for Human Resources Research Advisory Group. He received his B.A. degree from Duquesne University and his J.D. and MBA from the University of Pennsylvania. And thank you for being here.

Mr. Arthur Rosenfeld is a former National Labor Relations Board general counsel. Mr. Rosenfeld served as NLRB general counsel from of June 2001 to June 2005. And prior to that, Mr. Rosenfeld was senior Republican labor counsel in the Senate Health, Education, Labor, Pensions Committee. Mr. Rosenfeld received his B.A. degree from Muhlenberg College in Allentown, Pennsylvania, his MBA in labor relations from Lehigh University and his J.D. from Villanova. Thank you for being here.

Ms. Cynthia Estlund is professor of law at the New York University School of Law. And prior to joining the faculty at NYU Law, she filled multiple positions at the University of Texas Law and Columbia Law School, finally serving as vice dean for research. She received her B.A. in government from Lawrence University and J.D. from Yale Law School.

Mr. Roger King is partner in Jones Day. Mr. King represents management in matters arising under the National Labor Relations Act. Prior to his work in the private sector, Mr. King was labor relations counsel for Senator Robert Taft. He is a graduate of Miami University and his J.D. from Cornell University. Thank you for being here Mr. King.

The lights, as you all have been here probably many times before, the green light is 5 minutes, and I am going to try to keep my comments to 5 minutes. When the light in the center comes on, you have got 1 minute, and I won't cut you off in mid sentence, but we are going to hold to the 5-minute rule fairly closely. I would appreciate the members doing the same thing.

I would like again to thank the witnesses for taking time to testify today.

And I would appreciate now, Mr. Miscimarra, if you would begin with your testimony.

STATEMENT OF PHILIP MISCIMARRA, PARTNER, MORGAN, LEWIS & BOCKIUS LLP

Mr. MISCIMARRA. Chairman Roe, Ranking Member Andrews and subcommittee members, thank you for your invitation to participate in this hearing. It is an honor to appear before you today.

My name is Philip Miscimarra. I am a senior fellow at the University of Pennsylvania's Wharton School in the Wharton Center for Human Resources. I am also a partner in the law firm Morgan, Lewis and Bockius.

The National Labor Relations Act centers around a bargaining model where each side's leverage largely stems from economic damage it may inflict on the other side. In a global economy, this places unions and companies in a relay race. And all too often in the United States, the unions incentive is to use the baton to injure the employer instead of running the race. Companies and employees and unions suffer from this conflict, especially small businesses. Expanding the Act's coverage and making the weapons more destructive without direction from Congress to do so runs counter to the Act's primary objective, which is to foster economic stability.

The NLRA incorporates many Congressional policy decisions. First, the Act reflects fundamental choices by Congress in a balancing of interests between employers, unions, employees and the public.

Second, the Act was adopted for the overriding purpose of eliminating burdens on commerce. Third, a basic policy of the Act is to achieve stability of labor relations. Fourth, another important policy decision involves the Act's secondary boycott provisions which protect neutral parties from labor disputes.

The NLRB is charged with the difficult and delicate responsibility of administering the Act. I respect the members of the Board, its acting general counsel and others who work in the agency. The

work of the NLRB is not easy, and it is fraught with controversy. At the same time, there are definite limits on the Board's authority. Recent board decisions raise questions concerning the congressional policy choices that I have mentioned. I will briefly discuss three lines of cases.

First, in several decisions, the Board has concluded it is not coercion or picketing when multiple union supporters hold 20-foot long banners directed at neutral companies. This effectively eliminates the Act's secondary boycott protection for neutrals, even though it would violate the Act if the same number of people walked around carrying smaller signs within the same area. In these banner cases, there are well-reasoned dissenting opinions by former Member Shaumber and current Member Hayes.

In another decision, Dana Corporation, the Board, with member Hayes dissenting, upheld a written agreement which spelled out employment terms for unrepresented employees at nonunion facilities with most of the terms to take effect after the union received future card check recognition. Section 8(f) of the Act permits these non-majority agreements, but only in the construction industry. This is another area where policy changes should originate in Congress.

Finally, recent board decisions include New York University where a two-member plurality reinstated a representation petition covering college graduate assistance, again, laying a foundation for changing existing law and expanding the Act's coverage.

I will close by quoting a statement of the Supreme Court made more than 50 years ago which remains relevant today. It is suggested here that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the Federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what in its legislative judgment constitutes the statutory pattern appropriate to the developing state of labor relations in this country. We do not see how the Board can do so on its own.

This concludes my prepared testimony. I look forward to any questions members of the subcommittee may have and thank you.

Chairman ROE. Thank you.

[The statement of Mr. Miscimarra follows:]

Prepared Statement of Philip A. Miscimarra, Senior Fellow, the Wharton School, University of Pennsylvania; Partner, Morgan Lewis & Bockius LLP

Chairman Roe, Ranking Member Andrews, and Subcommittee Members, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am a Senior Fellow at the University of Pennsylvania's Wharton School and for more than 30 years I have been associated with the Wharton Center for Human Resources (previously known as the Wharton Industrial Research Unit). The majority of my academic work has dealt with the National Labor Relations Act and the National Labor Relations Board. I am also a Partner in the law firm of Morgan Lewis & Bockius LLP, and I have been a labor lawyer in private practice representing management since 1982.[1]

Summary—Labor Policy and Running the Race

The National Labor Relations Act (NLRA or Act)[2] was adopted when there was a national economy, and the Act still centers around a bargaining model where each side's leverage largely stems from economic damage it may inflict on the other party.[3]

In a global economy, this places unions and companies in a relay race, and all too often in the United States, the union's incentive is to use the baton to injure or maim the employer, instead of running the race against international competitors. Companies and employees suffer greatly from this type of conflict, especially small businesses. Expanding the Act's coverage and making the weapons more destructive—without direction to do so from Congress—runs counter to the NLRA's primary objective, which is to foster economic stability.

Legislative Choices in the NLRA

Decision-making concerning the scope of our federal labor laws has long been the province of Congress. The NLRA,[4] originally known as the Wagner Act, was adopted in 1935 after 18 months of work by the House and Senate. Important NLRA amendments were adopted in 1947 as part of the Labor Management Relations Act (the Taft-Hartley Act).[5] The Act was also substantially amended in 1959 as part of the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act).[6] And in 1974 the Act was amended based on the Health Care Amendments to the National Labor Relations Act.[7]

Perhaps to state the obvious (especially for this Subcommittee's Members), substantial debate, deliberation and controversy preceded every instance when the Act and proposed amendments were adopted by Congress, and also when they were not.[8]

The NLRA incorporates many policy decisions made by Congress. I will mention four in particular.

1. Balancing of Interests. First, the Act reflects fundamental choices by Congress in the balancing of interests between employers, unions, employees, and the public.[9] By comparison, the Supreme Court has stated the National Labor Relations Board (NLRB or Board) is not vested with "general authority to define national labor policy by balancing the competing interests of labor and management."[10]

2. Impact on the Economy. Second, the Act has always been closely associated with national economic policy. The Act was created during the Great Depression, and it was adopted to permit collective bargaining for the overriding purpose of eliminating burdens and obstructions on commerce.[11]

3. Stability. Third, a "basic policy of the Act [is] to achieve stability of labor relations."[12] Concerning Section 8(a)(3), the Supreme Court has stated: "To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act. * * * It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute."[13] Concerning Section 8(a)(5), the Supreme Court has held management "must have some degree of certainty beforehand * * * without fear of later evaluations labeling its conduct an unfair labor practice."[14]

The quest for labor relations stability is complicated by changes in direction coinciding with differences in the Board's composition. Arguments for stability and change at the NLRB are not new.[15] However, reducing abrupt changes in position should be a non-partisan objective—employers, unions and employees alike are disadvantaged by a proliferation of policy reversals at the Board.[16]

4. Protection of Neutrals. Fourth, another important policy decision by Congress involves the Act's "secondary boycott" provisions which protect "neutral" parties from labor disputes.[17] "Neutral" here means employers, employees, consumers and others who have no dispute with a union except they deal with a different company that is the target of union organizing, a union corporate campaign, or strike.[18] In 1947 and again in 1959, Congress made major changes in the Act to protect "neutral" parties from union strikes, refusals to handle, threats, coercion and restraint directed against them merely because they deal with someone else with whom the union has a dispute.[19]

The Act's secondary boycott provisions have become more important because of our economy's dependence on more numerous, complex relationships between manufacturers, service providers, suppliers, vendors and contractors.[20] It is no secret that unions have also dramatically increased their reliance on third party pressure to promote top-down union organizing, neutrality agreements and corporate campaigns.[21]

Outer Limits on the NLRB's Authority

The NLRB is charged with the "difficult and delicate responsibility" of administering the Act.[22] I have dealt with the Board for nearly 30 years. I respect the Members of the Board, its Acting General Counsel, and others who work in the agency.[23] The work of the NLRB is not easy, and it is often fraught with controversy.

At the same time, there are definite limits on the Board's authority. The Board is entitled to deference when it exercises its "informed judgment on matters within its special competence."[24] But the Supreme Court has held that, when courts review decisions of the Board, "they are not to abdicate the conventional judicial function" and "Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds."[25]

The Board's authority is most narrow when it comes to changing the NLRA's scope and altering the balance established by Congress as reflected in the Act's provisions. Again to quote the Supreme Court, federal labor policy does not permit the Board to create a "standard of properly 'balanced' bargaining power"[26] nor does it "contain a charter for the [NLRB] to act at large in equalizing disparities of bargaining power between employer and union."[27]

Selected Board Decisions—Changing the Balance

Recent Board decisions raise questions concerning the legislative policy choices built into the NLRA that I have just mentioned—i.e., the balancing of interests (between employers, unions, employees and the public), the impact on the economy, labor relations stability, and the protection of neutrals. I will briefly discuss three lines of cases.

1. Exposing Neutrals to Labor Disputes—Banners as Non-Picketing and Non-Coercion. First, in a series of "banner" decisions (including one handed down last week), the Board has concluded that, when multiple union supporters hold or stand beside 20-foot long banners directed at neutral companies, it is not coercion or picketing.[28]

To appreciate the importance of these cases, one must understand that legality of union activity against neutrals can depend almost completely on how it is characterized, because the Act prohibits some types of secondary activities and protects others. The Act makes it unlawful if a union takes action to "threaten, coerce, or restrain" a neutral employer (or induce a "strike" or "refusal to handle" by the neutral's employees). Picketing is a classic example—but not the only example—of potential coercion, threats and restraint against neutrals that the Act prohibits.[29]

By deciding that large banners do not constitute picketing (or threats, coercion or restraint), this effectively eliminates the Act's secondary boycott protection for neutrals if unions have people holding enormous stationary banners, even though it would violate the Act when the same number of people walk while carrying smaller signs within the same area.

Several additional points about the Board's recent banner decisions warrant particular attention:

• Size of banners. These cases involve banners that are "3 or 4 feet high and from 15 to 20 feet long," requiring up to 5 people to hold them,[30] and the banners identify the neutral company by name using words like "Shame," "Labor Dispute" and "Immigrant Labor Abuse," without indicating the union's dispute is actually with someone else.[31]

• Banners are equally or more coercive than conventional pickets. In these cases, the people holding banners do not engage in back-and-forth walking. However, what the Act prohibits are secondary union actions which "threaten, coerce, or restrain" neutrals.[32] It appears clear that a 4 foot high banner 20 feet long with large lettering being held by 3 or 4 stationary people is coercive to the same (or a greater) degree as 3 or 4 people holding smaller signs with smaller lettering who walk within the same area.[33]

• Number of affected neutrals. A large number of neutral parties—including small businesses—may be affected by the majority reasoning in the banner cases. Just taking four of the Board's recent banner cases, the union activity affected at least two dozen neutral companies, in addition to their own employees, customers, vendors and the public.[34]

• Dissenting opinions. In these banner cases, there are dissenting opinions by former Member Schaumber and/or current Member Hayes.[35] I refer the Subcommittee to those opinions for a more detailed discussion of relevant issues.

2. Expanding "Pre-Hire" Bargaining. In another decision, Dana Corp. (UAW),[36] a two-member plurality of the Board—with Member Hayes, dissenting[37]—upheld the legality of a written agreement between Dana Corporation and the United Auto Workers (UAW) which laid out employment terms for unrepresented employees at nonunion Dana facilities, where most of the terms would take effect after the union received future card-check recognition. The Dana agreement provided for union access to the nonunion facilities, company neutrality, and recognition after the union attained a card-check majority.[38] The agreement's other commitments set parameters around premium sharing, deductibles, out-of-pocket maximums, and dispute resolution (specifically, after the union was recognized, an arbitrator would decide

what would be in the parties' next contract if the company and union failed to agree on that contract by themselves).[39]

Arguments can be made for and against these types of arrangements.[40] However, Congress considered the legality of non-majority and pre-hire agreements in Section 8(f) of the Act, which permits these types of non-majority agreements, but only in the construction industry.[41] For this reason, and because the Act places such importance on the right of employees to decide whether or not to participate in collective bargaining,[42] this is another area where policy changes should originate in Congress.

3. Other Board Cases. Finally, recent Board decisions include New York University,[43] where a two-member plurality reinstated a representation petition covering college graduate assistants. The Board plurality—with Member Hayes in dissent[44]—overturned the Regional Director's dismissal of the union petition. Again, this lays the foundation for changing existing law and expanding the Act's coverage.[45]

There are other important Board decisions and developments in addition to those I have mentioned.[46] I have limited my comments to the authority of the NLRB, but I note that the Board's Acting General Counsel in recent months has also announced a variety of new enforcement initiatives.[47]

Conclusion

I will close by quoting a statement made by the Supreme Court more than 50 years ago, which remains relevant today:

It is suggested here that the time has come for a reevaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. * * * [W]e do not see how the Board can do so on its own.[48]

This concludes my prepared testimony. I have provided an extended version of my remarks for the record. I look forward to any questions Members of the Subcommittee may have. Thank you for the invitation to appear today, and for the Subcommittee's attention to our national labor and employment policy.

ENDNOTES

[1] My testimony today reflects my own views which should not be attributed to The Wharton School, the University of Pennsylvania, or Morgan Lewis & Bockius. I am grateful to Ross H. Friedman and Rita Srivastava for assistance.

[2] 49 Stat. 449 (1935), 29 U.S.C. §§ 151 et seq.

[3] See NLRB v. Insur. Agents' Int'l Union, 361 U.S. 477, 489 (1960), where the Supreme Court referred to the bargaining contemplated by the Act, and observed that the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. * * * The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

[4] 49 Stat. 449 (1935), 29 U.S.C. §§ 151 et seq.

[5] 61 Stat. 136 (1947), 29 U.S.C. §§ 141 et seq.

[6] 73 Stat. 541 (1959), 29 U.S.C. §§ 401 et seq.

[7] 88 Stat. 395 (1974).

[8] For example, the Employee Free Choice Act (EFCA) introduced during the 111th Congress would have substantially changed the NLRA's treatment of representation elections, the bargaining of initial contracts, and damages available under the Act, but was not adopted. See S. 560, 111th Cong., 1st Sess. (2009); H.R. 1409, 111th Cong., 1st Sess. (2009). The failure to adopt proposed amendments is sometimes regarded as validating prior interpretations of the Act. See NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 275 (1974) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress").

[9] The Act's central provision dealing with protected rights is Section 7, 29 U.S.C. § 157, which protects the right of employees "to bargain collectively through representatives of their own choosing * * * and to refrain from any or all of such activities," except as affected by union security agreements in states that do not prohibit such agreements. Cf. NLRA § 14(b), 29 U.S.C. § 164(b) (permitting state right-to-work laws prohibiting union security agreements).

[10] American Ship Building Co. v. NLRB, 380 U.S. 300, 316 (1965). The Supreme Court has held that, concerning "a judgment as to the proper balance to be struck between conflicting interests, 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" NLRB v. Brown, 380 U.S. 278, 291-92 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute").

[11] NLRA § 1, 29 U.S.C. § 151 (establishing policy "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions"). See also First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674 (1981), citing NLRB v. Jones &

Laughlin Steel Corp., 301 U.S. 1, 42 (1937) ("A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce"); Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation"); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining * * * and thereby to minimize industrial strife").

In many contexts, protected NLRA rights also give way if they cause substantial economic harm or implicate fundamental business considerations. See Fibreboard, supra note 11, 379 U.S. at 223 (Justice Stewart, concurring) (bargaining is not mandatory over decisions "fundamental to the basic direction of a corporate enterprise," which "lie at the core of entrepreneurial control" or which concern "the commitment of investment capital"); First Nat'l Maint., supra note 11, 452 U.S. at 674, 676-78 ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. * * * Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business"); NLRB v. Retail Store Employees Union (Safeco Title Insur. Co.), 447 U.S. 607 (1980) (consumer-directed struck product picketing, generally permitted under NLRA § 8(b)(4)(B), is unlawful if it "reasonably can be expected to threaten neutral parties with ruin or substantial loss"); Lear Siegler, Inc., 295 NLRB 857, 861 (1989) (NLRB's status quo ante remedy not required where the outcome would be "unduly burdensome"); NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) (rejection of collective bargaining agreements in bankruptcy); NLRB v. Burns Sec. Serv., 406 U.S. 272, 287-88 (1972) (legal successors not required to adopt the predecessor's labor contract because "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision").

[12] NLRB v. Appleton Elec. Co., 296 F.2d 202, 206 (7th Cir. 1961).

[13] Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 362-63 (1949).

[14] First Nat'l Maint., supra note 11, 452 U.S. at 678-79.

[15] Not much has changed since Professor Summers made the following observation about the NLRB more than 50 years ago: "The labor lawyer's world is not a secure one, for [the lawyer] walks on a thin crust of precedents. The body of Board decisions in many areas often gives an appearance of firmness only to have tremors beneath the surface open unexpected fissures or raise new ranges of decisions. In our primitiveness we may see these faults and upheavals in the crust of precedents as acts of God or Satan, crediting angels or devils incarnate in the bodies of Board members. With the appointment of new members the warning rumblings become more noticeable, and we spur our efforts to seek out the spirits and identify them as good or evil." C. Summers, Politics, Policy Making, and the NLRB, 6 Syracuse L. Rev. 93 (1955). No side has a monopoly on pleas for more stability and fewer changes at the Board. Such appeals have also been made at times when union proponents complain of changes by a Republican majority. See, e.g., L. Bierman, Reflections on the Problem of Labor Board Instability, 62 Denv. U. L. Rev. 551 (1985); Cooke & Gautschi, Political Bias in NLRB Unfair Labor Practice Decisions, 35 Indus. & Lab. Rel. Rev. 539 (1982); Dunau, The Role of Criticism in the Work of the National Labor Relations Board, 16 N.Y.U. Conf. Lab. 205 (1963). Cf. Hickey, Stare Decisis and the NLRB, 17 Lab. L.J. 451 (1966).

[16] The courts have especially been critical of NLRB changes in position that operate to the detriment of parties while litigation is pending. See, e.g., Ryan Heating Co., Inc. v. NLRB, 942 F.2d 1287, 1289 (8th Cir. 1991) (retroactive application of changed interpretation would be "manifestly unjust" and "essential demands of fairness" require that parties not be "subject to entrapment" merely because "the Board later departs from its earlier position") (citation omitted); Epilepsy Foundation of Northeast Ohio, 268 F.3d 1095, 1099 (D.C. Cir. 2001), cert. denied, 536 U.S. 904 (2002) ("It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board"; court denies retroactive enforcement of Board's changed interpretation because "[e]mployees and employers alike must be able to rely on clear statements of the law by the NLRB").

[17] A secondary boycott has been described as an effort "to influence A by exerting some sort of economic or social pressure against persons who deal with A." F. Frankfurter and N. Greene, THE LABOR INJUNCTION 43 (1930). The Act's principal secondary boycott provisions include §§ 8(b)(4)(B) and 8(e), 29 U.S.C. §§ 158(b)(4)(b). Section 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) makes it an unfair labor practice, in part, for a union to conduct a strike or use threats, coercion or restraint with the object of forcing an employer to enter into agreement prohibited by § 8(e). The term "boycott" can be misleading when discussing the Act's secondary boycott provisions. The Act prohibits certain types of secondary union activity directed at neutrals (e.g., picketing), but permits other secondary activity (e.g., publicity other than picketing), even though both situations may involve advocating a boycott of the neutral. For this reason, as mentioned later, how the NLRB chooses to characterize particular types of union activity can dictate whether it is lawful or unlawful. See text accompanying notes 28-35, infra.

[18] The courts have indicated: "The gravamen of a secondary boycott * * * is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 388 (1969) (citing IBEW Local 501 v. NLRB, 181 F.2d 34, 37 (1950), and Nat'l Woodwork Mfr. Ass'n v. NLRB, 386 U.S. 612, 623 (1967)).

[19] In 1947, as part of the Taft-Hartley Act, Congress added NLRA § 8(b)(4), 29 U.S.C. §§ 158(b)(4). The Supreme Court in NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951), described this addition as reflecting "dual congressional objectives of preserving the

right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own." In 1959, as part of the Landrum-Griffin Act, Congress made important changes in § 8(b)(4) and added NLRA § 8(e), 29 U.S.C. § 158(e).

[20] As I have written, "Numerically, the percentage of American employees represented by unions has steadily decreased, which might suggest unions would have less success in efforts to enmesh 'neutrals' in their primary disputes. However, declining union membership has also prompted unions to exert more pressure on third parties in an effort to increase unionization among nonunion employers." P. Miscimarra, A. Berkowitz, M. Wiener & J. Ditelberg, THE NLRB AND SECONDARY BOYCOTTS at 16 (3d ed. 2002). The Bureau of Labor Statistics indicates that, in 2010, the union membership rate was 11.9 percent counting all employers, and 6.9 percent counting private sector employers. See U.S. Dep't of Labor Bureau of Labor Statistics,, Economic News Release, Union Members Summary (2011), *http://www.bls.gov/news.release/union2.nr0.htm.* Concerning the increased reliance by unions on secondary pressure, see note 21, infra.

[21] The AFL-CIO's Industrial Union Department has indicated a "coordinated corporate campaign applies pressure to many points of vulnerability to convince the company to deal fairly and equitably with the union," "[i]t means seeking vulnerabilities in all of the company's political and economic relationships—with other unions, shareholders, customers, creditors, and government agencies—to achieve union goals," and "the union is looking for ways in which it can use its resources to expand the dispute from the workplace to other arenas. * * *" Ind. Union Dept., AFL-CIO, DEVELOPING NEW TACTICS: WINNING WITH COORDINATED CORPORATE CAMPAIGNS at 1-3 (1985). To the same effect, see C. Estlund, The Ossification Of American Labor Law, 102 Columbia L. Rev. 1527 (2002), which refers to "alternative forms of economic pressure" and states: "These tactics target not only the 'primary' employer, who may often be relatively insulated from public pressure, but others who have ties to and leverage over the primary employer. The 'corporate campaign,' for example, seeks concessions from employers by targeting directors, customers, suppliers, lenders, and investors with publicity and other forms of pressure." "This aspect of the new strategies is potentially in conflict with the secondary boycott provisions of the NLRA." Id. at 1605 & n.326.

[22] NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 499 (1960), quoting NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957). In NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963), the Court stated "we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life" (citation omitted). See also NLRB v. Action Automotive, Inc., 469 U.S. 490, 496-97 (1985); Ford Motor Co. v. NLRB, 441 U.S. 488, 495 (1978); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

[23] I have written that the NLRB and the courts have an unenviable responsibility under the Act, which becomes even more daunting when variations in the law result from periodic changes in the Board's composition. Philip A. Miscimarra et al., THE NLRB AND MANAGERIAL DISCRETION: SUBCONTRACTING, RELOCATIONS, CLOSINGS, SALES, LAYOFFS, AND TECHNOLOGICAL CHANGE at 569 (2d ed. 2010).

[24] Universal Camera, supra note 22, 340 U.S. at 490. The Board's factual findings are to be upheld if supported by "substantial evidence on the record considered as a whole." NLRA § 10(f), 29 U.S.C. § 160(f); Universal Camera, supra note 22, 340 U.S. at 478-79, 488. See also NLRA § 10(e), 29 U.S.C. §§ 160(e). Like other agencies, the Board is permitted to change its mind and overrule prior determinations although such changes of position must be explained and reflect a reasonably defensible interpretation of the Act. See, e.g., NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 351 (1978).

[25] Universal Camera, supra note 22, 340 U.S. at 490. See also American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965) (court denies enforcement to NLRB determination where the Board's view was "fundamentally inconsistent with the structure of the Act and the function of the sections relied upon"); NLRB v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 19, 154 F.3d 137, 141 (3d Cir. 1998) (Board decision afforded "limited deference" concerning common law agency principles as to which the NLRB "has no special expertise" and concerning § 2(13) of the Act, 29 U.S.C. § 152(13), where "Congress did not delegate to the Board the power to interpret that section") (citations omitted); NLRB v. Fin. Inst. Employees, 475 U.S. 192, 202 (1986) ("Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption * * * of major policy decisions properly made by Congress'") (citation omitted). Prior to enactment of the Taft-Hartley Act amendments, greater deference was afforded to NLRB decisions by the courts, which generated significant controversy and prompted Congress to modify the Act's treatment of court review. See Universal Camera, supra note 22, 340 U.S. at 478-79.

[26] NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 497 (1960).

[27] Id. at 490.

[28] See Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 (Aug. 27, 2010); Carpenters Local 1506 (Marriott Warner Center Woodland Hills), 355 NLRB No. 219 (Sept. 30, 2010); Southwest Regional Council of Carpenters (Richie's Installations, Inc.), 355 NLRB No. 227 (Oct. 7, 2010); Southwest Regional Council of Carpenters (New Star Gen. Contr. Inc.), 356 NLRB No. 88 (Feb. 3, 2011). Each of these cases were decided by a majority or plurality of Board members, with dissenting opinions by Members Schaumber and/or Hayes. See note 35, infra.

[29] Union conduct has been deemed unlawful secondary coercion even in the absence of conventional picketing. See, e.g., UFCW Local 1776 (Carpenters Health & Welfare Fund), 327 NLRB 593 (1999), citing Iron Workers Local 433 v. NLRB, 598 F.2d 1154, 1158 n.6 (9th Cir. 1979) (union representative stationed at neutral gate wearing "observer" sign held to constitute coercion in the form of "signal picketing," defined as "activity short of a true picket line that acts as a signal to neutrals that sympathetic action on their part is desired by the union"). As ex-

plained in the dissenting opinion by Members Schaumber and Hayes in Eliason & Knuth, supra note 28, "The prohibition against coercive secondary activity sweeps more broadly and has been held to encompass patrolling without signs, placing picket signs in a snowbank and then watching them from a parked car, visibly posting union agents near signs affixed to poles and trees in front of an employer's premises, posting banners on a fence or stake in the back of a truck with union agents standing nearby and * * * simply posting agents without signs at the entrance to a neutral's facility." 355 NLRB No. 159, slip op. at 19 (footnotes omitted) (Members Schaumber and Hayes, dissenting), citing Service Employees Local 399 (Burns Detective Agency), 136 NLRB 431, 436—437 (1962); NLRB v. Teamsters Local 182 (Woodward Motors), 314 F.2d 53 (2d Cir. 1963), enforcing 135 NLRB 851 (1962); NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d. Cir. 1964); Mine Workers Local 1329 (Alpine Construction), 276 NLRB 415, 431 (1985), remanded on other grounds, 812 F.2d 741 (D.C. Cir. 1987); Mine Workers District 2 (Jeddo Coal Co.), 334 NLRB 677, 686 (2001). Cf. Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enforced, 402 F.2d 452 (10th Cir. 1968) ("the Board and the courts have held that patrolling, in the common parlance of movement, and the carrying of placards, are not a sine qua non of picketing") (citations omitted).

[30] Eliason & Knuth, supra note 28, slip op. at 2-3, 26-27 (3 or 4 people holding banners). In some instances, the banners were 4 feet by 18 feet long, framed on the top and sides, with base legs which allowed them to stand by themselves, accompanied by multiple union members or employees. See, e.g., Marriott Warner, supra note 28, slip op. at 4 (ALJ opinion). Up to 5 people were holding or standing by the banners in New Star Gen. Contractors Inc., supra note 28, slip op. at 12-13 (ALJ opinion). See also Richie's Installations, Inc., supra note 28, slip op. at 3-5 (ALJ opinion).

[31] Eliason & Knuth, supra note 28, slip op. at 2-3; Marriott Warner, supra note 28, slip op. at 4 (ALJ opinion); Richie's Installations, Inc., supra note 28, slip op. at 3-5 (ALJ opinion); New Star Gen. Contractors Inc., supra note 28, slip op. at 12-13 (ALJ opinion).

In 1959, while strengthening the Act's secondary boycott prohibitions, Congress added a "publicity proviso" to Section 8(b)(4) which protects "publicity, other than picketing" for the purpose of truthfully advising the public of a union's primary dispute. 29 U.S.C. § 158(b)(4). The Supreme Court has explained this permits conduct which, if restricted, could run afoul of the free speech guarantees afforded by the First Amendment. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988). Cases addressing the "publicity, other than picketing" language, however, have most often interpreted the phrase as relating primarily to the distribution of leaflets. See, e.g., DeBartolo, 485 U.S. at 570-71, 578. When evaluating free speech issues, the Supreme Court has distinguished leafleting from picketing, with picketing being defined as "a mixture of conduct and communication," where the conduct element "often provides the most persuasive deterrent to third persons about the enter a business establishment." DeBartolo, 485 U.S. at 580, quoting Safeco, supra note 11, 447 U.S. at 619 (Justice Stevens, concurring); and citing Babbitt v. Farm Workers, 442 U.S. 289, 311 n.17 (1979); Hughes v. Superior Court, 339 U.S. 460, 465 (1950). The Board majority in Eliason & Knuth relied, in part, on the Ninth Circuit decision in Overstreet v. Carpenters Local 1506, 409 F.3d 1199 (9th Cir. 2005), where the court declined to issue an injunction against banners and leafleting under NLRA § 10(l), 29 U.S.C. § 160(l), based on "First Amendment concerns" (id. at 1219), although the court indicated that the Board was not entitled to deference as to any First Amendment issue because "constitutional decisions are not the province of the NLRB. * * *" Id.

[32] Union conduct has constituted unlawful coercion under § 8(b)(4)(B) in the absence of patrolling and/or conventional picketing. See note 29, supra.

[33] As indicated in note 30, supra, up to 5 union supporters were holding or standing by the banners in New Star Gen. Contr. Inc., supra note 28, slip op. at 12-13 (ALJ opinion). Conventional secondary picketing has been declared unlawful under § 8(b)(4)(B) based on picketing by as few as one person. See, e.g., IBEW v. NLRB, 341 U.S. 694, 696-67 (1951) (1 picket). See also Iron Workers Local 433 (Aram Kazazian Constr., Inc.), 293 NLRB 621 (1989) (2 pickets); Laborers' Eastern Region Organizing Fund (Ranches at Mt. Sinai), 346 NLRB 1251,1253 (2006) ("no minimum number of persons is necessary to create a picket line"). Cf. United Bhd. of Carpenters (Wadsworth Bldg. Co.), 81 NLRB 802, 812 (1949), enforced, 184 F.2d 60 (10th Cir. 1950), cert. denied, 341 U.S. 947 (1951): "It was the objective of the unions' secondary activities, as legislative history shows, and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress" (emphasis in original).

[34] Eliason & Knuth, supra note 28, slip op. at 26-27; Marriott Warner, supra note 28, slip op. at 3-10 (ALJ opinion); Richie's Installations, Inc., supra note 28, slip op. at 2-5 (ALJ opinion); New Star Gen. Contr. Inc., supra note 28, slip op. at 11-12, 15-23 (ALJ opinion). The affected neutrals included medical centers and hospitals, restaurants, a hotel, car dealership, spa, consulting company, newspaper publisher, mortgage lender, retail furniture store, medical device manufacturer, property management company, public transit authority, real estate developers, agents and brokers, a credit union, a pharmaceutical company, two universities, and a public courthouse. Id.

[35] See Eliason & Knuth, supra note 28, slip op. at 15 (Members Schaumber and Hayes, dissenting); Marriott Warner, supra note 28, slip op. at 2 (Member Hayes, dissenting); Richie's Installations, Inc., supra note 28, slip op. at 2 (Member Hayes, dissenting); New Star Gen. Contr. Inc., supra note 28, slip op. at 7 (Member Hayes, dissenting).

[36] 356 NLRB No. 49 (Dec. 6, 2010).

[37] Id., slip op. at 10 (Member Hayes, dissenting).

[38] Id. at 2.

[39] Id. The Board's Dana/UAW decision departs from case law that had been in effect for more than 40 years. Majestic Weaving Co., 147 NLRB 859 (1964), enforcement denied, 355 F.2d 854 (2d Cir. 1966). Cf. ILGWU v. NLRB (Bernhard-Altmann), 366 U.S. 731 (1961).

[40] In sale situations, for example, there may be a desire to have greater certainty because the law regarding successorship has become so difficult to understand. See, e.g., Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 263 n.9 (1974) (Supreme Court, after issuing several successorship decisions, states the term "successorship" is "simply not meaningful in the abstract" and a new employer "may be a successor for some purposes and not for others"). I have written that such complexity, by itself, undermines the stability that Congress hoped to foster when adopting the Act. Herbert R. Northrup & Philip A. Miscimarra, GOVERNMENT PROTECTION OF EMPLOYEES INVOLVED IN MERGERS AND ACQUISITIONS at 346 (1989) (Congress "could hardly have envisioned the massive array of complex legal principles that are now imbued in the term 'successorship'").

[41] NLRA § 8(f), 29 U.S.C. § 158(f) (permitting pre-hire agreements only where the employer is "engaged primarily in the building and construction industry"). Experience under § 8(f) has shown that other issues can require attention when negotiations and agreements sett employment terms for employees where there is no employee majority favoring union representation. See, e.g., John Deklewa & Sons, 282 NLRB 1375 (1987), enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988), cert. denied, 488 U.S. 889 (1988); Laborers Local 1184 (NVE Constructors), 296 NLRB 1325 (1989).

[42] NLRA § 9(a), 29 U.S.C. § 159(a).

[43] 356 NLRB No. 7 (Oct. 25, 2010).

[44] Id., slip op. at 2 (Member Hayes, dissenting).

[45] The Regional Director's dismissal of the union petition was based on a prior Board decision, Brown University, 342 NLRB 483 (2004), which held graduate assistants providing teaching and research services are not employees under the Act. In its recent New York University ruling, the Board plurality stated there were "compelling reasons" for reconsidering Brown University, but the plurality remanded the case so relevant issues could be addressed "based on a full evidentiary record." Id., slip op. at 2.

[46] The NLRB in an array of pending cases, each involving important issues, has issued public notices and invitations to file briefs, and the Board is also engaging in rulemaking as described below, raising the possibility that these may lead to further changes in position by the Board:

- Rite Aid Store #6473, Case 31-RD-1578 (notice issued Aug. 31, 2010), involving potential reconsideration of Dana Corp., 351 NLRB 434 (2007) where Board held that voluntary recognition bars representation or decertification petition for a reasonable time only if written notice advises employees of their right to file or support such a petition within 45 days after posting of notice;
- UGL-UNICCO Service Co., Case 1-RC-22447 (notice issued Aug. 31, 2010), involving potential reconsideration of MV Transportation, 337 NLRB 770 (2002) where Board held a successor employer's union recognition will not bar an otherwise valid petition or other challenge to the union's majority status, and possible return to contrary rule set forth in St. Elizabeth Manor, Inc., 329 NLRB 341 (1999);
- Roundy's Inc., Case 30-CA-17185 (notice issued Nov. 12, 2010), involving denial of union access to private property, and potential reconsideration of Register-Guard, 351 NLRB 1110 (2007) where Board (in context of e-mail) permitted distinctions regarding access so long as the employer did not discriminate between union access and other activities of a similar character, and Sandusky Mall Co., 329 NLRB 618 (1999), where Board held employers could not lawfully deny access to non-employee union supporters while permitting charitable solicitations on private property;
- Specialty Healthcare and Rehabilitation Center of Mobile, Case 15-RC-8773 (notice issued Dec. 22, 2010), involving potential reconsideration of Park Manor Care Center, 305 NLRB 872 (1991), where Board held that bargaining units in non-acute healthcare facilities would be based on the "pragmatic" or "empirical" community-of-interests test and not the Board's rules regarding acute care bargaining units;
- Proposed Rules Regarding Notice-Posting, 75 Fed. Reg. 80410 (published Dec. 22, 2010), involving potential notice-posting requirement regarding employee rights under the NLRA and the potential distribution of such notices "electronically" if the employer "customarily communicates with its employees by such means." Id. at 80413.

[47] See, e.g., GC Mem. 10-07 (Sept. 30, 2010) (§ 10(j) injunctions in union organizing); GC Mem. 11-01 (Dec. 20, 2010) (hallmark violation remedies in union organizing); GC Mem. 11-04 (Jan. 12, 2011) (default language in settlement agreements); GC Mem. 11-05 (Jan. 20, 2011) (deferral to arbitration under §§ 8(a)(1) and (3)); Am. Med. Response of Conn., Inc., Case 34-CA-12576 (complaint involving internet posting policies and Facebook comments; settlement announced Feb. 7, 2011).

[48] NLRB v. Insur. Agents, supra note 26, 361 U.S. at 500 (emphasis added; footnote omitted).

Chairman ROE. Mr. Rosenfeld.

STATEMENT OF ARTHUR ROSENFELD, FORMER NATIONAL LABOR RELATIONS BOARD GENERAL COUNSEL

Mr. ROSENFELD. Chairman Roe and members of the subcommittee, I want to thank you for the opportunity to testify before the subcommittee regarding emerging trends at the National Labor Relations Board. I served as general counsel of the Labor Board

from June of 2001 to January of 2006, and therefore, I will attempt to focus on arising issues within the general counsel's purview.

But I would like to take a few moments to discuss something. First, I would request that my written statement be made a part of the record.

I would like to take a few moments to discuss something that is an issue of concern. In January of 2011, acting general counsel Solomon sent letters to four States: Arizona, South Carolina, South Dakota and Utah. What the States had in common was that the voters, the respective voters in those States in the November elections had approved and the States had enacted secret ballot amendments providing, and the language from State to State varies a little, but providing that the designation or selection of union representatives only be done by secret ballot.

Board law, of course, acknowledges other means such as voluntary recognition, card check, voice votes, whatever. Acting general counsel Solomon's letter also indicated that he was authorized by the Board, if necessary, to initiate legal action, declaring that the State amendments violated the supremacy clause in article 6.

The States responded I understand on January 27. The attorneys general of the four States in a single letter responded, and there may be a softening of the general counsel's position on this at this point. I am not sure of that. But without opining on the merits of the issue itself, I have to applaud the Board's quick authorization, the quick action in the authorizing the acting general counsel in order to protect the Board's jurisdiction.

I raise the issue, however, and am concerned that the Board may not continue to be as vigilant when future State regulations threaten to encroach on the Board's jurisdiction. In this case it was clear, unfortunately, it had to do with secret ballot elections which is part and parcel of what the Employee Free Choice Act was directed at eliminating.

But I have had personal experience with these preemption issues. And in the summer of 2003, I urged the Board to authorize an amicus in a case in California pertaining to AB, assembly bill 1889, which basically prohibited employers from receiving State—excuse me, prohibiting employers who receive State funds from using those funds to assist, promote or deter union organizing. In other words, it forced neutrality provision.

I urged the Board to allow me to file this brief. It was not an easy sell, quite frankly. I finally was authorized by the Board to so do and in footnote 2 of the brief that we filed, it notes that the Board authorized my going forward by a 3-2 vote. One of the two dissenters, of course, is current chairman Liebman.

In June of 2008, the United States Supreme Court in that particular case held that AB 1889 was preempted. I believe the vote was 7-2.

Again, I raise this issue only because I hope that when other State intrusions into what is Board's jurisdiction that don't necessarily parallel what was in the Employer Free Choice Act arise, that the Board will authorize the general counsel to go forward.

The only other thing I would state in regard to that issue is that, and again, I want to opine on whether I think the floor actions are preempted or not, I think that will be worked out ultimately, but

there is probably a better way of skinning that particular cat, and that might be for Congress to enact the Secret Ballot Protection Act. And that would be an Act of Federal Congress.

With that, I will conclude my remarks by saying I welcome any questions, and I will try to answer them.

Chairman ROE. Thank you, Mr. Rosenfeld.

[The statement of Mr. Rosenfeld follows:]

Prepared Statement of Arthur F. Rosenfeld, Former National Labor Relations Board General Counsel

CHAIRMAN ROE AND MEMBERS OF THE SUBCOMMITTEE: Thank you for this opportunity to testify before the Subcommittee regarding "Emerging Trends at the National Labor Relations Board."

The National Labor Relations Board (NLRB) is an independent federal agency that administers the National Labor Relations Act (NLRA). The Board has two primary functions: to prevent and remedy unlawful acts, i.e., unfair labor practices by either employers or unions, and to determine, through secret-ballot elections, whether or not a unit of employees wish to be represented by a union in dealing with their employer and, if so, which union.

The NLRB has two major, separate components. The Board itself, consisting of up to five members, adjudicates unfair labor practice complaints on the basis of formal records in administrative proceedings and resolves election case issues. The second component is the Office of General Counsel. The General Counsel has independent prosecutorial authority and is responsible for the investigation and prosecution of unfair labor cases and for the general supervision of the NLRB's 32 Regional Offices and satellite offices in the processing of both unfair labor practice and representation cases.

I served as General Counsel from June of 2001 to January of 2006. Therefore, this statement will attempt to focus on arising issues within the General Counsel's purview. There are, however, compared to Board side activities, fewer clear guideposts from which to derive General Counsel prognoses. First, Acting General Counsel Lafe E. Solomon only has headed the Office since late June of 2010. The Obama Board, conversely, has nearly two years of published decisions, plus nearly a decade of dissents by Member Liebman (now Chairman) from which to glean an anticipated decisional proclivity for the current Board.

Secondly, and most significant, the General Counsel's influence often is exercised subtly, e.g., through enhanced enforcement of a certain class of cases, or through instructions to the Regional Directors, or in the way a case is presented, or even in performance evaluations of General Counsel Office employees. President Truman vetoed the Taft-Hartley Act (subsequently overridden by Congress in 1947), in part because of the concern that creation of an independent General Counsel, would result in creation of a labor czar. Prior to the vote to override the President's veto, Senator Taft answered criticism that the Act placed too much power in the hands of a single official, explaining:

In order to make an effective separation between the judicial and prosecuting functions of the Board and yet avoiding the cumbersome device of establishing a new independent agency in the executive branch of the Government, the conferees created the office of general counsel of the Board. * * * We invested in this office final authority to issue complaints (and) prosecute them before the Board. * * *

(H)e, of course, must respect the rules of decision of the Board and of the courts. In this respect his function is like that of the Attorney General of the United States or a State attorney general.

In practice, President Truman's concerns have proven unfounded. In large part, I believe, because of the integrity, as well as respect for the institution, of those who have served, and continue to serve, as General Counsel. And, of course, because of the extraordinary career staff in the Office of the General Counsel.

Consistent with its duties under the NLRA, the Office of the General Counsel should have no reluctance to present cases to the Board seeking reversal of current law when the Board signals some willingness to change its view or where a Supreme Court decision has called current Board law into question. The process, however, is not self-initiating. The General Counsel can issue a complaint only upon the filing of a charge alleging an impropriety.

In performing the duties of chief prosecutor and investigator under the NLRA, the General Counsel, through the Regional Office staffs, investigates, determines merit, and thereafter either dismisses the unfair labor practice charges or, absent settle-

ment, commences formal adjudication by issuing administrative complaints. In making these merit determinations, the General Counsel is guided by the body of decisions and orders of the Board.

In fiscal year 2010, more than 23,000 unfair labor practice cases were filed in the Regional Offices. Of these, slightly more than 35.5% were found meritorious, with the reminder dismissed or withdrawn by the charging party. 95% of the merit cases were settled. A high settlement rate is important, not only in preserving agency resources, but because it allows the parties to get back to work by putting the conflict to rest. This result was a major goal of Congress when creating the NLRB.

With the foregoing in mind, let us examine some GC memoranda issued by Acting General Counsel Solomon. They may prove revealing in terms of what can be expected of the Office of General Counsel in the next few years.

Memorandum GC 11-04

GC 11-04 was issued on January 12, 2011. It has the potential to adversely impact the aforementioned settlement rate. The issue addressed is inclusion of default provisions, and the language used in those provisions, in informal settlement agreements. Heretofore, Regions had utilized default language where there was a substantial likelihood that the charged party/respondent would be unwilling or unable to fulfill its settlement obligations. Regional Directors had discretion to use, and modify, default language based on case circumstances.

GC 11-04 now requires the Regions to "* * * routinely include default language in all informal settlement agreement. * * *" The concern, of course, is that charged parties may refuse to enter into informal settlements containing affirmative obligations. Clearly, default language may save agency resources in the event of a breach of a settlement agreement. However, these resource savings are lost, and other costs to the agency incurred, if charged parties/respondents avoid settlement. GC 11-04 cites experience of three regions (out of 32) to imply that settlement percentages will not be affected by the new policy. There is concern that this will not prove to be correct, particularly when default language subjects charged parties to a remedial order for all complaint allegations, not only the affirmative obligations contained in the settlement agreement.

GC 10-07

The Acting General Counsel here attempts to increase scrutiny afforded to unlawful discharges, referred to as nip-in the-bud violations, which occur during a union organizing campaign. The justification for this lies in the argument that other employees are chilled in the exercise of their section 7 rights because of fear that active participation in the campaign will result in similar punishment. Further, it is argued, that the discharge of union adherents deprives remaining employees of leadership of union supporters.

Countering these arguments, it should be noted that over 92% of the 1790 initial representation elections conducted in fiscal year 2010 were held pursuant to agreement of the parties, and over 95% of these elections were conducted within 56 days of the filing of the election petition. And, of course, these elections were conducted by secret ballot. Nonetheless, it cannot be gainsaid that unlawful discharges that occur during an organizing campaign should and must be remedied. The question that arises, and may be answered through review in the future of representation case statistics, is whether the remedial efforts can be justified.

GC 10-07 shortens in time frames for agency action in nip-in-the-bud cases. In addition, the use of 10(j) injunctive relief is to be considered in most cases, and the Acting General Counsel will personally review all pending organizing discharge cases found to have merit, to decide whether 10(j) authorization should be sought from the Board.

GC 10-07 notes that its required approach to nip-in-the-bud cases can drain resources in the field. Devoting scarce resources to a problem that may not be critical means that resources will be shifted from other issues, perhaps such as illegal secondary boycotts.

GC 11-01

GC 11-01 builds on GC 10-07, by outlining non-traditional remedies to be sought by the Regions for employer violations occurring during organizing campaigns. The memorandum both sets forth these remedies, and provides a rationale to be used by the Regions when arguing that certain extraordinary remedies are necessary to "* * * restore an atmosphere in which employees can freely exercise their Section 7 rights."

The remedies set forth in GC 11-01 include:

• Public reading of Board notices, to the widest possible audience, by a responsible management official;

- Access to bulletin boards;
- Provide union with list of employee names and addresses, earlier than the current Excelsior list requirements;
- Union access to employer property;
- Access and time for union pre-election speeches.

GC 11-01 and GC 11-07 are directed only at employer misconduct.

GC 11-05

For over a half century, the NLRB has, through deferral to final and binding arbitration awards, encouraged parties to resolve their disputes by voluntary methods agreed upon by the parties. This approach recognizes that the NLRA was designed by Congress to promote industrial peace and stability, and that a collective bargaining agreement that contains a final and binding grievance/arbitration provision contributes to this objective.

The Board's deferral policy has not always been a smooth road. Over the years, some commentators, and some courts, have expressed concerns regarding possible abdication of the NLRB's role in protecting statutory rights by deferring that role to an arbitrator. However, at least 1984, the parameters of post-arbitral deferral have been relatively clear, and accepted and understood by the parties. The process is referred to as Spielberg/Olin deferral.

In a nutshell, where disputes involve both contract and NLRA issues (e.g., did the termination of an employee violate the just cause provisions of the collective bargaining agreement, and also constitute an unfair labor practice), the Board has consistently deferred to an arbitration award if the process was fair and regular, all parties agreed to be bound by the determination, and the award was not repugnant to the purposes and policies of the NLRA. The arbitrator is considered to have adequately the alleged unfair labor practice where the contract issue was factually parallel to the unfair labor practice issue, and the arbitrator was presented with facts generally relevant to resolving the unfair labor practice. The burden of showing that these requisites were not met is placed on the party objecting to deferral.

GC 11-05 would turn this well-established practice on its head. The memorandum, in effect, urges the Board to revise its approach to deferral. Regional Directors are therein instructed to defer only where it is shown that the statutory right in question is incorporated in the collective bargaining agreement or that the statutory issue was presented to the arbitrator, and the "arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue." Further, the burden is now placed on the party seeking deferral.

The Acting General Counsel seeks to revise the ground rules in all deferral cases, including pre-arbitral deferral, where an employer is alleged to have violated a collective bargaining agreement provision, and to have committed an unfair labor practice. If adopted, I fear that there will be fewer deferrals, greater expenditure of agency resources, and diminution in achievement of the Congressional goal of promoting industrial peace and stability.

Thank you for the opportunity to address these issues before the Subcommittee. I would be happy to try and answer any questions you may have.

Chairman ROE. Ms. Estlund.

STATEMENT OF CYNTHIA ESTLUND, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Ms. ESTLUND. Good morning. I want to thank the committee for the opportunity to offer my perspective on recent developments at the NLRB.

Let me start off with my conclusion. In my view, the recent proposals and actions by the Board and the acting general counsel are fully consistent with the Board's statutory responsibilities and well within the boundaries of both the board's authority and traditional scope within which past boards have exercised that authority. So far from running amok, the Board and general counsel have taken or considered some modest steps to improve the efficiency, efficacy and transparency of the Board's administration of the statute. Nothing that the Board is doing or has proposed to do will work a major change in the labor relations landscape.

First, on rulemaking. The Board has traditionally announced changes in its interpretation of the Act in the course of deciding particular cases. And it unquestionably has the authority to do that.

On the other hand, courts and commentators across the political spectrum have often urged the Board to make better use of its well established rulemaking powers. Rulemaking is more time consuming, but it allows for a more thorough consideration of a range of views on recurring policy issues.

While the Board may or may not undertake additional rulemaking beyond the one rule proposed so far, its decision to do so should be welcomed. As to the one rule the Board has proposed so far, which would require employers to post a notice informing employees of their rights under the Act, I think that should be pretty uncontroversial, but I am happy to take questions on that if there are any.

Also on the procedural front, the Board has got some attention from soliciting amicus briefs from interested parties on several issues raised by pending cases. I don't think anyone actually thinks that is a bad idea. And I am happy to discuss any of those cases and questions, but I don't think it serves any real purpose here to speculate about the Board's eventual answers to questions on which it has sensibly sought a range of views.

That raises an important point about the Board's role. There is no question that the Board has an important policy making role under the Act, and that Presidential appointments affect the mix of policy considerations that board members bring to that role. That is all by congressional design. When the Board overturns its own precedent, as the previous board majority did in many cases, we may debate whether the new decision is good policy or whether it is consistent with the statute, a question on which the courts will, of course, have the last word. But there is nothing wrong or unusual in the Board's reconsidering its own precedents. That is a true even if the Board has fewer than five members due to vacancies as long as there are three votes to overrule. And I can explain that more in questions if there are any.

As to the Board's actual decisions so far, I am fairly confident that none has broken new ground and none has squarely overruled existing precedent. In fact, as Congressman Andrews pointed out, over 80 percent of its nearly 300 decisions since April 2010 were unanimous. In one that was not that has attracted some attention, the Board held that a union's peaceful display of stationary banners informing the public about a labor dispute with no patrolling, no obstruction of traffic did not violate the Act, and that serious First Amendment questions would be raised if it did violate the Act.

The Board overruled no prior decisions in holding that, but it did respond to several court decisions citing exactly these same reasons for rejecting prior general counsel's efforts to seek an injunction against stationary bannering of this nature.

I would also be happy to talk more about the Dana II decision, allowing for some pre-recognition framework discussions between unions and employers. That decision was actually welcomed by

many employers. But in the interest of time, let me move to the general counsel's office briefly.

Two recent memoranda by Acting General Counsel Solomon addressed appropriate remedies for serious unfair labor practices in the context of union organizing, especially in cases where the employer may hope to stop an organizing drive in its tracks by firing a leading union activist.

In the interest of time, I will just talk about the first one, which declared the general counsel's intent to give a high priority to unlawful discharges in organizing cases, and to consider seeking preliminary reinstatement in Federal Court under section 10(j) of the Act. Past general counsels of both parties, including Mr. Rosenfeld, have recognized the essential role of 10(j) injunctions in addressing discriminatory discharges in the organizing context.

The Board has since authorized more 10(j) petitions than it had in recent months. But those numbers are not outside the range of historic practice. And the fact that it has had such an extremely high success rate in those cases indicates that these are all very strong cases.

One final point on preemption of State and local laws. As Mr. Rosenfeld has noted, the Federal preemption is decidedly a double-edged sword. In the last decade, courts at the urging of the Board have struck down on preemption grounds numerous State and local laws that were supported by organized labor, and some now criticize the Board for challenging four recent State ballot initiatives requiring secret ballot elections.

In some cases, as in the California case that Mr. Rosenfeld mentioned, it is debatable whether a State law is preempted. But in the four State secret ballot amendments in this case, there is really no debate. These laws are clearly preempted. I am aware of no straight-faced argument to the contrary.

In conclusion, the current board and acting general counsel are doing no more and no less than conscientiously carrying out their statutory responsibilities as prescribed by Congress and underscored by the Supreme Court. Thank you very much.

Chairman ROE. Thank you, Ms. Estlund.

[The statement of Ms. Estlund follows:]

Prepared Statement of Cynthia L. Estlund, Catherine A. Rein Professor of Law, New York University School of Law

My name is Cynthia Estlund, and I am a law professor at the New York University School of Law. Since 1989, after several years of practicing labor law at the firm of Bredhoff & Kaiser here in Washington, I have taught at the University of Texas School of Law, Columbia Law School, and Harvard Law School, as well as at NYU. I have published and lectured extensively over the past twenty-two years on the law of the workplace, including on various aspects of the National Labor Relations Act.

I want to thank the Committee for inviting me to offer my perspective on recent developments within the National Labor Relations Board (NLRB or Board). Recent actions or statements by the Board and its Acting General Counsel have attracted interest, and even some controversy and criticism. Those include the Board's decision to challenge four recent state ballot initiatives on preemption grounds; two General Counsel memoranda regarding the use of preliminary injunctions and other remedies for unfair labor practices during union organizing campaigns; the use or consideration of rulemaking to address certain issues; and the solicitation of briefs on significant policy issues raised by several pending cases.

Before turning to some of the particulars, let me start with my conclusion: In my view, these recent proposals and actions are modest by any measure, and well within both the boundaries of the Board's statutory authority and the traditional scope

within which past Boards and General Counsels have exercised that authority. Indeed, some of what has spurred controversy amounts to no more than the solicitation of comments from interested parties on how certain issues should best be resolved. Far from running amok or striking out in radical new directions, the Board and General Counsel have taken or considered a few cautious steps to improve the efficiency and efficacy of the Board's administration of the statute and to improve the transparency of its decisionmaking. Moreover, in examining the recent developments, it is worth keeping in mind that any substantive decisions that the Board or its General Counsel do make—whether embodied in a decision on an unfair labor practice complaint, a rulemaking, or petition for preliminary injunctive relief—are subject to judicial review or approval to ensure that they are consistent with the statute and the Board's authority. In short, nothing that the Board is doing or has proposed to do will work a major change in the labor relations landscape.

These recent developments should be understood in the context of the statutory scheme over which the Board presides. The National Labor Relations Act was passed in 1935, amended significantly in 1947 and less significantly in 1959 and 1974. In the past fifty years Congress has enacted no significant amendments to the basic provisions of the Act in spite of dramatic changes in the labor force, the economy, the organization of work, and the surrounding legal landscape. That is the context within which one should examine proposals, decisions, and actions by the current Board and the Acting General Counsel pursuant to their statutory responsibility to interpret and administer the nation's labor relations regime.

Some Issues of Process and the Institutional Role of the Board

Let me first distinguish process from substance, as law professors are wont to do. Some recent developments are procedural in nature, or relate to the institutional role of the Board, rather than affecting the substance of labor relations policy.

Rulemaking: The Board has traditionally announced changes in its interpretation of the Act in the course of deciding particular cases; and it unquestionably has the statutory authority to do so.[1] On the other hand, courts and commentators, regardless of ideological leanings, have often urged the Board to consider acting more often through rulemaking,[2] as it also unquestionably has the authority to do.[3] As the Supreme Court put it, "rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course."[4] Rulemaking—the issuance of a proposed rule, solicitation and consideration of public comments, and then issuance of a final rule—has several advantages: It allows for more thorough consideration of a wider range of views on policy issues with implications that extend beyond the parties to a particular case; it facilitates the more efficient adjudication of cases raising recurring issues; and it tends to promote policy stability because rules tend to last longer than precedents adopted through adjudication. But of course the last advantage follows from the disadvantage that the rulemaking process itself is quite time-consuming. While the Board has only rarely proceeded through rulemaking, and may or may not do so beyond the one proposed rule issued so far, its decision to do so would be greeted by many mainstream observers as a victory for transparency and administrative regularity in Board decisionmaking.[5]

Solicitation of Briefs: Another recent development has been the Board's solicitation of briefs on a number of issues posed by pending cases.[6] As a procedural matter, that approach represents a middle ground between simply rendering revised policy judgments through adjudication, which has been the well-established norm at the Board, and initiating rulemaking proceedings, which is bound to be a rare undertaking.[7] The practice of inviting submission of briefs has at least one of the virtues of rulemaking: It allows interested parties who may be affected by the Board's deliberations to make their case and to introduce relevant viewpoints and considerations that may not otherwise enter the adjudication process. The Board's approach in this handful of cases in which significant policy issues are raised represents a clear advance in terms of public notice, participation, and transparency. Moreover, the solicitation of views from a wide range of interested parties should not be taken to signal any particular outcome on the merits.

The Board's Policymaking Role: It is probably not a concern about process, but rather speculation about substance, that has brought attention to the initiation of one rulemaking and the solicitation of briefs in several cases. But that brings us to a related set of issues that relate to the Board's institutional role under our nation's labor laws. To begin with, the Board's role includes a significant policymaking component. The Supreme Court "has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy."[8] That is the scheme that Congress established.[9] The Board's latitude under the NLRA to establish labor relations policy has grown narrower over the years. Although the text of

many key provisions of the NLRA leaves room for interpretation, much of that interpretive latitude has been whittled down over the past 75 years by Supreme Court decisions that have narrowed the scope of the Board's discretion. Still, within those constraints, there is no question that the Board has an important role in interpreting and administering the statute.

There is also no question that presidential appointments alter the mix of policy considerations that Board members bring to the process of statutory interpretation.[10] That is by congressional design. Especially in recent decades, that has led to a degree of policy oscillation (or "flip-flopping") on a number of recurring issues whenever presidential appointments shift majority control of the Board.[11] The previous Board majority in particular gained some notoriety for overturning numerous precedents, some recent and some well-established. When the Board overturns one of its precedents, it may provoke debate among Board members, advocates, and scholars over whether the new decision is consistent with the statute (a matter on which the courts have the last word), or justified as a matter of policy. But there is nothing unusual or illegitimate about the Board's reconsidering some of its own precedents. If the current Board does so—and that remains largely a matter of speculation so far—its decisions will be subject to the normal processes of judicial review that confine the Board to carrying out the statute as written by Congress and interpreted by the Supreme Court.

Preemption: Another dimension of the Board's role in our national labor relations framework relates to the preemption of state and local laws regulating labor relations. Some have criticized the Board and the Acting General Counsel for the decision to threaten suit against four states—Arizona, South Carolina, South Dakota, Utah—to enjoin the enforcement of constitutional amendments approved by voters in those states last November.[12] Each of these new provisions, with small variations, would prohibit workers from seeking union representation, and would prohibit employers from voluntarily recognizing a union, other than through a secret ballot election; they would prohibit reliance by either side on union authorization cards. To understand how unexceptional the Board's action is here, it is necessary to understand another aspect of the federal labor laws.

With the enactment of the NLRA in 1935, and then the major Taft-Hartley amendments in 1947, Congress created a comprehensive nationwide scheme of labor relations. The Supreme Court has long held that the NLRA preempts state and local laws and actions that regulate labor relations (with one large explicit exception allowing state right-to-work laws). Under the Supreme Court's decisions, the NLRA preempts not only state and local actions that directly conflict with the federal scheme, but those that regulate virtually any aspect of labor relations, including activity that the Act arguably or actually protects, arguably or actually prohibits, or intentionally leaves unregulated.[13]

The Supreme Court has long recognized the power of the NLRB, acting through its General Counsel, to sue to enjoin the implementation of preempted state laws, and has often done so.[14] Of course, the Board may sometimes be able to protect the federal interest in other ways, for example, by intervening in a private suit or supporting one as amicus curiae.

Preemption doctrine is decidedly a double-edged sword. Especially in the last decade, the doctrine has most often blocked state and local actions supported by organized labor (and the Board joined in many of these lawsuits); unions and their advocates have thus argued for a narrower preemption doctrine that gave more room for state variation and experimentation. For example, the Supreme Court's most recent labor law preemption decision reversed the U.S. Court of Appeals for the Ninth Circuit and struck down a California statute that sought to ensure that private employers that received state funds (as contractors, for example) did not use those funds to support or oppose employees' efforts to form a union; the Court held that the law infringed employers' ability to speak to their employees on the matter of unionization, as Section 8(c) of the Act left them free to do.[15]

Sometimes (as in Brown), it is debatable whether the law was preempted. In the case of the four state "secret ballot" laws, there is little room for debate. These laws would take away a well-established non-electoral route to union representation, long recognized by the courts, and would prohibit voluntary recognition of a union on the basis of a card majority. Employees' statutory right to seek, and employers' power to grant, union recognition on the basis of authorization cards was reaffirmed by the Board during the Bush Administration in the Dana decision of 2007.[16] Of course the Dana decision also imposed some new qualifications on voluntary recognition based on card check; but that only underscores the extent to which the four state laws tread on the core of the Board's regulatory authority. Just as a state law requiring employers covered by the NLRB to honor card check requests would be preempted by federal law, so is its prohibition.

So, far from being extraordinary, the Board's decision to file suit is an unexceptional exercise of its duty to assert its Congressionally-granted jurisdiction over the regulation of labor relations in the bulk of the private sector, and to oppose state and local laws that are "preempted" by the NLRA. In this context, it would be extraordinary had the Board not taken action against the states. This is an obligation imposed upon the Board, regardless of the views its members may have of the underlying policy decisions reflected in the NLRA. The fact that the Acting General Counsel promptly notified the states of the NLRB's position, and sought voluntary correction, should be commended.

The Recent Board Decisions and Actions

The Board has recently proposed and sought public comment on a new rule that would require employers to post a notice informing employees of their rights under the NLRA. The proposed rule would merely bring practices under the NLRA into line with those under every other major federal employment statute (and some minor ones): Currently, employers must post notices informing employees of their rights under the Fair Labor Standards Act, Title VII of the Civil Rights Act and other antidiscrimination statutes, the Occupational Health and Safety Act, the Family and Medical Leave Act, among others. That uniformity of practice is based on the self-evident fact that employees' statutory rights can be more fully realized if they are aware of those rights. It is thus an entirely appropriate exercise of the Board's authority under Section 6 of the Act to "make * * * such rules and regulations as may be necessary to carry out" the Act.

With regard to adjudications, since April 2010, when the NLRB gained a Democratic majority, it has issued almost 300 decisions. Nearly 100 of those readopted previous unanimous decisions issued by the two-member Board (one Democratic and one Republican appointee) whose authority to act was struck down by the Supreme Court in the New Process decision.[17] Of the total of 292 decisions issued since last April, over 80 percent were unanimous.[18]

The remaining decisions were divided, but not always along party lines. For example, Chairman Liebman joined Member Becker in holding that a union flyer to employees about union dues obligations constituted an unlawful threat and an unfair labor practice.[19] Democratic Member Pearce dissented, and would have dismissed the complaint. In another case, a Board majority required a union to rescind its requirement that employees who object to paying full union dues under Beck renew their objection annually (a requirement that had first been permitted by Republican-appointed General Counsel Rosemary Collyer).[20] Members Schaumber and Hayes filed individual opinions, concurring in part & dissenting in part; and Member Pearce filed a dissent.

In several decisions, Board panels split along party lines—much as past Boards have done—but the majority's decision broke no new ground and overruled no precedents. So, for example, a Board decision required employers who post other employment-related notices electronically to post remedial NLRB notices in the same manner.[21] Another split decision attracted more attention, but in fact hewed closely to traditional Board law and judicial precedents: The Board held that a union's peaceful display of stationary banners advising the public of the existence of a labor dispute—with no patrolling and no obstruction of sidewalk traffic or building entrances—did not violate the NLRA because it was not "coercive."[22] The Board majority recognized that a contrary ruling would raise serious First Amendment concerns—concerns that in recent years had led several federal district courts and the Ninth Circuit Court of Appeals to reject the previous Board's petitions to enjoin these peaceful informational displays. The decision is long, methodical, and balanced in its assessment of the caselaw both under the Act and under the First Amendment.

Another long pending case also split the Board panel, with Chair Liebman and Member Pierce producing a decision, over Member Hayes' dissent, that was welcomed by many employers: The Board held that an employer and a union did not violate the Act by agreeing on a framework for future bargaining prior to the union's gaining majority support among the employees, noting that the employer in this case neither recognized the union nor negotiated the terms of a contract before the union was selected by a majority of employees to represent them.[23] The Board cited the argument of several management attorneys, as well as scholars, that employers' ability to negotiate a framework of this sort lays the foundation for a productive collective bargaining relationship, and promotes their business interests, in the event the employees choose to be represented by the union.[24] The Board quoted two management attorneys to this effect:

As in other potential business relationships, the employer should be able to talk to the other side and perhaps even reach some preliminary understandings before it determines whether it wants to avoid such a relationship or not.[25]

Moreover, as the Board majority held, employees' ability to make a free and informed choice regarding unionization was fully protected, and even advanced, by their ability to examine the rough outlines of what they would gain through union representation and collective bargaining.

Then there are a number of cases in which the Board has not decided anything, but has solicited briefs from interested parties on a number of questions that might arise in the cases. In Roundy's, Inc. (Case No. 30-CA-17185), the question is under what circumstances an employer's refusal to allow non-employee union speakers access to private property constitutes discrimination in violation of the Act. Current Board law on this issue has been rejected by some courts of appeals, including the 6th Circuit in Sandusky Mall v. NLRB,[26] which take a narrower view of what constitutes discrimination; other courts of appeals have affirmed the Board's decisions in this area. In its request for briefs, the Board has simply asked the parties to address the question of whether the Board should reconsider the question in light of what these reviewing courts have held. It is entirely proper, given the judicial reception the Board's current caselaw has received, that the Board should give careful consideration, and seek a range of views, on this difficult statutory question.

In Lamons Gasket Co., Case No. 16-RD-1597, the Board has solicited briefing on whether it should modify or rescind the Dana I rule. Dana I (which itself overruled a 40year old Board precedent) held that that an employer's voluntary recognition of a union based on a card majority does not immediately trigger the "recognition bar" that normally follows voluntary recognition—that is, a year-long bar of rival or decertification petitions; rather, the recognition bar would begin only after the employer had posted for 45-days a Board-approved notice advising employees on their right to file a petition to oust the recently recognized union. This rule has required the expenditures of Board resources, and probably delayed the onset of collective bargaining in some cases; but it has apparently reversed very few outcomes. After more than two years, the parties now have sufficient experience with this new rule to offer valuable input into the Board's deliberations. The solicitation of briefs on this issue thus makes good adjudicatory sense.

The Board has also solicited views in several additional cases involving bargaining units in long term care facilities,[27] the duties of successor employers toward an incumbent union,[28] and to consider whether the Board should assert jurisdiction over an Illinois charter school or whether it is instead exempt from NLRA coverage as a government entity.[29] These cases are all standard grist for the Board's mill. There is no reason to believe that Board will decide these cases in a manner that is any less responsible than that exhibited by other cases it has decided over the last year. But perhaps most important for present purposes, the Board has not decided anything. It is hard to understand why the Board would court controversy by calling attention to these pending cases and soliciting views on these issues if it did not intend to actually consider those views.

Recent General Counsel Memos

Two recent memoranda by the Acting General Counsel have drawn some attention. Both address the appropriate remedial response to serious unfair labor practices in the context of union organizing. Many commentators and past General Counsels of the Board—Republican as well as Democratic appointees—have lamented the narrow range of remedies available under the statute to address employer interference with employees' statutory right to choose whether to form a union and engage in collective bargaining.[30] The statute permits only equitable remedies, which are neither fully compensatory nor calculated to deter illegal conduct; they fall far short of the remedies that Congress has seen fit to prescribe in employee rights statutes enacted in the past 50 years, such as the employment discrimination laws.

The weaknesses of the standard equitable remedies, and the duration of the standard adjudicative process, are especially problematic in cases in which the employer may hope to stop an organizing drive in its tracks by firing a leading union activist. Absent prompt reinstatement, this illegal firing will predictably chill others from joining the union, as well as remove from the workplace a leading union advocate. The fact and the fear of retaliation will "nip in the bud" efforts to unionize, even if a remedy is eventually forthcoming years later. And employers facing only a long-distant threat of being ordered to reinstate the employee (which is often unrealistic years after a discharge) and to pay backpay (offset by what the employee earned or should have earned in the interim) are sorely tempted to violate the Act.

The Acting GC issued a Memorandum on September 30th, 2010 declaring his effort "to give all unlawful discharges in organizing cases priority action and a speedy remedy."[31] The Memorandum outlined procedures to expedite investigations of discriminatory firing, and to secure prompt GC approvals of requests from the Regional Offices for preliminary injunctive relief from the federal courts under Section 10(j) of the NLRA. That means that the Board's attorneys may sue in federal court, and if the court concludes that they meet all the normal requirements for preliminary relief—in particular a strong probability of success on the merits—the court may order the employer to reinstate the discharged employee.

Following this memo, there was a significant uptick in the number of 10(j) cases.[32] Of the 59 cases submitted to the General Counsel's office by the Regional Offices, only 16 were submitted to the Board for authorization, and the Board approved 15 to proceed with litigation. The very high success rate on those cases that have been concluded (total or partial success in all cases)[33] indicates that, far from pushing the boundaries of what the law authorizes, the General Counsel and Board have acted cautiously and prudently, and brought only strong cases to the courts.

The number of Section 10(j) injunctions has ebbed and flowed over the years, but their usefulness has long been widely recognized. Several General Counsels in the past have emphasized the essential role of these injunctions in redressing the impact of discriminatory discharges, especially in the organizing context. For example, former General Counsel Meisburg observed that, "[d]uring my tenure as General Counsel, I continued to support the use of Section 10(j) as an essential tool in the effective administration of the Act. As has long been recognized, in some unfair labor practice cases, the passage of time inherent in the Board's normal administrative process render its ultimate remedial orders inadequate to protect statutory rights and to restore the status quo ante."[34] The current GC's guidelines and practices do evince a strong focus on protecting employees' right to decide whether to form a union, but they break no new ground, nor is it likely that they will do so, given the need to present every one of these cases to a federal court before any injunction can issue.

In December, 2010, the Acting General Counsel issued a second memorandum in which he outlined additional remedies the Board could use to more effectively protect employees' freedom of choice against serious misconduct by employers in the context of union organizing campaigns. In addition to the standard remedies that the Board generally pursues—reinstatement and backpay (in discharge cases) and cease-anddesist and posting of notices (in other cases)—the General Counsel's memo outlined additional remedies that are designed to mitigate the chilling effect that unlawful acts, particularly "hallmark violations" such as discriminatory discharges and the threat of job loss and plant closing, can have on employees' ability to exercise their rights under the Act. Those remedies may include additional provisions for affording employees' notice of prior violations, measures to improve unions' ability to communicate with workers both at work and away from work. The purpose of all of these remedies would be to help recreate an atmosphere in which workers feel free to exercise their Section 7 rights.

It is crucial to recall that these additional remedies are to be sought only against employers that have been found to have committed serious violations of the Act. The GC's memo emphasized that the decision to pursue these remedies would be evaluated on a case-by-case basis and only when there was strong evidence of the "lasting or inhibitive coercive impact" of the violation and of the potential remedial impact of the proposed remedy. Moreover, none of the Board's remedies can take effect without an opportunity for judicial review or judicial enforcement. All three of these additional remedies have been repeatedly affirmed by courts—again, in appropriate cases in which the standard remedies are shown to be inadequate to remedy the effects of serious employer illegality—as well within the range of discretion granted the Board as the institution with "the primary responsibility * * * [for] devis[ing] remedies that effectuate the policies of the Act."[35] Once again, there is simply no room under the statute for the Board to overreach its authority, even if it were moved to do so; and nothing in what the Board or its General Counsel has done so far suggests any such inclination.

Conclusion

In conclusion, the current Board and Acting General Counsel are doing no more and no less than conscientiously carrying out their responsibilities, as prescribed by Congress and underscored by the Supreme Court, in administering and enforcing the National Labor Relations Act.

ENDNOTES

[1] See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("The Board is not precluded from announcing new principles in an adjudicative proceeding[;] the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"); NLRB v. Wyman-Gordon, 394 U.S. 759 (1969).

[2] See Bell Aerospace, supra note 1, at 295; NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d. Cir. 1966). Encouragement of rulemaking is a recurring refrain among commentators. See James J. Brudney, Isolated and Politicized: The NLRB's Uncertain Future, 26 COMP. LAB. L. & POL'Y. J. 221 (2005); Samuel Estreicher, Policy Oscillation at the Labor Board: A Plea for Rulemaking, 37 ADMIN. LAW REV. 163 (1985); Catherine L. Fisk & Deborah C. Malamud, The NLRB in Administrative Exile: Problems with its Structure and Function and Suggestions for Reform, 58 DUKE L. J., 2013 (2009); Kenneth Kahn, The NLRB and Higher Education: The Failure of Policymaking through Adjudication, 21 U.C.L.A. L. REV. 63 (1975); Cornelius J. Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 YALE L.J. 729 (1960).

[3] See Section 6 of the NLRA: "The Board shall have authority from time to time to make, amend and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as may be necessary to carry out provisions of this subchapter." The Supreme Court upheld this authority in American Hospital Association v NLRB, 499 U.S.606 (1991), having previously encouraged its more frequent use in Bell Aerospace, supra note 1.

[4] Bell Aerospace, supra note 1, at 295.

[5] The one rule that the Board has actually proposed through rulemaking proceeding, as discussed below, is well-grounded and long-overdue.

[6] So for example, in one such amicus brief, a group supporting the employer on behalf of "businesses of all sizes from every industry sector in every region of the country" noted that it "welcome[d] the opportunity" to express its views to the Board. Brief for Coalition for a Democratic Workplace as Amicus Curiae Supporting Respondent, Roundy's, Inc., Case No. 30-CA-17185 (2011).

[7] This process has been used by the Board before, but not often enough in the view of Professor Samuel Estreicher, for example. Samuel Estreicher, Policy Oscillation at the Board: A Plea for Rulemaking, 37 ADMIN. L. REV. 163, 174 (1985).

[8] Curtin Matheson Scientific v. NLRB, 494 U.S. 775, 786 (1990) (citing Beth Israel Hospital v. NLRB, 437 483, 500-501 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers, 353 87, 96 (1957)).

[9] As the Court has explained, "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'"; if the Board "is to accomplish the task which Congress set for it, [it] necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions."Curtin Matheson, 494 U.S. at 786 (citing Beth Israel Hospital, 437 U.S. at 500-501, and Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945)).

[10] As the Supreme Court has emphasized, "[t]o 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." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-266 (1975). See also Curtin Matheson, 494 U.S. at 786 ("A Board rule is entitled to deference even if it represents a departure from the Board's prior policy").

[11] Samuel Estreicher, Policy Oscillation at the Labor Board: A Plea for Rulemaking, 37 ADMIN. L. REV. 163 (1985).

[12] The Acting General Counsel's letter to the Attorneys General sought to secure voluntary resolution of the preemption conflict without ligitation. But the Attorneys General of the four states vowed to defend the new provisions, and called the decision to threaten suit against them "extraordinary." A.G. Response to NLRB Concerning Secret Ballots, January 27, 2011, available at *http://attorneygeneral.utah.gov/cmsdocuments/nlrb012711.sol.pdf.*

[13] The Supreme Court concisely summarized its preemption doctrine recently in Chamber of Commerce v. Brown, 554 U.S. 60, 64 (2008): Although the NLRA itself contains no express preemption provision, we have held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. The first, known as Garmon pre-emption, see San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613 (1986). To this end, Garmon preemption forbids States to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286 (1986). The second, known as Machinists pre-emption, forbids both the [NLRB] and States to regulate conduct that Congress intended "be unregulated because left 'to be controlled by the free play of economic forces.'" Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976) (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

[14] NLRB v. Nash-Finch Co., 404 U.S. 138 (1971).

[15] Chamber of Commerce v. Brown, 554 U.S. 60 (2008).

[16] Dana Corp., 351 N.L.R.B. 434 (2007) ("We do not question the legality of voluntary recognition agreements based on a union's showing of majority support. Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it.").

[17] BNA Daily Labor Report, January 21, 2011, NLRB Has a Full Docket, Major Cases, and Plans for an Active Year.

[18] For example, in Jackson Hospital Corp., d/b/a Kentucky River Medical Center, 356 NLRB No. 8 (October 22, 2010), the Board unanimously authorized daily compounding of interest on backpay awards, in response to requests by past General Counsels, both Republican and Demo-

cratic appointees, over ten years, and consistent with the universal practice of awarding compound interest on damage awards in other areas of the law.

[19] SEIU, Local 121RN, 355 NLRB No. 40 (2010)

[20] Machinists Local Lodge 2777 (L-3 Communications), 355 NLRB No. 174 (2010).

[21] J & R Flooring, Inc., d/b/a J. Picini Flooring, 356 NLRB No. 9 (2010).

[22] Local 1506, UBC (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 (2010):

[23] Dana Corp. and International Union, UAW, Cases 7-CA-46965, 7-CA-47078, 7-CB-14083, 7-CA47079, 7-CB-14119, 7-CB-14120 (Dec. 6, 2010) (Dana II).

[24] See, e.g., Marshall Babson, Bargaining Before Recognition in a Global Market: How Much Will It Cost?, 58 LAB. & EMPL. REL. ASS'N SERIES 113 (2006), available at*http://www.press.uillinois.edu/journals/irra/ proceedings2006/babson.html;* Stanley J. Brown & Henry Morris, Jr., Pre-recognition Discussions with Unions in U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION: SECOND INTERIM REPORT—A WORKING DOCUMENT 98, 99 (U.S. Dep't of Labor, 1988).

[25] Dana II, citing Brown & Morris, supra.

[26] 242 F3d 682 (2011).

[27] Specialty Healthcare, Case No. 15-RC-8773

[28] UGL-Unicco Service Co., Case No. 1-RC-22447; Grocery Haulers, Inc., Case No. 3-RC-11944

[29] Chicago Mathematics & Science Academy Charter School, Inc., Case No. 13-RM-1768

[30] Former General Counsel Ronald Meisburg focused much attention, for example, on the need for stronger and faster remedies in first contract bargaining cases: Where there are bad faith bargaining tactics or other violations in the initial bargaining process that substantially delay or otherwise hinder negotiations, merely ordering the parties to bargain may not return the parties to the status quo ante. I believe that additional measures are often necessary in these situations to truly restore the conditions and the parties' relationships to what would have existed absent the violations * * * [In these circumstances] certain remedies specifically tailored to restore the pre-unfair labor practice status quo, make whole the affected parties, and promote good-faith bargaining should regularly be sought in initial bargaining cases where violations have interfered with contract negotiations. Memorandum GC 07-08, Additional Remedies in First Contract Bargaining Cases (May 29, 2007).

[31] Memorandum GC 10-07, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns, from Lafe Solomon to all Regional Directors, September 30, 2010.

[32] From October 1 through December 31, 2010, regional offices submitted 59 recommendations for Section 10(j) relief to NLRB headquarters—43 petitions more than were submitted by the regions during the same quarter in FY 2009. BNA Daily Labor Report, January 21, 2011, NLRB Has a Full Docket, Major Cases, and Plans for an Active Year.

[33] NLRB Statistics, 10(j) Authorizations, 1st quarter FY 11; 11 of 15 cases were concluded, while 4 remained open at the end of the quarter. Of the 11 cases pursued to conclusion, 7 were settled and 4 concluded in court (all 4 of which resulted in either a complete or partial win for the NLRB).

[34] End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings, January 4, 2006 through April 30, 2010 (June 2, 2010). See also GC 07-01, December 16, 2006 ("Section 10(j) relief is particularly well suited to accomplish the goal of protecting the representational choice of employees, collective bargaining, and labor peace, while also encouraging the use of Board election processes.")

[35] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 899 (1984). See, e.g., United Steelworkers of America v. NLRB, 646 F.2d 616, 640 (D.C. Cir. 1981) (upholding a Board order granting the union broad rights of access to a plant where repeated unfair labor practices occurred, as well as to two plants where organizational activity had been conducted and all other company locations where no organizational drives had yet begun, as "within the authority of the Board to impose"; "the Board was clearly entitled, in shaping its remedial order in this case, to consider the extensive record of past unlawful activity. * * *"); J. P. Stevens & Co. v. NLRB, 388 F.2d 896, 906 (2d Cir. 1967) (upholding Board order granting union access to company bulletin boards in order "to dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign."); Montgomery Ward & Co. v. NLRB, 339 F.2d 889 (6th Cir. 1965) (enforcing a Board order granting the union equal time to address employees after the employer unlawfully prohibited employee solicitation in nonworking areas of the store during nonworking time).

Chairman ROE. Mr. King.

STATEMENT OF G. ROGER KING, PARTNER, JONES DAY

Mr. KING. Thank you Chairman Roe. Thank you again for having me before this committee. I appreciate the opportunity. And ranking members and minority members, thank you also for having me.

I am going to start with preemption, since that seems to be a subject of some interest. It is debatable whether we are in a preemptive mode with respect to State actions just described. One solution to that is for this body to pass the Secret Ballot Protection Act to avoid all of the litigation that might be attendant thereto, and hopefully this committee will take that up in this Congress.

Let me move to my remarks. I am going to go through them, and they are summarized at page 2 through page 5.

We can debate about what the Board does or does not do. Reasonable people can differ. The distinguished panel I am with here today I would share some of their viewpoints, I would differ with some of the professor's viewpoints. I do think that people serving on the Board are of high integrity and they are trying to do the best they can, including the acting general counsel.

One of the principle problems we have at the very outset of this discussion is we don't have a fully confirmed board. We only have two confirmed Democrat members and only one confirmed Republican. That is not a good policy irrespective of one's viewpoint. We ought to have a fully confirmed five member board to make these important decisions that impact our Nation's labor laws.

The Chair of the Board, Chairman Liebman, has so stated, and I mention it in my testimony, her statement on the record in a case where she states there is a long held tradition at the Board to have five members making decisions. I think we should pause a moment here before we engage particularly in rulemaking until we get a full five member complement. Then we can proceed to have whatever discussions and whatever the case adjudication we might have.

Second, I am quite concerned, as many employers are, about the accelerated nature of the decision making process.

What is really happening, ladies and gentlemen, is the Board is hurrying up its agenda apparently to accommodate one very controversial member, the recess member, Craig Becker, and apparently the Chair, whose term will expire in August. That is not good sound public policy, irrespective of how we come out on these issues.

Why not use the Administrative Procedure Act with all its safeguards and proceed in a thoughtful manner? There is precedent for that. I was involved when the health care rule was promulgated. There the Board held multiple hearings, took testimony, went to great lengths to be careful about how it proceeded. That is not the picture we are seeing here today.

Third, the procedural framework that some of the cases are coming to the Board and the requests for amicus briefs, which might help in part, but they don't substitute for the Administrative Procedure Act. Simply filing a brief does not substitute for thorough hearings, thoughtful analysis. That is a misnomer. There is no middle ground here. I differ with my colleague on that point. We need to be careful. But this board has, sua sponte, raised issues that are not even the cases before them.

Next, there is precedent for this body to withhold funding for this or any other agency that engages in particularly rulemaking that is not appropriate. That has happened in the past. This body, for 3 fiscal years, as noted in my testimony, refused to fund an initiative, a rulemaking initiative of the Board. Subsequently, the Board withdrew that rule.

With respect to the Office of General Counsel, yes, very active, we all would agree but the action regarding deferral with respect to arbitrations and how that works has been turned upside down. Not a good idea. We can talk more about that. But it is going to

chill the use of private dispute resolution procedures used by both unions and employers.

Furthermore, the 10(j) injunction approach, where virtually any and every case is a 10(j) injunction, makes no sense. It chills particularly small business and its ability to respond. They can't afford to win.

Finally, I would points out to this committee that the President, through his executive order on January 18, asked the entire government to be more careful about rules and regulations. Now traditionally, such an executive order is not applicable to administrative agencies. OMB then earlier this month said, yes, all administrative agencies should so proceed. U.S. Chamber of Commerce has also asked that each administrative agency so proceed.

Hopefully, the National Labor Relations Board will follow the dictate of the President's executive order. I have not seen anything at all from the Board, but to reexamine these rules and regulations.

Mr. Chairman, I would be pleased to answer questions as we proceed. Thank you.

Chairman ROE. Thank you.

[The statement of Mr. King follows:]

G. ROGER KING, PARTNER, JONES DAY

STATEMENT TO THE RECORD

Hearing on Emerging Trends at the National Labor Relations Board
House Education and the Workforce Committee's Subcommittee on Health, Employment, Labor and Pensions

February 11, 2011 – 10:00 a.m.

Good morning Committee Chairman Roe, Ranking Member Andrews and members of the House Education and the Workforce Committee's Subcommittee on Health, Employment, Labor and Pensions. It is an honor and pleasure to appear again before the Committee as a witness. My name is G. Roger King, and I am a partner in the Jones Day law firm. Jones Day is an international law firm with over 2,500 lawyers practicing in over 30 offices located on four continents. We are fortunate to count more than 250 of the Fortune 500 employers among our clients. I have been practicing labor and employment law for over 30 years and I work with employer clients located in various parts of the country with varying workforce numbers, with a particular concentration of my practice in the healthcare industry. I have been a member of various committees of The Society for Human Resource Management (SHRM) and The American Society of Healthcare Human Resources Association (ASHHRA) and I also participate in the work of other trade and professional associations that are active in labor and employment matters. A copy of my CV is attached to the written version of my testimony as Exhibit "A". Mr. Chairman, I request that my written testimony and the attachments thereto, be entered into the Record of the hearing. Finally, my testimony today is based on my personal and professional experience as a labor practitioner.[1]

It has been widely recognized by legislative leaders, legal practitioners and representatives of the academic community that in addition to the fact that the Board is not an Article III Court, it is also governed by political considerations dictated by the tradition that three (3) of the five (5) statutory positions on the Board are to come from the political party in control of the White House and the remaining two (2) statutory positions from the other party. The latter factor from the perspective of many commentators is the primary reason for the "politicization" of the Board and its oscillating position on various issues arising under the National Labor Relations Act ("NLRA" or "the Act"). Unfortunately, due primarily to the latter factor there have been frequent impasses between the Congress and the President as to the composition of the Board. Further, certain significant disagreements on major labor policy issues have developed between management and labor, including the future direction of the Board. Notwithstanding such disagreements, however, previous Boards have, for the most part, refrained from engaging in significant reversal of precedent or pursuit of policy objectives, such as rulemaking, without having a representative complement of Board members being seated. Although there are

[1] My testimony today should not be construed as legal advice as to any specific facts or circumstances. The views expressed in my Statement to the Record are my own personal views and do not necessarily reflect those of Jones Day. I would also like to acknowledge my Associates, Scott Medsker and Kye Pawlenko, of the Jones Day Labor and Employment Practice Group for their assistance in the preparation of this testimony.

examples when the Board, in the past, has proceeded to overrule precedent without a full complement of members being seated, such an approach raises significant issues with respect to how our nation's labor laws should be administered and how national labor policy should be established. Further, at various times in the past, Board Members have taken the position that a full confirmed complement of Board members should be in place prior to precedent being reversed. For example, current Chairman Liebman, in a case in which she participated in prior to becoming Chairman, stated in her dissent in the Board case of *Teamsters Local 75 (Schreiber Foods)*, 349 N.L.R.B. 77, 97 (2007) as follows:

> First, as Chairman Battista states, the Board's representation to the Court that this case was pending hardly amounts to a promise that the Board, as constituted in 2002, would reconsider and possibly overrule *Meijer*. As it informed the Court, the Board at that time comprised only three Members (two were recess appointees). Given the Board's well-known reluctance to overrule precedent when at less than full strength (five Members), the Board could not have been signaling to the Court that a full-dress reconsideration of *Meijer* was in the offing. (emphasis added).

Unfortunately, the present Board majority, controlled by the party occupying the White House, appears to be significantly deviating from such past practice and self-imposed restraint. The "activist" nature of the present Board majority raises, from my perspective, substantive legal and policy issues that can be summarized as follows:

* The Obama Board, since being constituted in the latter part of 2010, has proceeded to undertake a very aggressive agenda. Two (2) confirmed Board Members—Chairman Liebman and Democrat Member Mark Pearce and unconfirmed Board Member Craig Becker—are not only dictating such agenda, but voting for and approving such agenda. In each instance, such courses of action have been undertaken over the strong dissent of a confirmed third Member of the Board, a Republican Member.[2] This approach of proceeding with only two confirmed Members of the Board raises a number of policy questions and, in many instances, is inconsistent with the past practices and self-imposed restraint of previous Boards. Further, such approach establishes a questionable precedent for an Agency that has been subject to considerable criticism over recent years. If a Republican "majority" of two confirmed Board members proceeded in such a fashion, certainly considerable "noise" would, no doubt, come from members of the other party and from representatives of organized labor. The Board, I submit, as a matter of sound public policy should not proceed to engage in rulemaking—either directly through the Administrative Procedure Act ("APA") or indirectly through case law adjudication—or overrule significant precedent without having five (5) confirmed members.

[2] The composition of the NLRB over such period of time has included the Chairman Wilma Liebman, a Democrat, Mark Pearce, a Democrat, and until August 2010, Republican Member Peter Schaumber. Republican Member Brian Hayes was confirmed by the Senate on June 22, 2010 and also has been part of the Obama Board. Democrat Member Craig Becker has been serving on the Board pursuant to a recess appointment by President Obama since March 27, 2010. The United States Senate has chosen not to confirm Member Becker.

* The Obama Board majority has also evidenced a zeal to engage in an accelerated decision-making process which, except for one of its new initiatives (the Board majority's official NLRA notice rulemaking initiative) is being undertaken without the protections and procedures of the APA. Such approach not only disregards a sound public policy approach to important labor law matters, but gives every appearance that such Board initiatives are designed to ensure that Member Becker—who may have to leave the Board at the end of the current Congress if he is not confirmed by the Senate or again appointed during a recess—is involved in formulization and implementation of such agenda. Further, it is interesting to note that Chairman Liebman's term will also expire in August of this year, and such an accelerated agenda may also be designed around her tenure on the Board. This questionable accelerated agenda is in stark contrast to the only prior successful endeavor of the Board in rulemaking in 1989 with respect to acute care hospital providers. The Board's rulemaking initiative with respect to that issue was undertaken with considerable more deliberation and adherence not only to the APA, but also consistent with the Board's rulemaking statutory requirements.

* The Board's suggestion of rulemaking through case law adjudication and its request for *amici* participation in such cases as *Roundy's, Inc. and Milwaukee Building & Construction Trades Council, AFL-CIO*, Case No. 30-CA-17185, and *Specialty Healthcare & Rehabilitation Center of Mobile and United Steelworkers, District 9*, 356 N.L.R.B. No. 56, raise serious procedural questions. Certain important issues and questions posed by the Board majority in these cases do not arise from the facts or legal issues in such cases, and would appear to be a thinly veiled attempt to establish *sua sponte* a "case and controversy" where none previously existed. The Board majority's attempt to indirectly engage in rulemaking through such case law adjudication is not only inconsistent with the Board's traditional approach of only deciding issues presented by the facts of a pending case, but also brings into question the Board majority's objectives in proceeding in this manner. For example, as outlined below, the *Specialty Healthcare* case does not raise part of the issue in question number 7 in the Board's Notice to Interested Parties, and certainly does not raise the issue posed in question number 8 of such notice—the proper approach to follow in making voting or bargaining unit determinations in industries outside of non-acute health care facilities. In addition, the Board majority in the *Roundy's* case has posed questions that raise issues that are not presented in the case in question. For example, there is no question in the *Roundy's* case involving the rights of an employer to enforce its no solicitation policy with respect to employee activity—the facts and issues in the *Roundy's* case involve non-employee (union representatives) access to employer private property. Nevertheless, question number three posed by the Board majority in *Roundy's* specifically raises such question.

* The Board's recent expenditures in certain areas also bring into question its objectives, and present a clear need for close Congressional scrutiny of its budget. For example, on June 9, 2010, the Board, through a "request for information" ("RFI"), asked vendors to provide it information about "secure electronic voting" for Board-supervised elections. The RFI stated that the Board's division of administration was interested in acquiring equipment that would enable it to not only conduct on-site electronic balloting, but also to implement "remote electronic voting technology" which would permit telephonic and internet voting in union representation elections. Such RFI was not published in the

Federal Register or on the Board's website, and was only publicized on the Federal government's on-line procurement portal. This initiative appears to undermine the 75 years of labor law associated with the secret ballot box procedure in Board-conducted representation elections, and also raises questions regarding sections 9(c) and 9(e) of the NLRA directing that the Board shall utilize secret ballot elections in representation proceedings. Further, the Board's Rules and Regulations also require that "all elections are by secret ballot" (Rules and Regulations of the NLRB section 102.69). In addition to the electronic voting initiative, the Board has also recently engaged in a considerable expenditure of money for various public relations initiatives that would appear to support in part its aggressive agenda, including the recent establishment of an Office of Public Affairs and the hiring of its first New Media Specialist. The above-noted expenditures come at a time when the Board's case load, on average, over the last few years has significantly decreased.[3] The Subcommittee may wish to closely scrutinize the above Board expenditures and others that the Agency is planning to pursue.

* The Subcommittee may also wish to review precedent established by a prior Congress wherein the Legislative Branch prohibited funding for the implementation of a proposed Board rule with respect to the presumption of appropriateness of a single-site voting or bargaining unit. The Congress, in that instance, refused to fund through the appropriation process such initiatives by the Board for fiscal years 1996, 1997 and 1998, and the Board subsequently withdrew the proposed rule in 1998. A similar close scrutiny of any inappropriate Board proposed rule, either through direct rulemaking under the APA or through case law adjudication, may again be a prudent course of action for the Congress to consider. Attached as Exhibit "B" to this testimony is a chronology of the Board's unsuccessful rulemaking initiative in 1995 with respect to the Appropriateness of Requested Single Location Bargaining Units in Representation Cases.

* The Board's Office of The General Counsel also has been engaged in an "activist" agenda. For example, the Board's Office of The General Counsel recently issued guidelines with respect to the deferral of unfair labor practice charges to alternative dispute resolution procedures, including arbitration. These guidelines are cumbersome at best, and change long-standing Board practice regarding deferral of a Board charge to an alternative dispute resolution procedure. Such guidelines certainly have the potential to interfere with the deferral process and cause an unneeded burden on both employers and unions. Further, such initiative presents additional legal risks, particularly to employers and has the potential to result in a fewer number of matters being deferred to arbitration. The Federal Mediation and Conciliation Services ("FMCS"), the American Arbitration Association, and other neutral bodies that assist parties in resolving labor disputes may wish to comment on this initiative. Further, the Office of The General Counsel's greatly expanded use of Section 10(j) injunctions has resulted in unnecessary additional investigation time being expended by the Regional Offices of the Board, causing not only

[3] The trend of Board case intake has clearly decreased over recent years. I do note, however, there was a slight increase of 5% in total case intake by the Board during fiscal year 2010 as well as ten percent increase in representation cases. *See Solomon Reports NLRB FY 2010 Intake Rose; Representation Cases Up 10 Percent*, 07 DAILY LAB. REP. (BNA) A-1 (Jan. 11, 2011).

an inappropriate diminution of Agency resources, but also an unnecessary burden on employers in responding to such requests. One wonders if this approach is designed, in part, to "chill" employer responses to unfair labor practice charges and especially to force small businesses that may not understand the limits of the Board General Counsel's authority under Section 10(j), to prematurely enter into settlements.

* The Board, to my knowledge to date, has failed to publicly embrace President Obama's January 18, 2011, Executive Order (Executive Order 13563), which stated as its primary goal, the objective of improving regulations and regulatory review. Specific provisions of such Executive Order not only require executive agencies to review existing regulations, but also require such agencies to conduct open, transparent rulemaking and to carefully balance the public health, welfare and other considerations against the need to protect economic growth, competitiveness and job creation. Finally, such Executive Order places a particular emphasis on agencies to engage in a cost-benefit analysis when proposing new initiatives in rules and regulations. While administrative agencies are not directly subject to such Executive Order, the Office of Management and Budget ("OMB") on February 2, 2011, requested that independent agencies, such as the NLRB, also comply with the President's Executive Order. The United States Chamber of Commerce has also made such a request to various federal agencies and, hopefully, the NLRB will favorably respond to such a request. It will be interesting to see if the Board makes a meaningful and substantive response to the requirements of President Obama's January 18, 2011, Executive Order.

Record of the Obama Board

The term of the Obama Board started with the confirmation of President Obama's nominees, Democrat Mark Pearce and Republican Brian Hayes on June 22, 2010, and the President's recess appointment of Democrat Craig Becker on March 27, 2010. Members Pearce and Becker joined Board Chairman Wilma Liebman, also a Democrat, to form what has become a three Member majority consisting of Chairman Liebman and Members Becker and Pearce for the major initiatives and rulemaking discussed in this testimony. During a portion of the time that the Obama Board has been in place former Chairman and Board Member Peter Schaumber, a Republican nominee of President Bush, served on the Board. When Member Schaumber's term expired in August 2010, he was not renominated by the President. The fifth statutorily authorized position on the Board – a Republican position – remains vacant with the President's nominee, Terry Flynn, awaiting Senate confirmation.[4] Finally, the important position of General Counsel to the Board remains vacant, with the President's nominee for the position, Lafe Solomon, serving as Acting General Counsel and awaiting Senate confirmation.

[4] The terms of the current NLRB Members expire as follows: Chairman Liebman, August 27, 2011; Member Pearce, August 27, 2013; and Member Hayes, December 16, 2012. Unless confirmed, Member Becker's recess appointment will expire when the present Congress adjourns later this year. Member Becker was recently renominated by the President for a term to expire in December 2014. According to Congressional Research Service, it appears that the President can make successive recess appointments to the same or different vacant Board positions. However, the Office of Legal Counsel has opined that in such a circumstance, the recess appointee would be prohibited from being paid from the Treasury pursuant to 5 U.S.C. § 5503(a).

The Democrat majority on the Obama Board has been particularly active in the relatively short period it has been in place. Over the dissent of former Member Schaumber and/or present Member Hayes, the Board has issued the following decisions that either overturn precedent, substantially change the direction of the law under the NLRA, or change the direction of the Board though either APA rulemaking or rulemaking through case law adjudication:

- In *Eliason & Knuth of Arizona, Inc.*, 355 N.L.R.B. No. 159 (Aug. 27, 2010), and numerous related cases, a three-Member majority held that the posting of stationary banners at a secondary employer's job site was not "coercive"—despite that the banners read "Shame On [Employer]" and "Labor Dispute"—and thus not prohibited under the Act. The majority held that merely holding banners that did not obstruct ingress or egress, and were not accompanied by chanting, yelling, or movement, was not unlawful picketing. In dissent, both Members Schaumber and Hayes accused the majority of "rely[ing] on a strained definition of statutory language, and selective and ambiguous excerpts from the legislative history" to find the conduct lawful. According to the dissent, "[t]his new standard substantially augments union power, upsets the balance Congress sought to achieve, and, at a time of enormous economic distress and uncertainty, invites a dramatic increase in secondary boycott activity."

- In *J. Picini Flooring, Inc.*, 356 N.L.R.B. No. 9 (Oct. 22, 2010), a Board majority of Chairman Liebman and Members Becker and Pearce held that questions concerning whether a respondent customarily uses a particular electronic method in communicating with employees and whether electronic notice would be unduly burdensome and/or appropriate in a particular case, would be resolved at the compliance stage. In doing so, the Board overturned *International Business Machines Corp.*, 338 N.L.R.B. 966 (2003) and *Nordstrom, Inc.*, 347 N.L.R.B. 294 (2006), to the extent that they are inconsistent with *J. Picini Flooring, Inc.*. In *International Business Machines*, the Board denied the Union's request to review the General Counsel's refusal to consider at the compliance stage whether the company would have to post electronic notices. The Board held that the appropriate time to request electronic posting was before the administrative law judge or the Board. *Nordstrom*, too, refused to require electronic posting where the issue was not raised during the underlying hearing. Thus, in *J. Picini Flooring, Inc.*, the Board expanded the "heretofore…extraordinary remedy" of electronic posting "into a routine remedy." 356 N.L.R.B. No. 9 at *8 (Hayes, dissenting).

- In *Austal USA, LLC*, 356 N.L.R.B. No. 65 (Dec. 30, 2010), a panel made up of Board Chairman Liebman and Members Becker and Pearce, without a Republican Member, held that unfair labor practice allegations can be considered for setting aside an election even if the unfair labor practices were not specifically stated in the election objections. The Board held that its decision was consistent with cases after *Super Operating Corp.*, 133 N.L.R.B. 241 (1961) and that *Super Operating Corp.* was an "anomaly" that had never

expressly been overturned. Thus, *Super Operating Corp.*, which held that challenges to an election must be specifically stated in the election objections, is "effectively overruled" by *Austal USA*.

- In *Stabilus, Inc.*, 355 N.L.R.B. No. 61 (Aug. 27, 2010), the Board majority made up of Chairman Liebman and Member Becker, held that an employer violated the Act by prohibiting an employee from wearing T-shirts with union insignia during a certification election. Dissenting, Member Schaumber noted that the Board majority held "for the first time that the well-recognized right of employees to display union insignia extends to substituting a prounion T-shirt for a required company uniform." *Id.* at 7. Member Schaumber described *Stabilus* as "a radical rebalancing of the relevant interests and a sharp curtailment of legitimate management prerogatives."

Additionally, the Board majority of Chairman Liebman and Members Pearce and Becker, have engaged in a very aggressive rulemaking initiative with respect to requiring employers to post a new NLRA official notice. Such proposed rulemaking presents a number of issues. First, as noted by Member Hayes in his dissent, it is questionable whether the Board has the authority to engage in rulemaking to require notice posting, particularly where Congress has explicitly required notice posting in other statutes. "The absence of such express language in [the NLRA] is a strong indicator, if not dispositive, that the Board lacks the authority to impose such a requirement." 75 Fed. Reg. 80,410, 80,415 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104). Second, substantively, the notice only informs employees of some of their rights under federal labor law. For instance, there is no clear statement that employees have a right to refrain from joining a union or paying any dues in a right-to-work state. Nor is there any indication that employees have the right to file decertification petitions. Finally, there is no mention of an employee's right to remain nonmembers, paying only dues for representational activities under *Communications Workers v. Beck*, 373 U.S. 734 (1963). Indeed, in footnote five of the Notice of Proposed Rulemaking, the Board suggests that there is an affirmative duty under the NLRA for unions to notify employees of their *Beck* rights at various times during the employment relationship. However, I have found in my years of practice, it is exceptionally rare for a union to openly advertise the *Beck* rule, as apparently required by the Act.

Finally, the Board majority has in the context of case law adjudication avoided formal rulemaking under the APA and is engaging in indirect rulemaking by requesting *amicus* briefs from interested parties in the following areas:

- As I have already mentioned, the Board in *Roundy's, Inc.*, has engaged in overreaching to address issues that are not properly before the Board. By taking a case involving non-employee and third-party access issues and seemingly attempting to reverse the standard for discrimination as applied to employee access, the Board has gone far beyond the permissible limits of announcing new rules in adjudicatory matters.

- Likewise, in *Specialty Healthcare*, the Board even acknowledges that it is engaging in rulemaking via adjudication, writing that "we think it is evident that adjudication, which is subject to judicial review, provides for no less 'scrutiny and

broad-based review' than does rulemaking, *especially where interested parties are given clear notice of the issues and invited to file briefs.*" 356 N.L.R.B. No. 56 at 3 (emphasis added). While the Board engaged in rulemaking to address this issue with respect to the acute healthcare industry, it now finds a Notice and Invitation alone sufficient to address the same issue in not only the non-acute care industry, but in all industries. Such an approach, especially with less than a fully-confirmed complement of Board members, does not represent a sound public policy approach to these important issues.

- The same Board majority requested briefing in *Lamons Gasket Co.*, 355 N.L.R.B. No. 157 (Aug. 27, 2010) "to evaluate whether its decision in *Dana* [*Corp.*, 351 N.L.R.B. 434 (2007)] and the procedures developed to implement that decision have furthered the principles and policies underlying the Act." In *Dana Corp.*, the Board held that it would refuse to apply an election bar after a card-based recognition "unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition." 351 N.L.R.B. at 434. In the Notice and Invitation in *Lamons Gasket Co.*, the Board decried *Dana* as "a major departure from prior law and practice" and, as a result, sought comment on the parties experiences under *Dana*.

- Again, on the same day the same Board majority asked for briefing in *Lamons Gasket*, the Board also asked whether it should reverse *MV Transportation*, 337 N.L.R.B. 770 (2002), and return to the successor bar doctrine articulated in *St. Elizabeth Manor, Inc.*, 329 N.L.R.B. 341 (1999). *See* Notice and Invitation, *UGL-UNICCO Serv. Co.*, 355 N.L.R.B. No. 155 (Aug. 27, 2010). Under *MV Transportation*, "an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status." 337 N.L.R.B. at 770. Under *St. Elizabeth Manor, Inc.*, the presumption is irrebuttable, at least for a reasonable period of time. 329 N.L.R.B. at 344.

- Finally, in *Chicago Mathematics*, Case No. 13-RM-1768, the Board requested briefing on the issue of whether a charter school is a political subdivision within the meaning of section 2(2) of the Act and therefore exempt from the Board's jurisdiction. Although the primary issue in this case centers on scope of the Board's jurisdiction, it nevertheless is another example of the Board circumventing the formal APA rulemaking process and proceeding on indirect rulemaking through case law adjudication.

Under any objective definition the current Board majority with only one sitting Republican Member is engaged in an activist labor-oriented agenda. Irrespective of one's political party affiliation, academic perspective, or labor versus management viewpoint, this high degree of activism with only three Senate-confirmed Members, and in many of the above matters over the dissent of the lone Republican Member, establishes a dangerous precedent for an

Agency that already has been under substantial criticism from many quarters for being too "political" and not following a more judicial "*stare decisis*" approach to case law adjudication.[5] As noted above, only two confirmed Members of the Board are making important policy decisions for the Agency. If Republicans were in the majority at the Board with a third Republican member only sitting by a recess appointment, and the lone member of the other party consistently dissenting, clearly there would be expressions of concern and Democrat members of the Congress and representatives of organized labor would loudly state their objections to the manner in which the Board would be proceeding.

In addition to the above noted policy concerns there are a number of substantive legal questions posed by the direction in which the Board majority appears to be headed. These concerns are clearly evidenced not only in the Board's proposed rule with respect to the posting of NLRA notices in the workplace, but also in the two previously noted cases where the Board appears to engage indirectly in rulemaking through case law adjudication, the *Roundy's* case and the *Specialty Healthcare* case.

Employer Property Rights and Third-Party Access – *Roundy's Inc. and Milwaukee Building & Construction Trades Council, AFL-CIO*

In *Roundy's*, the Board issued in its Notice and Invitation to File Briefs a request for interested parties to address what standard should define discrimination with respect to non-employee access to employer private property and, further, what bearing a decision issued by the Bush Board in *Register Guard*, 351 N.L.R.B. 110 (2007), had on the matter. The *Register Guard* decision, a decision in which Chairman Liebman dissented, involved employee access and solicitation issues. The factual situation in the *Roundy's* case does not involve employee access or solicitation issues – the *Roundy's* case involves non-employee (union representative) access rights to employer private property. It appears that the current Board majority clearly would like to reverse *Register Guard's* definition of discrimination and is straining to find a way to place in front of it the issues addressed in the *Register Guard* decision. *Register Guard* held that *in the context of employees*, an employer is required to compare groups that seek access to its private property on the basis of whether they are of the same type and that an employer will not be found guilty of an unfair labor practice unless it engages in a practice of treating "equals" discriminatorily. It is inappropriate for the Board to try to get to the holding in *Register Guard*

[5] *See The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights Joint Hearing Before the H. Subcomm. on Health, Employment, Labor & Pensions, H. Comm. on Educ. & Labor, Employment & Workplace Safety S. Subcomm., & S. Comm. on Health, Educ., Labor & Pensions*, 110th Cong. 27 (2007) (statement of Wilma Liebman, Member, National Labor Relations Board) (describing the Bush II Board's recent activities: "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 [sic] 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 long-standing precedent going to the core values of this statute."); id. at 66 – Letter from Law Professors Regarding National Labor Relations Board ("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....") (emphasis added).

through the *Roundy's* case. Stated alternatively, there is no case or controversy before the Board in the *Roundy's* case involving employee access rights.

Roundy's addresses the proper standard for the Board to apply in cases involving alleged discrimination with respect to non-employee access to employer private property, and whether the Board should adhere to its prior holding in *Sandusky Mall Co.*, 329 N.L.R.B. 613 (1999)—an approach that has been rejected by numerous U.S. Courts of Appeals.[6] In *Sandusky Mall*, the Board held that an employer violated section 8(a)(1) of the Act by denying union access to its property while permitting other individuals, charitable groups, and organizations to use its premises for various activities. However, the U.S. Court of Appeals for the Sixth Circuit reversed the Board in *Sandusky Mall*, holding that "discrimination [] among comparable groups or activities and...the activities themselves under consideration must be comparable." Nonetheless, the Board's Notice and Invitation in *Roundy's* not only asks whether the Board should continue to apply *Sandusky Mall* and, if not, what standard should apply, but also calls for a discussion of the definition and application of "discrimination" in *Register Guard*, an employee access and solicitation case.

Although *Roundy's* is not a proper procedural vehicle for reversing *Register Guard*, that opinion plays an important role in this area. Because the Supreme Court has consistently held that the access rights of non-employees to employer property derive only from the organizational rights of that employer's employees, *Register Guard*—which addresses employee access—establishes the minimum threshold for a finding of discrimination in non-employee access cases. Indeed, the Board cannot logically or reasonably adopt a standard of discrimination regarding non-employees or third parties in *Roundy's* that is more exacting than, or that is in conflict with, the standard the Board recently established with respect to employee access rights in *Register Guard*.

Thus, while employers may hope that the Board will abandon *Sandusky Mall* and square its precedent with the U.S. Supreme Court's decisions in *Babcock*, *Lechmere*, and their progeny, the more likely result is foreshadowed in Chairman Liebman's *Register Guard* dissent. There, Chairman Liebman advocated a standard which in essence requires an employer to treat groups and organizations that are not the same on an equal basis. Under Chairman Liebman's approach, the Girl Scouts and the United Autoworkers Union presumably would be the same type of organizations. Accordingly, if an employer permitted the Girl Scouts entry to its private property it would also have to grant access to the UAW. In such hypothetical, if the employer said no to the UAW, it would be guilty of discrimination under the NLRA. By adopting Chairman Liebman's *Register Guard* dissent, the Board would not only interfere with fundamental private property rights of employers, but also be in conflict with the Supreme Court's decisions in *Babcock* and *Lechmere*.

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[6] *See, e.g.*, *Salmon Run Shopping Center LLC v. NLRB*, 534 F.3d 108, 116-17 (2d Cir. 2008) (holding, in order to engage in discrimination, "the private property owner must treat a nonemployee who seeks to communicate on a subject protected by section 7 less favorably than another person communicating on the same subject") (emphasis added); *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 691 (6th Cir. 2001) (denying enforcement of Board order).

While there are numerous reasons why such a holding would be troubling to employers, allow me to highlight two from my private practice experience. *First*, with respect to health care providers, hospitals have long been recognized by both the Board and the courts to have a special patient-care mission that can be harmed by unchecked third party access, solicitation and distribution. Most notably, the Supreme Court has affirmed the importance of a tranquil environment in a hospital and the need to avoid unnecessary disruptions caused by organizational activities. To that end, the Court has upheld restrictions on solicitations and distribution – *even among hospital employees* – and has further stated that rules restricting appeals to patients and visitors would be justified by patient care concerns. *See, e.g.*, *NLRB v. Baptist Hosp.*, 442 U.S. 773, 778 (1979) (noting greater leniency for solicitation rules in hospitals because of "the need to avoid disruption of patient care and disturbance of patients"); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring) ("Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed."). To the extent that *Sandusky Mall* or the *Register Guard* dissent would require hospitals to "open the door" to trespassory union activities without regard to its impact on patient care, they would conflict with U.S. Court of Appeals and Supreme Court precedent and should not be allowed to stand. *Second*, retail employers also regularly face challenges in this area in that if they permit community groups such as the Girl Scouts or the Salvation Army to have access to the premises under the *Sandusky Mall* rationale, they would be subject to unfair labor practice charges if they thereafter prohibited unions and other non-charitable groups similar access.

If the Board continues to apply the *Sandusky Mall* analysis to access issues, an employer assumes the risk of being required to open its doors to any third-party solicitation or distribution even if the groups are not comparable. This approach would appear to give little to no attention to the *criteria* an employer (such as a hospital or retail store) applies in permitting third-party groups to solicit and distribute on its premises, and whether such criteria – rather than a blanket assumption of arbitrariness or anti-union animus – might explain why an employer would choose to open its doors to certain charitable groups but close its doors to for-profit groups and labor organizations. For example, if permitting charitable solicitations for health causes or allowing support groups to meet on a hospital campus is viewed as "opening the door" to all third party groups including union canvassing, then hospitals are faced with a dilemma: either to close their doors to all important activities that benefit their communities, or permit unfettered third party and union access to their campuses. Attached as Exhibits "C" and "D" are the *amicus* briefs filed with the Board in the *Roundy's* case by Human Resource Policy Association, Society for Human Resources Management, and the American Hospital Association that provide in greater detail the troubling approach that the Board majority appears to be taking in this area.

Defining The Proper Standard For Unit Determination Issues – *Specialty Healthcare & Rehabilitation Center of Mobile and United Steelworkers, District 9*

An equally aggressive example of disregarding a standard of only addressing case and controversies that are actually before the Board can be found in the Board's recent Notice and

Invitation in *Specialty Healthcare, Inc.*, 356 N.L.R.B. No. 56 (Dec. 22, 2010). Here the Board majority rejects proceeding under the APA and injects unraised issues into the case. Question 7 in its Notice to Interested Parties asks whether units of all employees performing the same job at a single facility for **all** employers covered by the NLRA should, as a general matter, be presumptively appropriate.

Like *Roundy's*, *Specialty Healthcare* also could lead to the reversal of decades of labor law precedent by replacing the widely accepted "community of interest" test in determining which groups of employees can vote or petition to form a bargaining unit. This long-established standard may be replaced with a "job description" unit approach with a presumption that such a unit is appropriate if the unit includes all employees performing the same job at a single facility. And again like *Roundy's*, it appears that the Board's result may have been foreshadowed in another prior Board dissent, this time authored by Member Becker. In *Wheeling Island Gaming*, Member Becker dissented and wrote that "one clearly rational and appropriate unit is all employees doing the same job and working in the same facility. Absent compelling evidence that such a unit is inappropriate, the Board should hold that it is an appropriate unit." 355 N.L.R.B. No. 127 (Aug. 27, 2010), Slip Op. at 2. The similarities between his views in *Wheeling Island Gaming* and the questions posed in the Notice and Invitation cannot be ignored.

Based on my experience in various industries, it would be highly disruptive for the Board to adopt a rule that would lead to the proliferation of extremely narrow units. While I would be happy to discuss the consequences of such a rule with respect to the non-acute health care industry,[7] I would like to focus my *Specialty Healthcare* comments on the Board's attempts to change the community of interest standard for important unit determination tests for all employers subject to the Board's jurisdiction.[8] I believe that the Board's consideration of changing the standard across industries is inappropriate for at least three reasons.

First, it is unclear whether the Board even has the authority to make this decision through adjudication, rather than rulemaking under the APA. While the Supreme Court has recognized that the NLRB may announce new principles in adjudicative proceedings and that the decision to rely on adjudication or rulemaking belongs to the Board, the Court has also noted that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

Relying on *Bell Aerospace Co.*, the U.S. Court of Appeals for the Ninth Circuit in *Pfaff v. U.S. Department of Housing*, 88 F.3d 739 (9th Cir. 1996), struck down a rule announced in an

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[7] It should be noted that Chairman Liebman did not agree with Member Becker's dissent in the *Wheeling Island Gaming* case and joined with Member Schaumber to find the requested single job description unit – a unit of poker dealers – to be inappropriate.

[8] There appears to be no substantive or empirical evidence to support the need to engage in rulemaking in the first instance with respect to non-acute care healthcare facilities. A preliminary review of the representative cases involving unit determinations for this industry suggests that very few cases go to a hearing and that a great number of such representation cases are not litigated in any fashion. Further, it would appear that many of the voting unit eligibility issues are resolved by stipulation of the parties. Second, my experience in practicing in this area would support such a conclusion.

adjudication conducted by the U.S. Department of Housing. The Court wrote that an agency could abuse its discretion where:

> the new standard, adopted by adjudication, *departs radically from the agency's previous interpretation of the law*, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and *where the new standard is very broad and general in scope and prospective in application.*

Id. at 748 (emphasis added). The Ninth Circuit further stated that:

> We do not mean to suggest that an agency can never adapt its interpretation of a statute in the light of experience, or that administrative adjudication is a presumptively invalid means to make such changes. Adjudication has distinct advantages over rulemaking *when the agency lacks sufficient experience with a particular problem to warrant ossifying a tentative judgment into a black letter rule*; still other solutions may be so specialized and variable as to defy accommodation in a rule. . . . The disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency's authority. While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable per se, *this problem grows more acute the further the new rule deviates from the one before it. Adjudication is best suited to incremental developments to the law, rather than great leaps forward.* The APA contains numerous mechanisms, such as the notice and comment rulemaking procedure, by which the public is given notice of proposed changes before they occur. For this reason, the Supreme Court has concluded that rulemaking is generally a better, fairer, and more effective method of announcing a new rule than ad hoc adjudication.

Id. at fn. 4 (emphasis added) (quotation and citation omitted).

Though I recognize that the Board has the statutory discretion to decide whether to proceed in rulemaking or adjudication, I suggest as a matter of sound public policy that if the Board majority decides to consider reviewing such a long standing and well-established principle of labor law (which I submit there is no reason to do), it should first wait until a full five-member Board has been confirmed and then proceed through formal rulemaking with the safeguards provided for in the APA. For instance, had the Board proceeded in this fashion, it could have properly raised, in the first instance, whether any change at all is necessary with respect to voting or bargaining unit determinations outside the non-acute health care industry instead of proceeding in a "back door" approach by injecting such an important question into an otherwise rather routine bargaining unit determination case such as *Specialty Healthcare*.

The Board is certainly familiar with the proper way to proceed with respect to rulemaking. When the Board addressed unit determination issues in acute health care facilities, it engaged in a formal rulemaking process that included three hearings in Washington D.C., San Francisco and Chicago, and even then a fourth hearing was held at the request of interested parties. I was involved in that process and there the Board gave great attention to detail and assembled data and experiences from many and varied interests. At these hearings, 47 witnesses appeared and offered over 1,000 pages of testimony. *See* 53 Fed. Reg. 33,900, 33,900 (Sept. 1, 1988) (to be codified at 29 C.F.R. pt. 103). One would hope that at a minimum the Board would take those same precautions before addressing this important issue not only for the acute care industry, but before considering changing the law of how unit determinations are made for the remainder of the nation's industries.

Second, Member Becker's position in *Wheeling Island Gaming* raises serious concerns in relation to section 9(c)(5) of the Act, which states that "[i]n determining whether a unit is appropriate…the extent to which the employees have organized shall not be controlling." *See* 29 U.S.C. § 159(c)(5). While section 9(c)(5) does not prevent the Board from considering extent of organizing as one factor in determining whether a unit is appropriate, the Board has also noted that section 9(c)(5) "was intended to prevent fragmentation of appropriate units into smaller appropriate units." *Overnite Transportation Co.*, 322 N.L.R.B. 723 (1996); 93 Cong. Rec. 6444 (1947) (statement of Senator Taft) ("Subsection 9(c)(5) adopts the House amendment written to discourage the Board from finding a bargaining unit to be appropriate even though such unit was only a fragment of what would ordinarily be appropriate, simply on the extent of organizing.").

If *Specialty Healthcare* results in the Board adopting Member Becker's *Wheeling Island Gaming* position, it will almost certainly result in highly fragmented bargaining units with a corresponding adverse impact not only on employee rights but also a great damage to the day-to-day operations of many and varied business interests. Member Becker's view focuses on "the perspective of employees seeking to exercise their rights" and requires the Board to honor those wishes "absent compelling evidence that [the petitioned-for] unit is inappropriate." 355 N.L.R.B. No. 157 Slip Op. at 2. However, in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), the Fourth Circuit held that the Board violated section 9(c)(5) by refusing to include technicians in a petitioned-for unit because they did not share "such a community of interest…as to mandate their inclusion in the unit." The Court noted that by presuming the proposed unit was appropriate unless there was evidence to the contrary, "the Board effectively accorded controlling weight to the extent of union organization. This is because the union will propose the unit it has organized." *Id.* at 1581 (internal quotation and citation omitted). Member Becker's proposal in *Wheeling Island Gaming* fails for the same reason.

Finally, from a practical perspective, adopting Member Becker's "job description" bargaining or voting unit approach could result in a number of presumably unintended consequences for the workplace. For employers, having their workforce divided into multiple narrow job description units would lead to a state of constant bargaining, including the frequent drama and potential work disruption attendant to collective bargaining. Further, once a contract is achieved, supervisors and managers will have the added burden of attempting to properly administer numerous contracts, with different provisions, applicable to a narrow subset of the workforce. Inevitably, errors in contract administration will be made, resulting in increased costs

in time and money handling grievances, arbitrations, and, ultimately, unfair labor practice charges.

But the employer is not the only party burdened by Member Becker's position on unit determination issues. A rule allowing for narrower units also creates barriers for employees. For instance, presumptively approving a petitioned-for unit solely along job description lines may deny employees excluded from the petition the ability to organize because, though they share a community of interest with the petitioned-for unit, they may not form a viable unit on their own. Allowing overly narrow units also creates the risk of balkanizing the workforce by forming communities of interest based on such unit determination, rather than the underlying functional reality of the positions. But perhaps most troublesome is the freezing effect that fragmented units would have on employee advancement. When the varied collective bargaining agreements inevitably have differing provisions for transfers, promotions, seniority, position posting and preference, etc., it would be extremely difficult for an employee whose unit is limited to his or her unique job description to develop his or her career.

* * *

Thus, both *Roundy's* and *Specialty Healthcare* exemplify concerns of the Board's decision to inject issues into cases when they are not presented by the facts, and to decide those issues through adjudication, without the protections of the APA and to so proceed with less than a full complement of confirmed members.

Finally, allow me to briefly discuss the Board's Office of The General Counsel and its increasingly aggressive and burdensome litigation policies.

The Office of The General Counsel's Initiatives

In recent months, the Office of The General Counsel has taken two positions with the potential to cause serious policy, procedural, and operational problems. First, on January 20, 2011, the Acting General Counsel issued Memorandum GC 11-05, entitled "Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases." Under the Board's long-standing prior deferral procedures, the Board would consider deferring to an arbitrator's award where the grievance submitted to arbitration involved alleged violations of both the NLRA and the applicable collective bargaining agreement. In such cases, the Board would defer to the award if the contract and statutory issues were "factually parallel" and the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice." *See Olin Corp.*, 268 N.L.R.B. 573, 573-74 (1984). Going forward, the Acting General Counsel has instructed the Regional Offices to engage in an investigation of the statutory allegation before agreeing to defer and, if the Region finds arguable merit in the allegation, defer to arbitration. *See* Memorandum GC 11-05 at 10.

Under the new procedures, even if the employer agrees to settle the grievance, the NLRB will not defer to a pre-arbitral-award grievance settlement unless the parties intend the settlement to cover the unfair labor practices. As part of that review, the Board will examine all circumstances, including "(1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risk

of litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements"). *See* Memorandum GC 11-05 at fn. 24 (citing *Independent Stave Co.*, 287 N.L.R.B. 740, 743 (1987)).

Assuming the Region, after the above analysis, agrees to defer and the arbitration produces an award, deferral is still not guaranteed. And, now far different from the standard under *Olin*, the party seeking deferral—rather than the party seeking to avoid deferral—must prove not only that all of the NLRA issues were presented to the arbitrator, but that the arbitrator "correctly enunciated the applicable statutory principles and applied them in deciding the issue" and that "the arbitral award is not clearly repugnant to the Act." In effect, the Acting General Counsel has provided virtually an automatic appeal to the Board for a merits review of any arbitrator's decision that involves NLRA issues.

Understandably, employers are concerned that grievances will now contain statutory allegations as a matter of course. If the Board decides to defer, any settlement or arbitral award made thereafter will be subject to the Board's review. This is particularly troublesome if a matter has been successfully litigated before an arbitrator—under a procedure mutually agreed upon by the parties through collective bargaining—and is then forced to litigate a second time to defend the arbitrator's award before the Board. Indeed, this burden may be substantial, given that, in cases that are deferred, it appears the Board's General Counsel will have already found arguable merit in the complaining parties' position.

This initiative may not only undermine the desirability of arbitration—an approach embraced by unions and employers alike—but cause all parties to expend additional resources and perhaps discourage the use of the arbitration process as a means to resolve workplace disputes. It would not be surprising to see the Federal Mediation and Conciliation Service, the American Arbitration Association, and other neutral resolution groups requesting that the Acting General Counsel reexamine this initiative.

Second, the Office of The General Counsel has exponentially increased the number of Section 10(j) petitions that it is filing, particularly in cases related to union organizing. The increase in 10(j) cases is directly related to Acting General Counsel Lafe Solomon's GC Memorandum 10-07, titled "Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns." In that memo, the Acting General Counsel indicated his intention to increasingly use Section 10(j) petitions as a way to "nip in the bud" any possible retaliation or coercion by employers being organized. The Board also recently created an entire section of its webpage summarizing the 10(j) injunction activity taken since September 23, 2010. That information reveals that for the period between September 23, 2010 and February 4, 2011, the General Counsel's Office has authorized 26 petitions, compared to the 23 petitions filed in all of Fiscal Year 2009.[9]

[9] The Board's website, www.nlrb.gov, was substantially revised on February 9, 2011. It appears that the webpage dedicated to 10(j) petitions no longer exists.

While there may be merit in the Board's General Counsel requesting injunctive relief in certain cases, the Acting General Counsel's initiatives with respect to Section 10(j) certainly appears to be overbroad and as a practical matter has placed considerable additional pressure on the Board's Regional Offices to unnecessarily expand the scope of investigations in a number of unfair labor practice charge cases that, under past practice of both Republican and Democrat General Counsels, would not have merited even a cursory 10(j) analysis. Indeed, the Office of The General Counsel is on a pace to more than double the number of injunctions that this Office has historically sought. I submit that there are no doubt more productive ways to use the Agency's resources. Further, this initiative also has placed a strain on employer resources by requiring them to respond to Section 10(j) "threats" where the underlying facts of such cases merit no 10(j) consideration. I submit that there are no doubt more productive ways to use the Agency's resources.

In conclusion, I have not meant to overstate the concerns of employers regarding the above matters. Perhaps when the *Roundy's*, *Specialty Healthcare*, and other pending important decisions before the Board are decided, concerns of dramatic reversals of precedent and inappropriate rulemaking will be proven to be unfounded. I hope that this is the outcome regarding such matters. The Board, however, has put these issues in play particularly by proceeding with only two confirmed Board Members and over the strong dissent of the lone Republican Board Member. Further, the exceptionally accelerated manner in which the Board is proceeding, and in certain instances bypassing the procedural safeguards of the APA, raise serious questions. Hopefully, the Board will properly utilize its resources, including being totally transparent regarding its intentions with respect to off-site electronic voting. Finally, hopefully the Board also will embrace the objectives and desired outcomes of President Obama's January 18, 2011 Executive Order and not only curtail certain of its initiatives but also reexamine all of its rules and regulations.

Mr. Chairman, I would be pleased to answer any questions you or your colleagues may have regarding my testimony.

EXHIBIT B

CHRONOLOGY OF THE BOARD'S UNSUCCESSFUL RULEMAKING INITIATIVE

- June 2, 1994

  The Board published Advance Notice of Proposed Rulemaking in Federal Register on Appropriateness of Requested Single Location Bargaining Units in Representation Cases. 59 Fed. Reg. 28,501 (June 2, 1994).

- September 28, 1995

  The Board published Notice of Proposed Rulemaking in Federal Register on Appropriateness of Requested Single Location Bargaining Units in Representation Cases. 60 Fed. Reg. 50,146 (Sep. 28, 1995).

- March 7, 1996

  House subcommittee held hearings on the proposed rule. 38 Republican Senators and 67 Republican House members signed separate letters stating their opposition to the proposed rule. The letters argued that the Board should not make fundamental changes in such an important area of the law when it was operating with only four members, one of whom was serving as a recess appointee.

- September 12, 1996

  The federal budget bill passed and it included a rider prohibiting the NLRB from spending any of its funds on the proposed rule. The rider stated that "none of the funds made available by this Act shall be used in any way to promulgate a final rule . . . regarding single location bargaining units in representation cases." H.R. 3755 [Report No. 104-368], 104th Congress, Second Session (Sep. 12, 1996). The rider remained in the following two years' budgets.

- February 23, 1998

  The Board published Withdrawal of Proposed Rulemaking in Federal Register on Appropriateness of Requested Single Location Bargaining Units in Representation Cases. 63 Fed. Reg. 8,890 (Feb. 23, 1998). The Board stated that "[a] Congressional rider attached to each of the NLRB's 1996, 1997, and 1998 appropriations bills has prohibited the Agency from expending any funds to promulgate a rule regarding the appropriateness of single location bargaining units in representation cases." *Id.* at 8,891 n.2.

NATIONAL COUNCIL ON DISABILITY

SALARIES AND EXPENSES

For expenses necessary for the National Council on Disability as authorized by title IV of the Rehabilitation Act of 1973, as amended, ~~$1,757,000~~ *$1,793,000*.

NATIONAL EDUCATION GOALS PANEL

For expenses necessary for the National Education Goals Panel, as authorized by title II, part A of the Goals 2000: Educate America Act, ~~$974,000~~ *$1,500,000*.

NATIONAL LABOR RELATIONS BOARD

SALARIES AND EXPENSES

For expenses necessary for the National Labor Relations Board to carry out the functions vested in it by the Labor-Management Relations Act, 1947, as amended (29 U.S.C. 141–167), and other laws, ~~$144,692,000~~ *$170,266,000*: *Provided*, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29 U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203), and including in said definition employees engaged in the maintenance and oper-

1 ation of ditches, canals, reservoirs, and waterways when
2 maintained or operated on a mutual, nonprofit basis and
3 at least 95 per centum of the water stored or supplied
4 thereby is used for farming purposes: *Provided further,*
5 That none of the funds made available by this Act shall
6 be used in any way to promulgate a final rule (altering
7 29 CFR part 103) regarding single location bargaining
8 units in representation cases.

9 NATIONAL MEDIATION BOARD

10 SALARIES AND EXPENSES

11 For expenses necessary to carry out the provisions
12 of the Railway Labor Act, as amended (45 U.S.C. 151–
13 188), including emergency boards appointed by the Presi-
14 dent, ~~$7,656,000~~ *$8,300,000: Provided, That unobligated*
15 *balances at the end of fiscal year 1997 not needed for emer-*
16 *gency boards or any other purposes in fiscal year 1997 shall*
17 *remain available until expended.*

18 OCCUPATIONAL SAFETY AND HEALTH REVIEW
19 COMMISSION

20 SALARIES AND EXPENSES

21 For expenses necessary for the Occupational Safety
22 and Health Review Commission (29 U.S.C. 661),
23 $7,753,000.

[Exhibits C and D submitted by Mr. King may be accessed at the following Internet address:]

http://www.nlrb.gov/search/nlrbdocsearch/Roger%20King%2030-CA-017185?page=1

Chairman ROE. And our first questioner will be Dr. Heck.

Mr. HECK. Thank you. My question is for Mr. King. Mr. King, on December 22 of last year the Board invited briefs on Specialty Healthcare and Rehabilitation Center of Mobile to determine what constitutes an appropriate bargaining unit. Although the case involved nursing homes directly, the Board requested comments that appeared to cover hospitals both acute and nonacute health care fa-

cilities. It is my understanding that you represent a number of health care facilities.

Currently, how are bargaining units determined in acute and nonacute health care facilities? And what is your opinion of the current procedures? And how would it change to the determination of bargaining units affect hospitals and patient care?

Mr. KING. A number of points to your question. First of all, the specialty health care case is of a questionable vehicle, Congressman, to even raise these issues. Nowhere in the underlying facts of that decision were the broad policy issues the Board is now trying to tee up, if you will. So that is a questionable procedural backbone.

Second, the rulemaking process for nonacute care, long-term care facilities, there is no support to even engage in that. We have already done some support analysis and research. The number of cases that are contested in that area are virtually nil that get to the Board. We don't even understand why this is going on.

Third, this approach in question 7 and question 8 of the notice for amica participation, interested party participation, would expand it to all industries. Why are we doing that in a rather run-of-the-mill representation case and potentially overturning law in all areas, including hospitals perhaps? It makes no sense, Mr. Congressman, and I don't know we are proceeding that way. And that is one of the underlying problems here. We have a very activist board that appears to go by the back door, not through rulemaking. This is not a rulemaking approach. They refuse to do so. So I think your questions raise serious policy concerns.

Mr. HECK. Do you believe that this type of rulemaking decision making has an impact on patient care?

Mr. KING. Absolutely. I can tell you as an active practitioner, I am in a hospital maybe 3 or 4 times a week somewhere in the country. We right now are having to litigate issues over access.

I was talking to the chairman earlier today. If a hospital lets in the Red Cross or the American Heart Association, for example, for some charitable activity, under the Chair's view, at least in a dissent, and existing board law, that hospital has to let everyone else in, including any union or any other group. And that causes chaos. We have here in the District of Columbia just recently had to escort out of our corridors union organizers. They are up on nursing floors. And the hospital is not sure how far it can go because it might get an unfair labor practice charge.

This interferes just in that area alone. Banners and picketing, these banners that are so mild apparently to some are very disruptive to others. We have had in Florida institutes where a union put in front of a hospital caskets, albeit they weren't real, skeletons, albeit they are not real, and someone dressed up as the grim reaper marching back and forth. What kind of an environment is that for a patient coming into a hospital? I could go on. I know my time is limited. But absolutely, you are right on your question.

Mr. HECK. Thank you, Mr. King. Thank you, Mr. Chairman. I yield back.

Chairman ROE. Thank you. Ranking Member Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman. Again, thank the lady and gentlemen for their testimony which I apologize for not being

present when you spoke, but I did read it and it was all very well thought out and very helpful. Thank you.

I wanted to ask Mr. Miscimarra, did I pronounce your name correctly? And also Mr. King, welcome back to the committee, I think in both cases. Could you outline for me your concerns about the general counsel's letter to the States that are enacting or attempting to enact State law that the general counsel believes are preempted with card check or whatever. What are your concern about those letters?

Mr. MISCIMARRA. I share the same concerns that were articulated by Arthur Rosenfeld to my left. I think that the better way to approach those particular issues is for them to be addressed by the Congress. And one of the themes that really, I think, goes through many of the things we are discussing at the hearing is the lead from these, on many of these issues, should come from the Congress rather than have the Board at the forefront of some of them.

Mr. ANDREWS. Mr. King, what do you think?

Mr. KING. Good to see you again.

Mr. ANDREWS. Nice to see you.

Mr. KING. Your Cornell Law School education I am sure will get you through this analysis.

Mr. ANDREWS. People from Cornell Law School have a way to seeing things well, don't we? We are proud to have you in our alumni body.

Mr. KING. Thank you very much. The preemption discussion is a difficult one. In the California case that was mentioned earlier by Mr. Rosenfeld, our firm litigated. We were successful in the United States Supreme Court having that statute overturned as being preempted.

However, what we are dealing with with respect to the different State initiatives are constitutional initiatives. That, I think, is the important distinguishing characteristic. But the preemption issue, Mr. Andrews, is a difficult one. You know that. I think the better course of action would be for the Congress to enact the Secret Ballot Protection Act to avoid all of this litigation.

Mr. ANDREWS. I am asking something of a different question. And that is, do you think there is anything inappropriate about the general counsel sort of taking the lead on writing the letters that were written, statements made to the States trying to do constitutional amendments?

Do you have any problem with that?

Mr. KING. I believe it is appropriate to the general counsel to raise the question. I would ask the general counsel, the acting general counsel, to raise those same concerns in the literally hundreds of initiatives that organized labor is pursuing, that would also be exempted which we don't see.

Mr. ANDREWS. Because in reading your testimony, I think it is a fair statement that you would characterize those actions by the general counsel as part of the culture of the labor board that discomforts you. Is that a fair statement?

Mr. KING. It clearly falls within the definition of the very activist nature of this present board and its general counsel.

Mr. ANDREWS. I think it is actually one of the points that you make in your written testimony about what is wrong with the sort of aggressive and unbiased board. Is that fair to say that?

Mr. KING. It would fit within those remarks yes, sir.

Mr. ANDREWS. I just want to ask, one of your fellow panelists, Mr. Rosenfeld, on November 26, 2003, when he was general counsel, wrote a letter to the attorney general of North Dakota. And North Dakota, at the time, was considering, I believe, statutory law that afforded employees certain rights not afforded by the National Labor Relations Act. And the letter which I would ask be entered in the record from Mr. Rosenfeld essentially said, these would be preempted, we think that North Dakota shouldn't do what it is doing, and he said he was hopeful that the State of North Dakota would agree to take voluntary measures to repeal the statute, which, of course, is, I am from New Jersey, so I know what the implication there was, if you don't take the voluntary measures there are other things that we could do. I am suggesting they would have been legally appropriate measures obviously in this case. So was he wrong, Mr. King, when he wrote that letter?

Mr. KING. Mr. Rosenfeld?

Mr. ANDREWS. Yes.

Mr. KING. He was acting pursuant to his statutory duties at the time.

Mr. ANDREWS. Isn't the general counsel doing exactly that now?

Mr. KING. I would concur, as I said earlier, that Acting General Counsel Solomon had a duty to raise the issue. I think it would not be wise to initiate litigation. And again, the proper place to settle this discussion is here in this body.

Mr. ANDREWS. Mr. Rosenfeld, did you have to initiate litigation against North Dakota? Do you remember?

Mr. ROSENFELD. I honestly don't remember that particular issue. I do note, however, that the tone of the letter was more gentile as you described it.

Mr. ANDREWS. It was much more gentile than New Jersey language, I will give you that. But you did say, you hoped it could be dealt with voluntary, but obviously you had the authority as general counsel to initiate litigation. Is there anything wrong with initiating litigation if they had refused to voluntarily repeal the statute?

Mr. ROSENFELD. No.

Mr. ANDREWS. Thank you very much. I yield back the balance of my time.

Chairman ROE. Thank you. Mrs. Roby.

Mrs. ROBY. Thank you, Mr. Chairman. And thank you to the witnesses for your thoughtful testimony. Representing a district that is a right-to-work State, the activist agenda of the current National Labor Relations Board greatly concerns me. And while I strongly feel that employees' rights should be protected and that they should have a right to organize and negotiate with their employer, I feel equally strong about protecting an individual from being forced to join a union or an employer being coerced by a national labor union.

Just this week, the U.S. Bureau of Labor Statistics reported that in my State of Alabama, the number of workers belonging to a

union was 183,000. This accounts for 10.1 percent of wage and salaried workers. An additional 20,000 wage and salary workers were represented by a union in their main job or were covered by an employee association contract while not being union members themselves.

Nationally, the number of workers belonging to unions fell by 612,000 to 14.7 million in 2010, which, on the national level, is 11.9 percent of employed wage and salary workers. Even though Alabama is slightly lower than the national average, it is far ahead of many other States. It concerns me the attempts of the national union groups and the current NLRB attempts to remove the constitutional right to freedom of association that Alabama and other right-to-work States are committed to protecting.

The recent rulings of the NLRB have demonstrated a pro union approach in an attempt to erode Alabama and other right-to-work State status.

So my question is for Mr. Miscimarra, regarding the December 21, 2010 publishing of a substantive notice of proposed rulemaking requiring almost all covered employers to post a notice of employee rights in the workplace. So does the Board have the authority to require the posting of a notice covering the employee rights in the workplace, and then following that, ignoring whether the Board has the authority to require the posting of such notice, what should be included in the notice to provide employees with an unbiased understanding of their rights?

Mr. MISCIMARRA. Thank you, Congresswoman. I will also address the point made by Professor Estlund, which is, and many people look at those notice issues and say, well, it is just another notice. And I think there are a couple of points that are relevant which indicate that this is really not appropriately within the Board's authority.

First, a number of statutes, and the Board has identified this in their proposed rule, the Age Discrimination in Employment Act, title 7, the Fair Labor Standards Act, the Occupational Safety and Health Act, that have explicit provisions in the statutes that require the posting of a notice. And what is conspicuously absent from the National Labor Relations Act is a similar requirement.

I also think that there is some overreaching at the present time, union membership constitutes 6.9 percent of the private sector, but the Board would have these notices posted in almost all of the employers that are subject to the Act. And I also think that the content of the proposed notice that has been distributed by the Board is troublesome in a couple of different respects.

First, there is nothing in the proposed notice that relates to decertification union representative status. And if you are going to instruct somebody to ride the bus, you should cover getting on the bus and getting off the bus.

Also there is no reference to right to work State laws, there is no reference to Beck financial core membership rights, and the last two things that I find most troubling is that the proposed rule that would relate to the posting of the notice actually creates a new unfair labor practice. We have been calling it section 8(a)(6), a new one for labor practice that could also result in an adverse inference

in certain types of cases against the employer if the notice hasn't been posted.

And also if there is a failure to provide the notice, the Board's proposed rule indicates that there would be a tolling, basically an overriding of the statute of limitations.

And the last two things that I have mentioned really represent changes, substantive changes in explicit provisions of the Federal Act.

Mrs. ROBY. Thank you so much, Mr. Chairman. I yield back.

Chairman ROE. Thank you. Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman. Ms. Estlund, has the authority of the NLRB to issue substantive regulations been upheld by the courts? Your testimony said that the courts have actually encouraged NLRB to use more rulemaking.

Could you tell us what why this is so?

Ms. ESTLUND. Yes, certainly. Commentators across the spectrum have encouraged the Board to make greater use of its rulemaking powers. The court has specifically upheld its rulemaking powers. And I think this particular rule, I am kind of amazed that it has become controversial at all. The National Labor Relations Act is the only statute as to which there isn't already a requirement that employers post notices informing workers of their rights.

Now, of course the issue of the content of the posters is something that will be discussed in the rulemaking proceeding but the contents that has been proposed seems to me quite a fair, balanced, and concise description of what employees' rights are. Some of the particular omissions that Mr. Miscimarra referred to are only relevant once there is a union in place.

It might be actually more important, given the very low percentage of workers who are involved in unions, to alert workers to their rights in general. All workers have rights under the National Labor Relations Act.

So I think it is an excellent example of the Board's power under section 6 of the Act to pass rules in order to further the purposes of the Act.

Mr. KILDEE. Thank you. Historically, the National Labor Relations Board has operated under both Democratic and Republican administrations, it was passed in 1935 under the Wagner Act, it was operated under both those administrations to uphold Federal law.

Professor Estlund, how have the recent decisions of the Board been consistent with rulings from previous administrations?

Ms. ESTLUND. Well, the decisions that I have seen, very few of them have been, have departed remotely from prior precedent. They have simply carried forward the mission of the Board. None has squarely overruled precedent as best I can tell. I am quite sure about that. They have shown a renewed focus on enforcing employees' rights under the Act. That is in the nature of the process in which different administrations bring different focus to their approach to the Act. But they seem to me to be very careful, very meticulous, and very consistent with existing board precedent, and in some cases, the reception that the Board has gotten from the courts to some of its decisions and efforts by the past general counsel. So

I think it has been actually a model of the Board's role in enforcing its statutory authority.

Mr. KILDEE. Can you discuss with us how the National Labor Relations Board has operated in a more open and transparent process compared to previous years?

Ms. ESTLUND. Well, I think the effort to use rulemaking is one example of that. Rulemaking is a model of open and relatively transparent decision making. They may or may not do that in future cases, we don't know. But I think the invitation of briefs in several cases is a very good example of something that given the Board's authority to make policy judgments in the course of deciding cases, it is a good idea to solicit a wide range of views when there are those policy issues raised.

Now we shouldn't prejudge the Board's decisions on those policy issues. All of the rather alarmist discussion recently about what might happen down the line, we have to remember the Board hasn't even ruled in these cases yet, and if it does, its rulings will be subject to judicial review.

Mr. KILDEE. And the changes in different views that we receive reflected in NLRB, these are found in every agency, are they not? These are not unique, these are people or even in courts, you find permutations.

Ms. ESTLUND. Yes. And given the fact that Congress has not made any significant amendments to the core of the Act since 1959, one can make an argument for 1947 on that score, the Board's policy-making authority and efforts to keep the Board law up to date to the extent that the statute allows that, is really important.

The Board was set up to reflect to some extent changing political determinations by the people. And so it has had some oscillation back and forth. Nothing that this board has done or proposed to do seems to go beyond the historic modest back and forth in a narrow range of issues.

Mr. KILDEE. 1947 was the Taft Hartley law.

Ms. ESTLUND. Yes, that was a big change. In 1959 there was some significant but not huge changes. Since then, the changes have been relatively minor other than the health care amendments were significant for the health care industry but not the Board.

Mr. KILDEE. Thank you very much for your testimony.

Chairman ROE. Thank you. Mr. Thompson.

Mr. THOMPSON. Thank you, Mr. Chairman. Thanks to the panel for bringing your expertise on this issue today.

Mr. Miscimarra, I am looking at something that the Board did on August 27, 2010 when they requested briefs on the Dana Corporation, commonly referred to as the Dana/Metaldyne and Dana/Metaldyne the Board modified its recognition bar principles giving employees and rival unions 45 days in which to demand a secret ballot election if their employer voluntarily recognized a union.

Now, according to the NLRB, as of August 18, 2010, the NLRB has received 1,111 requests for voluntary recognition notices, 85 election petitions were filed and 54 elections were conducted. In 15 of those elections, employees voted against voluntary recognized unions, including two elections in which a petitioning union was selected over the recognized union.

And here is my question. That was kind of background.

If the NLRB reverses Dana/Metaldyne, what recourse would employees have if their employers agreed to recognize a union based on authorization cards?

Mr. MISCIMARRA. In your question is really the answer, Congressman. What is happening in these cases is an employer has made the decision in extending voluntary recognition to the union and employees have not had an opportunity to have what governs the political process in this country, secret ballot election. And so in the situation that you have just described, you have an employer that makes the decision to extend voluntary recognition, and we have already seen a significant number of employees subsequently pursuant to the opportunity afforded them in Dana/Metaldyne to turn around after they receive a notice of voluntary recognition, they then have 45 days in order to, they have a window in which to submit to file a decertification petition.

If that window is taken away from them, then you are in a situation where the employer has made a decision to extend recognition to the union, you have employees, at least a showing of 30 percent of employees, who have expressed an interest in decertification, and they don't have the opportunity, the decertification petition will be dismissed if the precedent established by Dana/Metaldyne goes away.

Ms. ESTLUND. If I could just answer the Congressman's question directly, after 1 year, if there isn't a collective bargaining agreement, the workers can always vote out the union, and I would like to point out the numbers, 99 percent of the cases in which a Dana notice was requested have resulted in no change. It has been a very, very tiny percentage of workers that, in which this made any difference.

Mr. KING. If I may, Congressman, that is exactly the point. Why are we reconsidering this well-thought-out, and, well-established principle? This board has asked for briefs on this issue. It has given every indication it is going to overturn this basic right of employees to vote on whether they want this particular arrangement to go forward or not. That is one of the reasons why we are here today. Why are we even spending time revisiting that issue? Your question is an excellent one.

Mr. THOMPSON. My second question is kind of an issue that you had raised, Mr. King, before and I wanted to get some follow-up from you and Mr. Miscimarra, and it had to do with the NLRA provide that it is unlawful for a union to quote threaten, coerce or restrain a secondary employer not directly involved in a primary labor dispute with the objective of forcing or requiring any person to cease doing business with any other person.

However, in this specific incident I point to, is in the United Brotherhood of Carpenters and Joiners of America, local 1506, the Board held that the unions may display large stationary banners including, and you describe mock coffins and skeletons also was used in another situation, inflatable rats in front of a neutral employer's business.

And in light of this holding, what is left of the prohibition against secondary boycotts? And frankly, how does this affect employers?

Mr. KING. Mr. Thompson, I think in large part, I would disagree with my colleague. The Board has really read out of the statute any secondary activity. There are some limits, I would concede that.

Another important point here is the Board not focusing on the truthfulness or lack thereof of some of the statements that go with the inflatable rat, inflatable cockroach, the coffins, the skeletons. In fact, in the jobs issue, this type of activity is designed to put businesses on point if they don't go to the direction that the labor union in question wants them to go to, they are out of business. It is pressure. It is just pressure. But they are secondary. They are not even involved in the dispute in the first instance.

Mr. MISCIMARRA. If I could add to that, Congressman, what is happening in these cases, we are using the term "neutral," we are talking about union pressure and including these large banners, 4-foot by 20-foot banners that are being set up in front of an employer with whom the union has no dispute. So this is all secondary pressure that is directed towards employers that don't even have a dispute with the union except the union wants to pressure somebody else.

And if you were a union representative after these cases have been issued, and if you have a dispute with me, I do business with eight other people, and you want to pressure me by setting up big displays and banners at eight different places for eight different companies who themselves don't have any dispute with a union, your choice is to go up with small picket signs and have people walk around in front of the eight different establishments, and that would be declared unlawful, or you could get a 20-foot banner, put it up at eight different establishments, and that would be declared lawful.

I think that goes against the grain of provisions in the act that weren't simply added to the act in 1947. The Congress two separate times, in 1947 and 1959, devoted significant attention to the act's secondary boycott provisions, and I think these banner cases really do violence to the scheme——

Chairman ROE. Commissioner, can you wrap that up?

Mr. MISCIMARRA. Yes, thank you. That has been long established.

Mr. THOMPSON. Thank you, Mr. Chairman.

Chairman ROE. I would appreciate it if you stay to the 5-minute, Mr. Holt.

Mr. HOLT. Thank you, Chairman Roe.

I would like to direct some questions to Ms. Estlund. Actually, first of all, since the ranking member began our attention to our alumni allegiances, I would like to point out that I was a graduate student at New York University, relevant to the discussion here, although my time there preceded any litigation, and I was not in the law school, rather in the physics department.

I would also like to point out hanging on the wall over here the portrait of Mary Norton, chairman of this committee in the 1930s, who oversaw the passage of the NLRA, the Fair Labor Standards Act and other such important legislation.

Ms. Estlund, you commented that the rulings, meaning both the adjudications as well as the rulemaking, in the last couple of years or last year hasn't really broken new ground, and I think—I do

want to make sure that I am clear that you say that the law is really quite stable.

And I wanted to talk about the posting of employee rights. As you understand it, this is not breaking new ground either in requiring posting or in what is being posted. For example, it says under the NLRA, you, whether you are a union member or not, can form, join or assist a union, bargain collectively, discuss the terms of your employment with coworkers, take action to improve your working conditions, or choose not to do any of these activities.

Your employer may not prohibit you from soliciting for a union during break time, question you about your union support, fire or demote you in connection with that, prohibit you from wearing T-shirts, spy on you for peaceful activities; and the union may not refuse to process a grievance if you have criticized union officials not being a member of the union, and so forth.

Am I clear that this is pretty standard established language?

Ms. ESTLUND. It seems to me to be clear and balanced and about as much information as you could get on a poster that workers are supposed to be able to read and understand. If there are particular problems, this is exactly the kind of thing that people can comment on in rulemaking, but it strikes me as a very balanced presentation of the law.

Mr. HOLT. What is the importance of having something like this in light of the 6-month statute of limitation on seeking enforcement of one's rights, also in light of workers' level of knowledge about their rights?

Could you say something about what has—you know, from opinion polling or other sources, what workers know about their rights, and what we know about employers' statements or misstatements about workers' rights?

Ms. ESTLUND. Well, there is a lot of research on workers' misunderstanding and lack of understanding of their rights. I, myself, with my entering employment law students have often conducted a little poll to see what they know about the law. And the one thing they are most wrong about, of all the employment issues that might arise, is rights under the NLRA.

And, in fact, there is a lot of evidence that employers, especially small employers, don't know about rights under the NLRA, especially with respect to nonunion workers.

So every once in a while there is a—you know, an alarmist article from management lawyers saying, employers, be aware, your employees may have rights even if there is no union organizing on the scene. And it is clear that many employers don't know what the law is under the National Labor Relations Act.

Mr. HOLT. But that has been the law since 1938; has it not?

Ms. ESTLUND. That has been the law since it was passed in 1935.

Mr. HOLT. 1935, I beg your pardon.

Ms. ESTLUND. I think it is kind of an embarrassment that the only significant Federal employment statute that we have that doesn't include—it doesn't have to be presented to employees so that they recognize their rights is the National Labor Relations Act. And as you point out, given the unusually short statute of limitations period that workers have to file complaints under the NLRA, that is particularly concerning.

Mr. HOLT. Now the, OSHA, Fair Labor Standards Act and others require postings. Is there anything peculiar to the NLRA that would forbid postings, or is there anything about the structure of the law that would make postings unsuitable?

Ms. ESTLUND. Not at all. In some of the statutes, the notice posting is explicit, but under the Fair Labor Standards Act, for example, which is also one of the early New Deal statutes, it was put into effect by regulation first, I believe, in 1949.

So this has become standard practically because it is so obviously important in order to enforce rights under these statutes that workers be made aware of their rights.

Mr. HOLT. Thank you. Thank you, Mr. Chairman.

Chairman ROE. Thank you.

Dr. DesJarlais.

Mr. DESJARLAIS. Thank you, Chairman Roe, and thank you, panel, for your thoughtful testimony today.

Mr. Miscimarra, I would like to start with you mainly because I empathize with a difficult last name.

Mr. MISCIMARRA. Yes.

Mr. DESJARLAIS. The Board has issued a number of significant decisions governing employer issues ranging from employer speech to NLRB jurisdiction. Looking forward, what can we expect from the Board in the next 10 months?

Mr. MISCIMARRA. Well, you know, I brought my crystal ball with me today, and that is a very difficult question to answer. I think the one point that Professor Estlund made is that the number of the things that we have discussed today involve rulemaking and pending decisions where there has not yet been a resolution.

But, you know, I think the most reliable indication of what the current Board may do prospectively is to look backwards. And there are a couple of unique things that relate to the context which surrounds many of these things right now. You know, first of all, there has been—as most people know, there is a significant backlog of cases that confronted the Board because there was a 2-year period where the Board was down to two members. And when with the two members were Chairman—excuse me, Peter Schaumber and Chairman Liebman, they didn't resolve controversial cases, so those really were backed up to the Board.

And then the other thing that I think is one of the reasons, from a contextual perspective, that there is some concern right now is looking backwards, there are dozens, three dozen or so, decisions that were issued during the Bush administration where all of the Democratic Board members dissented, all of them, and many of those are very important decisions. And if the current members who are in the majority—the Democrats are in the majority—decide those issues the same way in new cases, then we could be looking at very significant changes in the direction and focus of the act that would be different from what at least I have experienced in the 28 years I have been practicing.

Mr. DESJARLAIS. Thank you.

Mr. ROSENFELD——

Mr. ROSENFELD. Yes, sir.

Mr. DESJARLAIS. The acting general counsel directed regents to consider using uncommon remedies with greater frequency, includ-

ing notice readings, giving union names and addresses of employees, and access to company bulletin boards.

When you held this position, did you have a policy with regard to uncommon remedies; and, in follow-up, are these remedies effective, and when should they be used?

Mr. ROSENFELD. Well, our policy with these remedies basically was that these remedies are extraordinary remedies and only to be used in cases where extraordinary remedies were called for. The difficulty with the new approach is what heretofore have been extraordinary remedies will become routine, and it will, at least according to what has been suggested in the memorandum—it would require an employer, for example, to open up his workplace to an outside third-party union organizer and allow that union organizer perhaps to give speeches on the employer's premises and on and on. So these remedies are extraordinary.

And though we have used these remedies, some of these remedies, in the past, we have only done it in cases—I hate to mention a recidivist company, but J.P. Stevens, for example, in the 1980s, okay, was considered to be a recidivist employer, well before my time. But these types of remedies were used with that type of situation.

Ms. ESTLUND. Could I just point out that the current memo does suggest that those sorts of remedies that Mr. Rosenfeld just mentioned would be for pretty extraordinary cases, and the Board has to pass these rulings through the court. The courts will decide whether it is an appropriate case.

Mr. DESJARLAIS. Thank you.

Mr. Chairman, I yield back my time.

Chairman ROE. Thank you.

Mr. Hinojosa.

Mr. HINOJOSA. Thank you, Chairman Roe, and thank you, Ranking Member Andrews.

In the current economic recession, I believe that it is vitally important that our Nation protect the rights of American workers. It is my opinion that to achieve this goal, the NLRB must be allowed to do its job effectively.

I would like to ask two or three questions of Professor Estlund.

The NLRB proposed a regulation to require posting of notices of employees' rights under its rulemaking authority in section 6 of the NLRA, and we have been discussing that, but I want some clarification. Is this an overreach by the NLRB?

Ms. ESTLUND. In my opinion, it is very long overdue. I think, again, it could hardly be surprising to propose that for workers' rights under the act that Congress has put in place to be enforced, workers need to know about their rights under the law, and we really have very good reason to believe that workers are quite ignorant of their rights under the National Labor Relations Act.

Mr. KING. If I may, Congressman, I would agree. I think reasonable people can differ as to what the notice says. The dispute is what the notice says, how it is articulated, how broad it is, whether employees have the right, as my panelists said, to decide whether they wish to join or not to join, and whether they wish to vote in or vote out, whether they wish to decertify, if you will, and whether

they wish to pay dues or not to pay dues. In right-to-work States the notice is lacking considerably.

So it is the content, by and large, where I think we are having our differences.

Mr. HINOJOSA. Thank you, Dr. King.

Professor Estlund, from your bio, I can see that you have a very impressive background in labor law. In your expert opinion, are the current policies for the decisions reached by the NLRB well within the bounds of our Federal law?

Ms. ESTLUND. Yes, I think they clearly are, and I actually haven't heard anything today from any of the witnesses that suggests that they have really gone beyond their statutory authority.

Take, for example, the stationary banner case that has gotten a lot of attention. At least five Federal courts have refused to issue injunctions against stationary bannering, somewhat similar to this, stationary displays, on free speech grounds or on statutory grounds that are informed by unions' free speech rights.

Nonpicketing publicity, the Supreme Court has said in a couple of decisions, is within the First Amendment. And so it seems to me responsible and appropriate for the Board to respond to that, again, without overruling any of its prior decisions, by recognizing that these stationary displays, without any patrolling, without any effect of causing a work stoppage or any such thing, are within the free speech rights and within the room that the statute affords for this kind of publicity.

Mr. ANDREWS. Would the gentleman yield, Mr. Hinojosa?

Mr. HINOJOSA. Yes, I will yield.

Mr. ANDREWS. If I could just follow up on one of your questions of Mr. King. If I understand your answer about the rulemaking that if the content of the poster were satisfactory, you have no objection to the actual rulemaking itself?

Mr. KING. Rulemaking has a place.

Mr. ANDREWS. You think it has a place here?

Mr. KING. Yes.

Mr. ANDREWS. Thank you.

I would yield back to Mr. Hinojosa.

Mr. HINOJOSA. Thank you.

The Board has solicited amicus briefs in five pending cases before it from potential interested parties. Do you think, Professor Estlund, that it is better for the Board to have increased openness and transparency and invite multiple perspectives before deciding important cases?

Ms. ESTLUND. I think that would be—that would obviously be a move forward. I think the past Board, for example, exercised its authority under the statute. It overruled a very large number of precedents, including some precedents that had existed for decades. In some of those cases, they didn't take the opportunity to solicit a full range of views.

So I think this Board, having solicited views in a handful of cases—and we don't know what direction they are going to go on those cases—that is only a good thing.

Mr. KING. If I may, Congressman, per the ranking member's questions, rulemaking, as opposed to just filing amicus briefs, is certainly preferable. More rights, more protections proceeding in

that manner. The filing of the amicus brief, frankly, has been given a lot of attention by the Board. While it may be important, it is not a good substitute for the protections and procedures of the merit——

Mr. HINOJOSA. It wasn't meant for it to be a substitute. It was prior to actually having hearings and so forth so that they could get a better understanding of their case.

It looks like I have run out of time. I yield back.

Chairman ROE. I thank the gentleman.

Mrs. Noem.

Mrs. NOEM. Thank you, Mr. Chairman.

I am from the State of South Dakota, which obviously is a wonderful State, but very cold this time of year. But we have our right-to-work State, and we are also one of the four States that recently passed the constitutional amendment that would protect a worker's right to a secret-ballot election and a union election. So these conversations have been going on in our State over the last year or 2 and have been very important to us, and we have a community and a population that is very well aware and concerned with these issues.

So I appreciate the discussion that all the witnesses have brought to the table today. Actually when it did pass the legislature. I served there in that body as well.

So I know we have discussed the idea of preemption, but my question is specifically for Mr. Rosenfeld. You know, in your previous role, I think you have some insight that would be very good for our subcommittee, and I would like to ask you your opinion on does the NLRA preempt State anti-card-check legislation, constitutional amendments, and what would have to be done to protect an employee's right to an election free from coercion, from intimidation and from irregularities?

Could you tell me—give me your personal opinion on that? What would have to be done to protect employees in those situations and those elections, and what specific insight do you have considering your previous role?

Mr. ROSENFELD. Well, you know, we have discussed here briefly the benefits of the Secret Ballot Protection Act, okay, passed by Congress, Federal Congress.

But employees are protected. They are protected not necessarily in terms of what process is used, but they are protected by the act itself and by the National Labor Relations Board, and that is the purpose of the Board is to administer the act. It is not necessarily to set labor policy. You all set labor policy.

Therefore, if an employee—if a petition is filed for an election, for example, the Board has been very vigilant in making sure that laboratory conditions are adhered to and during the critical period certain conduct which is impermissible is remedied.

The problem I have with your question, quite frankly, is I don't feel competent to opine specifically on the merits of whether or not what South Dakota has done, okay, violates the Constitution.

But what I said before is that I am pleased to see that the Board, if it believes that it is preempted, that conduct is preempted, I am pleased to see that the Board has gone forward this quickly to raise those issues. And then what I said before was I hope they do the

same thing in other types of issues, because over the last 10 or 12 or 15 years, there has been an attempt by organized labor to Balkanize the Board, to get back to prior to 1935, because it is easier to get States and municipalities and localities to pass certain sorts of neutrality provisions, for example, to muffle an employer's voice.

When I was general counsel, we tried to be very vigorous in opposing those sorts of things. I mentioned before that in one of the hallmark cases, which was decided as Chamber of Commerce v. Brown, for the Board to authorize me to go forward, there was still a dissent, and one of the dissents was by current Chairman Liebman.

And so I hope that if that type of case were to come up again, and the general counsel were wise enough to seek authorization, that Chairman Liebman would vote to authorize going forward, not necessarily in your particular case, but in other types of cases.

Ms. ESTLUND. Could I just add on, 15 seconds, there are hard cases under preemption, and there are easy cases under preemption. The Brown case was a hard case because obviously States have some power to control the use of their own funds and make sure they don't get misused. And so that was a hard case. That is why it went to the Supreme Court, and the court below had reached a different decision.

In this case Mr. Rosenfeld has declined to opine, but I feel comfortable opining. This is a pretty easy case. Congress has the power to change the law. But under the law as it exists, these State enactments are preempted.

Mr. ROSENFELD. If I would argue just quickly that there are hard cases and easy cases, but when you get a 7-2 Supreme Court decision saying something is preempted, that is darn close to being a slam dunk.

Mr. KING. If I may, the California case was a State statute. We are talking about a constitutional amendment. Put aside where we may be in the law. As a matter of policy, does it make sense for a regulatory agency, whether it be the NLRB or any other agency, to tell a State where an overwhelming number of their voters have passed a proposition, have passed a constitutional amendment, that it can't, in fact, go into effect?

I am glad to see that the acting general counsel has withdrawn his initial letter. Perhaps there will be some thoughtful dialogue. But this does pose policy issues that need to be thought out.

Chairman ROE. Thank you.

Mr. Tierney.

Mr. TIERNEY. Thank you, Mr. Chairman.

Mr. Chairman, I can't help but think that Mr. King was mentioning he thought that the Board was taking a lot of its time up with things it probably shouldn't be considering. And I am looking at what we are doing here today, how many unemployed Americans are sitting home watching this hearing when we are sitting here doing things that really don't make a lot of sense.

This is an extraordinary gripe session, I guess, for the employers' labor bar. They are complaining about First Amendment rights and have clearly decided it is a free speech issue, but we are going to complain about it today anyway. The apparently unbelievable bur-

den of actually e-mailing a notice out, that must be working people up to a real sweat.

The decisions of how work—that workers can wear a T-shirt with an insignia on it, I am glad we are spending a lot of time on that one. And the fact that people have got amicus briefs to help them inform a decision, all these pressing matters, you know, certainly aren't helping anybody in this country get a job, or get back to work, or even get a wage that is decent and sustain their families.

But one issue that we talked about, I would like to talk a little bit, is one of the witnesses questioned whether it is uncommon or bad policy to overturn precedents with recess appointments, well, when you have fewer than five Senate-confirmed Board members. The disturbing part about that question, because we have a totally dysfunctional Senate going on where certain obstructionists could, I suppose, by not ever confirming or letting them——

Mr. KLINE. I ask unanimous consent that we agree to that.

Mr. TIERNEY. No objection.

I mean, they could just do as they were doing and obstruct, and you would never get five members on the Board, and therefore you would basically freeze out the Board's action on that.

So I want to just question the professor here a second. Isn't it a case that Board members who were seated through Presidential recess appointment have the same authority as ones who were confirmed by the Senate?

Ms. ESTLUND. They do.

Mr. TIERNEY. All right. I mean, President Eisenhower appointed William Brennan to the bench, Earl Warren to the bench, Potter Stewart to the bench by recess appointments. Their decisions were as effective as any judge that was on the Supreme Court that was appointed and approved by the Senate; is that right?

Ms. ESTLUND. Yes.

Mr. TIERNEY. All right. So, it doesn't—I don't understand quite why we are spending a lot of time worrying about recess appointments. It is still the reverse of past precedent. They are still requiring three votes, right?

Ms. ESTLUND. That is right.

Mr. TIERNEY. On that. So do you see any notion of this being a dangerous thing that is going on here?

Ms. ESTLUND. I don't. I think the law is pretty clear. Section 3(b) of the act says a vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board.

The practice has been not to overrule precedent when there are not three votes, at least three votes, to do so, and that—and nothing the Board has done has departed from that traditional practice. So the Board has many times voted to reverse prior decisions in the rare cases when it has had only three members, as long as all three of them went along with that.

Mr. TIERNEY. Thank you for clearing that up. I yield back.

Chairman ROE. I thank the gentleman.

Mr. Rokita.

Mr. ROKITA. Thank you, Mr. Chairman. I want to thank all the witnesses as well.

Just to follow up to the last line of questioning, I would make a comment for the record that this is all about jobs. When you are

talking about businesses that are trying to grow them and manage their internal affairs—we are talking about unions, for that matter, trying to do the same thing—not having certainty about these kinds of things is very detrimental, especially when you are talking about an activist Board like, in my opinion, we are talking about.

A couple of questions. The Board has issued a number of significant decisions. This one is from Mr. King. It has requested briefs on a wide array of controversial issues and proposed substantive rulemaking that will affect almost all private employers. At the same time we have an acting general counsel-issued memoranda addressing remedies during union organizing, the scope of Board deference to a contract arbitration award, and the use of default language in informal compliance settlement agreements. How has this active agenda affected your dealings with regional NLRB offices and employees? Is there a general sense that regional employees are now acting more aggressively or not, or have they changed their behavior?

Mr. KING. Congressman, there is no question, and this is based on personal practice, experience throughout the country, that each and every regional office I have dealt with has felt great pressure from Washington to be more aggressive. That requires expenditure of more agency resources, which could be better utilized elsewhere; and, second, it requires the employer, frankly, to retain counsel if it can afford counsel and causes the employer to spend more resources.

With respect to jobs, how much regulation is too much? What we are talking about here is a full-out approach by the Office of General Counsel and the Board to change the law in a number of areas. I would differ with my colleague in that we have already had reversals with precedent, and what a lot of employers tell me is, Mr. King, I can't understand why the law keeps going back and forth and back and forth. How are we supposed to follow some national labor policy? How are we supposed to comply with the law? And we have this oscillation back and forth.

I think we would agree that it has been too much. And it does get to the point of why don't we get full five confirmed Board members as a matter of principle? Put aside whether we have had three in the past or four in the past voting, and go about it in a more thoughtful way, in a more uniform way.

Mr. ROKITA. Thank you, Mr. King.

Mr. Miscimarra, in your practice, and considering the last line of questioning, what is the potential cost to all these different changes to employers? What have your clients seen? Any particular data that you can provide?

Mr. MISCIMARRA. Well, I would echo the sentiments that were just expressed by Mr. King. You know, we are talking here about, in the case of general counsel initiatives, the general counsel plays a prosecutorial role and determines whether employers, where there hasn't even been an adjudged violation, are going to be in 3 to 5 years of litigation, frequently because the Board prosecutes complaints.

An employer ends up being the only party in litigation before the Board that is responsible for attorneys' fees, and the biggest problem that I have seen and the companies that I work with, every

day, end up talking about how can we make decisions because of the process that is associated with the Board, and much of it is unavoidable.

Mr. ROKITA. The uncertainty.

Mr. MISCIMARRA. Yes. It takes 3 to 5 years in order for Board cases to get to their conclusion, and people are making business decisions right now and hiring decisions right now that are heavily influenced by uncertainty about many of the issues we have talked about today.

Mr. ROKITA. Thank you very much.

This is a one-word answer for all four of you. I will set the question up by saying I am holding up a proposed neutrality agreement that was offered one of the employers in my district after he was called and visited by the regional NLRB office. A neutrality agreement, for the Record, of course, everyone here probably knows, contains language that not only makes the employer stay neutral as to any statements they made, but also got rid of the secret ballot.

The employer claims that there was a good cop-bad cop situation going on between the union and the NLRB. Is he reasonable in that accusation?

Mr. MISCIMARRA. I haven't experienced anything like that in my dealings with the Board.

Mr. ROKITA. Thank you.

Mr. Rosenfeld.

Mr. ROSENFELD. Possibly. I mean, I would have to see, you know, the facts to be able to make that determination. It is a possibility. You are dealing with, you know, 2,000 employees of the NLRB, and you are dealing with whomever in the union, and there could be—I can't say, categorically.

Mr. ROKITA. Is that a possibly? Thank you very much.

Ms. Estlund.

Ms. ESTLUND. I would have to know more about the facts, for example, whether this was a situation where the employer had a long record of violations. Without knowing——

Mr. ROKITA. No, he has got no violations. He has won every one of his cases.

Ms. ESTLUND. It sounds very unusual.

Mr. ROKITA. Mr. King.

Mr. KING. Assuming it did occur, I would hope and think the acting general counsel would stop it immediately.

Mr. ROKITA. Thank you.

Mr. ROSENFELD. Yes, if I may comment on that, that is exactly right. If there is a problem of that nature, somebody should get on the phone immediately with the General Counsel's Office.

Mr. ROKITA. I will recommend that. Thank you.

Chairman ROE. Thank you.

Mr. Scott.

Mr. SCOTT. Thank you, and I thank our witnesses for being with us.

Mr. King you have suggested several times the fact that these four States have passed constitutional amendments makes some difference in whether or not the laws ought to be preempted. Is it true that if it is a constitutional amendment, it is more protected from preemption than if it is a statute, or Executive Order, or regu-

latory rulemaking or any other way you can make State law, or are all State laws preempted by Federal law, however they come about?

Mr. KING. Mr. Scott, in any of those scenarios, preemption is a factor.

Mr. SCOTT. Whether it is a constitutional amendment or not.

Mr. KING. A constitutional amendment would have scrutiny just like a State statute, perhaps a different type of scrutiny.

Mr. SCOTT. And if it is clearly inconsistent with Federal law, then Federal law would preempt even if it is a constitutional amendment; is that right?

Mr. KING. The Supreme Court has spoken to that issue, yes.

Mr. SCOTT. And what did the Supreme Court say?

Mr. KING. The Supreme Court, at least in the Brown case, said that we have a uniform set of Federal labor laws, and that this body and the other body, when it has passed legislation in that area, preempts as a general rule State and local initiatives.

Mr. SCOTT. And if the NLRA allows voluntary recognition, and the State Constitution prohibits voluntary recognition, would not the State—would not the Federal law preempt the State Constitution?

Mr. KING. It may. You know, Mr. Scott, what is really troubling me here is the State of Oregon, for example, right now, has enacted a statute that won't permit, apparently, employers to have so-called required meetings with their employees. I haven't heard the National Labor Relations Board of the Office of General Counsel say one word about that.

Mr. SCOTT. Well, my question was just because it is a State's constitutional amendment doesn't make any difference.

Mr. KING. I understand.

Mr. SCOTT. I think you have acknowledged that. We have heard in another testimony that seemed to imply that an employer could pick any union that it wanted without regard to the workers' desires.

Ms. Estlund, when with the employer voluntarily recognizes a union, do they pick this union out of the blue, or how does the union come to the employers' attention?

Ms. ESTLUND. No, it is very clear that employers are only allowed to recognize and collectively bargain with the union that represents a majority of the employees. Now, in the recent Dana II case, a decision that was welcomed by many employers, the Board said the union and the employer can have some discussions to put out a framework so that the employees, when they are making that choice whether to select a union, will know a little bit about what they might be getting into. But that was not recognition, and it was not collective bargaining. That requires majority support from the employees.

Mr. SCOTT. So when the employer recognizes a union, it is a union that has demonstrated majority support within the bargaining unit?

Ms. ESTLUND. That is right.

Mr. SCOTT. It is my understanding that about over 2,200 employees were reinstated because they were victims of unfair labor practices. Are you familiar with many of those cases, Ms. Estlund?

Ms. ESTLUND. Yes. And I was struck by the rhetoric about the current Board and general counsel's aggressive approach to the law. Yes, there has been a more assertive approach to enforces employees' rights, but aggressive is exactly the term that has been used repeatedly by scholars to describe the very typical employer approach when they learn that one or more of their employees may be interested in forming a union.

This is a key right. The central right in the act is the right of employees to decide whether or not to join a union. That right requires, yes, aggressive enforcement, given the aggressive response that employees very often meet when they attempt to organize a union.

Mr. SCOTT. And can you describe some of these cases so we know what we are talking about?

Ms. ESTLUND. Well, without describing any particular cases, discriminatory discharges of union activists have become quite common. Threats of plant closing, threats of job loss, these kinds of threats that the Board and the Supreme Court have repeatedly condemned, have become almost routine. In fact, there is a whole industry of management consultants that advise employers how to hold captive audience meetings, repeated one-on-one meetings between employees and their supervisors to impress the views, the employers' views, upon the employees.

The comprehensiveness and aggressiveness of these campaigns has become pretty common knowledge, I think, among—I am not saying all employers do this, and not all employers violate the law, but it has become all too common, and it does require a very assertive remedial response, given the rights under the act.

Mr. KING. Mr. Scott, I only would add that I know of no employer that actively goes out and violates the law. I don't know of anyone that we represent that goes out and discharges union activists. To the contrary, they are protected in their activities under the statute, as they should be.

Chairman ROE. I thank the gentleman.

Mr. Barletta.

Mr. BARLETTA. Thank you, Mr. Chairman, and I would like to thank the Board, the panel for coming in and taking your time today.

To follow up on an earlier question dealing with uncommon remedies, my question is to Mr. Rosenfeld. If a union decides to use one of these uncommon remedies proposed by Mr. Solomon, mainly giving unions the names and addresses of employees, what protections do the employees have, and shouldn't this be a concern for the privacy of those employees?

Mr. ROSENFELD. Under current Board policy there is something called an excelsior list, which has to be provided by the employer, incorporating names and addresses of the unit employees, I think, 7 days before an election. Is that correct?

The reason why this list is provided only 7 days before an election is basically to protect the privacy and sanctity of the employees. Organized labor, unions, can go to an employee's home—of course, an employer can't do that. They can go to wherever an employee may be having a drink after work.

The only protection would be for an employee, okay, to claim that he was coerced by union activity. The problem with that, of course, is that these are the fellows you work next to, day in and day out. It is a very difficult situation to be put in.

Ms. ESTLUND. It is worth mentioning that this name—that the names and addresses would only be made available. This is one of the remedies that would be made available in cases where employers have already violated the law and shown that they are not respecting employee rights.

Mr. BARLETTA. Mr. King, drawing from your professional experience and past work with the NLRB, how truly assertive is this current Board specifically in terms of their interpretation of precedent and their willingness to overstep traditional boundaries in asserting their authority?

Mr. KING. I think quite activist, Mr. Congressman, and that is why we are here today.

I know that you can put anything on a spin basis, but they are just deciding cases, they are not going outside of the parameters of past Boards, that is simply not correct. What this Board has done recently is ask for amicus briefs more times than have been asked by a Democrat or a Republican Board in my history, in my memory.

Second of all, this is only the third time in the agency's history that it has engaged in rulemaking. That is certainly not the norm.

Further, to the contrary of what has been said today, this Board has already reversed precedent. Further, it has teed up, if you will, another very important question, including in the specialty health care case, in question number 7 and question number 8, how we go about determining who is in a voting unit and who ultimately might be in a bargaining unit. That is nowhere on that case. But just the ramifications of that, to perhaps turn upside down our whole Nation's labor laws on selection of the bargaining or voting unit approach, is very troubling.

So for anyone to suggest that this Board is not an activist Board and its general counsel is clearly wrong. Now, we can disagree about where this Board comes out, where this general counsel comes out, I would concur. Decisions are still yet to be made. But you have to look at this objectively and walk out of this room today and say, yes, this Board is extremely active, and this committee, I would submit, needs to be concerned.

Mr. BARLETTA. Mr. Miscimarra, drawing on my question to Mr. King, on December 21, 2010, in a rare exercise of formal NLRB rulemaking, the Board published a Notice of Proposed Rulemaking requiring almost all covered employers to post a notice of employees' rights in the workplace.

My question is does the Board have the authority to do this?

Mr. MISCIMARRA. I think the Board does not, and this is an issue, Congressman, that I have already addressed to some degree. But, you know, the Railway Labor Act, I think, was passed in 1926. It has a notice-posting requirement. The National Labor Relations Act was passed in 1935. It does not.

Congress makes the decisions when you insert in laws whether they have notice-posting requirements or other requirements, and I haven't heard anything that I have found to be convincing to sug-

gest that the Board should make that determination rather than Congress.

Mr. BARLETTA. Thank you.

Chairman ROE. Mrs. McCarthy.

Mrs. MCCARTHY. Thank you, thank you, Mr. Chairman.

Mr. Rosenfeld, I know when one of my colleagues asked you the question on whether you believe that anti-card-check State law is preempting, I really don't think you answered the question correctly.

Now, I know Mr. King tried to answer that question, too, but looking at the statute of the State of South Dakota, which one of my other colleagues had talked about, basically what they are saying, that in their legislation was the rights of individuals—this is put up—the rights of individuals to vote by secret ballot is fundamental. If any State or Federal law requires or permits an election for public office, or any initiative or referendum, or for any designation, authorization of employee representation, the right of any individual to vote by secret ballot shall be guaranteed.

So with that being said, do you think that you would want to reanswer the question on anti-check State laws preempting the Federal?

Mr. ROSENFELD. No, I wouldn't, but I am going to, okay.

No, what I try to say is that on its face there is no question in my mind that the language read that way should be preempted.

However, again, there has been a letter sent by the four attorneys general referring to how that language is going to be interpreted, such that it would not be preempted. At least this is an argument being made by the acting general counsel. And so I would not opine on whether that is correct or not correct because that is beyond my purview.

But I wasn't trying to avoid the language that you read. I would say definitely. I mean, that is clearly—but it depends on how it is enforced and how it is administered.

Mr. KING. I would only add, Congresswoman, I think this shows how concerned certain States are, and they are really almost begging, I think, the Congress to say, let us get into this discussion, and if it is preempted, let us have some clear guidance on it. This is extraordinary to have these many States pass these type of constitutional referendums.

Mrs. MCCARTHY. Well, I am going to disagree with you just on one level. Basically I think an awful lot of States are antiunion, and, in my opinion, when they are antiunion, they are actually antiworker.

When you see how many—unfortunately, workers, whether it is unionized or not unionized, we still have the high rate of people that die on the job. We still have a high rate of people that are seriously injured. And I think that is why, when you start looking at why so many of us try to defend safety, work safety, anything—listen, there are a lot of good employers out there, and they take their job very seriously on protecting their workers. We also know there are an awful lot out there that do not treat workers as human beings.

I come from a family that were all union, hard-working people; gave us, myself, a chance to move up into middle-income families.

So when I hear people talk about unions like they are not human beings or they are not good people, I get very upset, because you are talking about my family. And so with that being said, that is why I believe that the NLRB, the Board, is doing the best they can to protect workers.

Now, I know, I have watched you answer an awful lot of the questions, Ms. Estlund. Would you like to also answer to what we have been discussing?

Ms. ESTLUND. Well, I do think that we need to recognize that we have—we do have a serious unemployment problem. We have a serious problem in the economy. Many other countries, Canada and Europe, have weathered the recession better, and they do happen to have significantly higher levels of unionization.

I am not suggesting that that is the entire explanation; there are many differences between how different countries run their economies and their labor relations. But clearly one problem with declining union density that many economists have pointed to is that it has eroded purchasing power in the middle class and contributed to increasing economic inequality.

So I would agree with you.

Mrs. MCCARTHY. Thank you.

With that, I yield back.

Chairman ROE. Thank you.

Mr. Ross.

Mr. ROSS. Thank you, Mr. Chairman.

I do want to point out there was an article and editorial in the Wall Street Journal 2 weeks ago that indicated that the 22 right-to-work States have much better economies than the remaining States. So I think there is some causal relationship between right to work and strong employment.

Ms. Estlund, I am intrigued by the preemption argument, and I have—I will admit right up front that I have a shallow understanding of the National Labor Relations Act.

But I also have a question, because it seems to me that this is a broad brush that we paint. And, for example, in the State of Florida, we have a drug-free workplace that requires certain requirements of the employee and obligations, of course, of the employer.

If, in fact, there was a union in the State of Florida that collective bargained so that their employees, their union employees, would not have to take the—or apply to the drug-free workplace, would that be an adequate preemption of the NLRB's jurisdiction over the State of Florida so that you would have nonunion employees subject to the drug-free workplace and the union employees who have collective bargained not?

Ms. ESTLUND. No, preemption is not that broad. There is a domain of State authority over many of these issues, and collective bargaining may be constrained by it——

Mr. ROSS. So you would agree, then, that there are certain States' rights that would allow for the absence of a Federal preemption under the NLRB?

Ms. ESTLUND. Certainly. States have power in the workplace arena generally. It is in the labor relations context particularly that preemption is so very broad.

Mr. ROSS. Speaking of the Employee Free Choice Act, Ms. Estlund, do you have an opinion whether any of the provisions of that act could be administered strictly through rulemaking authority absent congressional intervention?

Ms. ESTLUND. I don't think any of them could be enacted as written, not even close, no.

Mr. ROSS. So that the secret ballot would only then be allowed through congressional legislation?

Ms. ESTLUND. To ban the use of card check, in other words, to prohibit employers from recognizing a union on the basis of card check, that would definitely take congressional action because that is a right that the Supreme Court has recognized, that the Bush Board in 2007 recognized, the right of employees to seek voluntary recognition on the basis of cards. So that would require congressional action, yes.

Mr. KING. Congressman, if I may, you touch upon a very important point. That is one of the concerns the employer community has about this Board, whether a number of provisions that were put forth in the Employee Free Choice Act might, in fact, result from this Board's activist agenda.

By the way, the Lakeland Regional Medical Center is a client, and you have a great community.

Mr. ROSS. Yes, we do. Thank you.

Ms. Estlund, about the publication of notice, I note that the notice is not inclusive; in other words, it is incomplete of all the rights, would you say?

Ms. ESTLUND. Well, it is incomplete in the sense that there are 75 years' worth of decisions elaborating these rights, and it struck me as a very fair-minded summary in a way that could be understood by employees, and it takes pains to recognize in every case that employees have the right to do these things, they have the right not to.

Mr. ROSS. Exactly. And I think in your opening comments you said that it is one of these things that should be uncontroverted and shouldn't have any problem being implemented. But yet don't you think that it should also include that the employees have the right not to form, join or assist in any labor organizations?

Ms. ESTLUND. I believe it says that. They also have the right not to engage. I am sorry, I don't have the actual text.

Mr. ROSS. I think you might want to go back and take a look at that, and also whether they also have the right to pay only a portion of union dues attributable to collective bargaining, contract administration and grievance adjustments.

Ms. ESTLUND. That is an interesting one because that right only becomes relevant once there is a union, and that notice is—some notice to that effect is already required.

Mr. ROSS. And so when he talk about rights, because that is what the NLRB is existing for is to make sure employees have rights, but then on the same token you have also got obligations. So if an employer wanted to make sure that, enforcing the rights of the employees, they also made known the obligations of the employees by way of performance and production standards, would you have an opinion whether it would be an intimidating communication and, therefore, an unfair labor practice if they were to

post, the employer were to post, notice of what was required of the employees in terms of production and performance?

Ms. ESTLUND. I think it is absolutely routine for employers to do that. They have the right to do that. They manage the workforce. They notify employees all the time in many forms, by orally, handbooks, rules. They have the power to do that already.

This is one effort to notify employees that they have some rights that sometimes are exercisable against their employers as well, because that is what Congress——

Mr. ROSS. Thank you. I see my time is up.

Chairman ROE. I thank the gentleman.

I will finish this up by asking a few questions, and basically, since it is my first day to chair, I want to introduce myself to the committee and just tell you I grew up in a union household. My father was a member of United Rubber Workers Union. I have been out on many strikes. I have seen that occur in my hometown. I also spent 30-plus years as an employer and working in—certainly on the medical industry side.

My good friend, the ranking member who just left, had mentioned in his opening remarks that the Board agreed 83 percent of the time and 67 percent of the time under Bush. Well, I would say it depends on what you are agreeing to.

I think the Republicans and Democrats have agreed pretty well to name post offices and congratulate Confucius, but it would be depending on what we were discussing that particular day. So I think major issues like that you will find some disagreement on.

I want to go where Mr. Ross was momentarily. You know, I don't know about you, if you have ever been in a workplace recently. In my office, the bulletin board looks like a NASCAR driver's suit with all of the stuff that you have to tell people about. I can barely read the statutes of Fair Labor Standards Act; Title VII, Civil Rights Act of 1964; Occupational Safety and Health Act; Family Medical Leave Act. But the NLRA does not require postings of those things, it does not require that. So this is an activist rulemaking, and I have gotten a lot of employer feedback about where is this going?

And, Mr. King, I would like for you—I know you are out there every day in the field working. Have you seen the same thing I have?

Mr. KING. Absolutely, Mr. Chairman. Where does it stop? And how much regulation does the employer, particularly a small business employer, have to put up with? How do you interpret what a class-action lawsuit standards might be these days? This activist OSHA group that we have now at the Department of Labor frequently has gone out on a limb in saying we are going to be very, very aggressive. Now they have pulled back perhaps a little bit recently.

So the employer community is at risk every day of a lawsuit from a private practitioner or from a regulatory agency. I mean, how much does this economy have to bear of this regulation is really, I think, perhaps what we are talking about.

Chairman ROE. I have seen numbers and so forth, and I would wonder, if I would just have an opinion from you all briefly, about why—because I absolutely agree with you that worker rights have

to be protected, but so do employer rights. Employers have rights also. And I wonder what your opinion is about why the public-sector unions are the only unions that are growing now.

And what worried me was my father lost his job in 1974 making shoe heels in a factory to Mexico because of one more strike that occurred, and they could do business less expensively somewhere else. And that is why that company left, and my father, at 50 years old, post-World War II, didn't have a job.

So I would look at that, and I would just like to solicit your opinion about that, what you think the reasons for, our decreasing private-sector unions?

Mr. MISCIMARRA. There are probably, Congressman—you can ask 10 people, and you will get 1,000 different reasons. But the one thing that I will come back to, and I mentioned this in my opening remarks, is the act was passed at a time where we had a national economy.

It is, at its essence, an adversarial system. So the thing that really makes collective bargaining work—and I have embraced collective bargaining in my practice. I have many clients that have mature bargaining relationships and constructive relationships with their unions. Bargaining ends up reducing to leverage. I think many employees recognize that this system is one that is not conducive to cooperativeness and efficiency, and confrontation and dissension ends up being unpleasant and harmful to everybody. In spite of everybody's best efforts, the act's structure really makes it very difficult to avoid confrontation.

Ms. ESTLUND. This is actually a question, Mr. Chairman, that I have spent a lot of time thinking and reading and writing about, and I completely agree that there are many reasons why private-sector unionism has declined. Clearly, in my mind, one of them is that employers have become increasingly aggressive in opposing and resisting employees' efforts to unionize. That is the one part of the picture that the National Labor Relations Board is obligated to address.

But the question of the adversarial system that we have set up, I also completely agree that it is important to think about ways to allow for more cooperative labor-management relations, and some provisions of the existing law may be problematic in that regard.

Strike levels in our country are at literally the lowest level in a century. And, secondary, picketing and activities of that nature is also at historically low levels.

Workers at this point need to be able to exercise the right to get together and sit down with their employer and discuss what is the best way to move forward.

Mr. KING. Mr. Chairman, if I could highlight for just a minute, I couldn't agree more, and hopefully this body and the other body will look at the TEAM Act that was, in fact, passed by the Congress a number of years ago that allows for cooperation in the workplace. The law in this area is outdated, and perhaps my colleague would join me here in urging this committee and other committees of the Congress to pass the TEAM Act.

Chairman ROE. Thank you.

Does the ranking member have any closing remarks?

Mr. KILDEE. I just have two points that I would like to make. You know, I listened with interest, as a history major, the preemption discussion. It takes me back to John Calhoun and nullification. And then it was he—Andrew Jackson finessed that one very well. But the Civil War, after he settled the question of nullification—so I think we have a basic constitutional question here.

This is a type of nullification that Calhoun embraced so strongly. I think we should all agree to our history, and we are celebrating the 150th anniversary of the beginning of the Civil War right now.

Also, you know, for employees who—employers who are government contractors, what is displayed there talks about the rights under the NLRA, and it has to choose not to do any of these activities, activities including joining or remaining a member of a union. And they are circulating now opinions from all employees to have that included in the display to say that under the NLRA, you have the right to choose not to do any of these activities, those previous ones, including joining or remaining a member of the union. So I think that should clarify that.

But the preemption scares me. You know, you have the Governor of Texas talking about secession. You have Utah doing certain things, South Dakota doing certain things. We have a Federal Constitution, which makes us one Nation. You have States kind of almost capriciously defying that fact is a little scary, as the nullification under John Calhoun was scary back 180 years ago.

Chairman ROE. Thank you.

Just, in closing, I put on a uniform and left this country 37 years ago and spent 13 months in a foreign country in an infantry division. I did that willingly, and I am proud of the service that I did, as many, many veterans are. And we did that to give you the right for a secret ballot. My wife claimed she voted for me in the election. I don't know that she did or didn't. And that is not necessarily a bad thing. I think we have a right to do that. I think it is one of the most fundamental rights. The President was elected that way; every Member of Congress was elected that way. And I think it makes Ms. Estlund's point that if you think someone is putting pressure on you from the employee standpoint or the employer standpoint, you have a right to go in a secret place to cast your ballot, and the majority wins.

That is what is the most important thing I can think of. And I believe that you are correct, Mr. King, that we need to make sure that we put that in statute where, once again, the Constitution gives us that right, and every worker and every employee in this country should have that right. We should never take that right away.

I can't thank you all enough. It has been a great panel, good questions, and I look forward to carrying on this discussion.

Any further comments?

Without any further comments, the meeting is adjourned.

[Additional submissions of Mr. Andrews follow:]

Federal Register Notice (Volume 14, No 242)

Friday, December 16, 1949. 14 FR 7516

This document is a notice by the Wage and Hour Division in the U.S. Department of Labor of a regulation requiring covered employers to post and keep posted notices of the applicability of the Fair Labor Standards Act of 1938, even though the FLSA does not contain an express statutory requirement for employers to post a notice of employee rights under the law. (29 CFR 516.18)

1949: 14 HK 7516, Dec. 16, 1949

It is ordered, That Edward Baum, individually and trading as The Mega-Ear-Phone, or under any other name, and his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of his device designated as "Mega-Ear-Phone", or any device of substantially similar character, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

A. Disseminating or causing to be disseminated, by means of the United States mails or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or through inference:

(1) That said device will relieve deafness or enable a deaf person to hear or that it will be of any value in the treatment of or as a mechanical aid for deafness or impaired hearing;

(2) That said device will eliminate head noises;

(3) That said device will restore a proper degree of moisture or elasticity to the ear drum or will restore the natural flow of wax in the ear or promote ear health;

(4) That said device will cause thickened membranes of the ear to become thinner, will correct or hold in proper position a distended ear drum or dislocated ossicles, or will serve as a substitute for punctured, perforated, ruptured, or destroyed ear drums;

(5) That said device will not injure the ear;

(6) That respondent's device is an effective substitute for the inflation treatment or that the inflation treatment for catarrhal deafness is harmful;

(7) That the position of respondent's device in the ear will be as indicated in respondent's drawings or that respondent's device affords the corrected placements of the ear drum and ossicles as portrayed in respondent's advertisements;

(8) That respondent will be enabled to determine the proper size of the device required for a prospective purchaser solely from the answers given by the purchaser to questions in the "Information Blank" sent to him by respondent.

B. Disseminating or causing to be disseminated, by means of the United States mails or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement which fails to reveal:

(1) That the insertion and removal of respondent's device by persons not trained in the anatomy of the human ear may cause injury to the ear and to hearing.

C. Disseminating or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said device in commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in paragraph A above or which fails to comply with the requirements of paragraph B.

It is further ordered, That the respondent shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

Issued: November 15, 1949.

By the Commission.

[SEAL] D. C. DANIEL, *Secretary*.

[F. R. Doc. 49-10097; Filed, Dec. 15, 1949; 8:55 a. m.]

TITLE 24—HOUSING AND HOUSING CREDIT

Chapter VIII—Office of Housing Expediter

[Controlled Housing Rent Reg., Amdt. 199]

[Controlled Rooms in Rooming Houses and Other Establishments Rent Reg., Amdt. 197]

PART 825—RENT REGULATIONS UNDER THE HOUSING AND RENT ACT OF 1947, AS AMENDED

CALIFORNIA AND OKLAHOMA

The Controlled Housing Rent Regulation (§§ 825.1 to 825.12) and the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments (§§ 825.61 to 825.92) are amended in the following respects:

1. Schedule A, Item 30, is amended to describe the counties in the Defense-Rental Area as follows:

Orange County, except the Cities of Fullerton, Huntington Beach, Laguna Beach and Newport Beach, and except that portion lying south of the south line of Township Six south, Range Eight west, San Bernardino Base and Meridian, and the easterly and westerly prolongation of said south line; and Los Angeles County, except Catalina Township and the Cities of Beverly Hills, Covina, El Monte, La Verne, Monrovia, Pomona, and South Pasadena.

This decontrols the City of El Monte in Los Angeles, California, a portion of the Los Angeles, California, Defense-Rental Area, based on a resolution submitted in accordance with section 204 (j) (3) of the Housing and Rent Act of 1947, as amended.

2. Schedule A, Item 245b, is amended to read as follows:

(245b) [Revoked and decontrolled.]

This decontrols the entire Guthrie, Oklahoma, Defense-Rental Area, on the Housing Expediter's own initiative in accordance with section 204 (c) of the Housing and Rent Act of 1947, as amended.

(Sec. 204 (d), 61 Stat. 197, as amended, 62 Stat. 37, 94, Pub. Law 31, 81st Cong.; 50 U. S. C. App. 1894 (d))

This amendment shall become effective December 14, 1949.

Issued this 13th day of December 1949.

TIGHE WOODS, *Housing Expediter*.

[F. R. Doc. 49-10092; Filed, Dec. 15, 1949; 8:51 a. m.]

TITLE 29—LABOR

Chapter V—Wage and Hour Division, Department of Labor

PART 516—RECORDS TO BE KEPT BY EMPLOYERS

POSTING OF NOTICES

In the administration of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U. S. C. 201; Public Law 393, 81st Cong., 1st Sess.), it has been found that effective enforcement of the act depends to a great extent upon knowledge on the part of covered employees of the provisions of the act and the applicability of such provisions to them, and a greater degree of compliance with the act has been effected in situations where employees are aware of their rights under the law. For this reason Industry Wage Orders issued pursuant to the act have included a requirement that employers post appropriate notices in conspicuous places where covered employees are working.

On the basis of the accumulated experience of the Division over a period of more than 11 years of administration of the act, I hereby find and determine that the posting of notices of the applicability of the act in establishments where covered employees are employed is a necessary adjunct to proper enforcement of the statutory provisions, and is an essential aid to the Division in preventing evasion or circumvention of the statutory provisions, and that a general requirement for posting of such notices in all covered establishments should be adopted.

On the basis of these facts and the fact that the administrative experience of the Division has provided complete and conclusive information and data necessary to a determination of the matter here involved, I find that notice and public procedure provided for in section 4 of the Administrative Procedure Act is unnecessary.

Now, therefore, pursuant to authority vested in me by the Fair Labor Standards Act, as amended, this part is amended by adding a new section, designated as § 516.18, to read as follows:

§ 516.18 *Posting of notices.* Every employer employing any employees engaged in commerce or in the production of goods for commerce shall post and keep posted such notices pertaining to the applicability of the Fair Labor Standards Act as shall be prescribed by the Division, in conspicuous places in every establishment where such employees are employed so as to permit them to readily observe a copy on the way to or from their place of employment.

Present §§ 516.18 and 516.19 are renumbered as §§ 516.19 and 516.20, respectively.

The above amendments are to become effective on January 25, 1950.

(Sec. 11, 52 Stat. 1065, as amended; 29 U. S. C. and Sup., 211)

Signed at Washington, D. C., this 9th day of December 1949.

WM. R. MCCOMB,
Administrator.

[F. R. Doc. 49-10071; Filed, Dec. 15, 1949; 8:56 a. m.]

TITLE 32—NATIONAL DEFENSE

Chapter V—Department of the Army

Subchapter B—Claims and Accounts

PART 536—CLAIMS AGAINST THE UNITED STATES

PART 537—CLAIMS ON BEHALF OF THE UNITED STATES

MARINE CASUALTIES

Sections 536.44 and 537.6 are rescinded and the following substituted therefor:

§ 536.44 *Marine casualties; claims*—(a) *Scope.* (1) This section is concerned with marine casualties involving vessels, cargoes, or waterfront facilities under the jurisdiction of the Transportation Corps.

(2) The provisions of this section apply to all claims otherwise within the scope thereof, not heretofore paid, arising out of marine casualties, as herein defined, except claims cognizable under part 2, Federal Tort Claims Act (Pub. Law 601, 79th Cong.) as codified in the act of June 25, 1948 (62 Stat. 982; 28 U. S. C. 2671), occurring on or after May 27, 1941.

(b) *Definitions.* For the purpose of this section, the following definitions apply:

(1) *Army vessel.* Any vessel operated (manned, supplied, or maintained) by the Army and under the jurisdiction of the Transportation Corps, including vessels subject to policies promulgated by the Chief of Transportation and assigned to, operated, or maintained by commanders of armies (ZI) and oversea commands.

(2) *Marine casualty.* (i) Any collision, grounding, fire, explosion, or other accident or incident involving an Army vessel resulting in loss of life, personal injury, or damage to or loss of vessel, cargo, or other property.

(ii) Any accident or incident resulting in damage to a pier, dock, wharf, quay, or other waterfront facility under the jurisdiction of the Transportation Corps, excepting such accident or incident as would give rise to a claim cognizable under the Federal Tort Claims Act.

(iii) Any accident or incident which may result in a salvage claim, or general average contribution in respect of either vessel or cargo.

(iv) Damage to or loss of cargo while being carried on an Army vessel.

(v) Damage to or loss of vessel or cargo caused by Army stevedores, or stevedores under contract with the Department of the Army, in the course of the loading or discharging of cargo on or from a vessel, except such damage or loss as would give rise to a claim cognizable under the Federal Tort Claims Act.

(3) *Investigating officer.* An officer designated pursuant to the provisions of this section to investigate marine casualties.

(c) *Claims under Article of War 105.* Claims payable under Article of War 105 will be investigated, processed, and disposed of as provided generally in this section except as otherwise specifically provided in § 536.25.

(d) *Foreign claims.* Claims payable under the provisions of the Foreign Claims Act, act of January 2, 1942 (55 Stat. 880; 31 U. S. C. 224d) as amended by act of April 22, 1943 (57 Stat. 66) will be investigated, processed, and disposed of as provided generally in this section except as otherwise specifically provided in § 536.26.

(e) *Public laws pertaining to claims*—(1) *Act of July 3, 1943.* The Secretary of the Army, and, subject to appeal to the Secretary of the Army, such other officer or officers as he may designate for such purposes and under such regulations as he may prescribe, are hereby authorized to consider, ascertain, adjust, determine, settle, and pay in an amount not in excess of $1,000, where accepted by the claimant in full satisfaction and final settlement, any claim against the United States except claims cognizable under part 2, Federal Tort Claims Act (Pub. Law 601, 79th Cong.), as codified in the act of June 25, 1948 (62 Stat. 982; 28 U. S. C. 2671), arising on or after May 27, 1941, when such claim is substantiated in such manner as the Secretary of the Army may by regulation prescribe, for damage to or loss or destruction of property, real or personal, or for personal injury or death, caused by military personnel or civilian employees of the Department of the Army while acting within the scope of their employment, or otherwise incident to noncombat activities of the Department of the Army, including claims for damage to or loss or destruction, by criminal acts, of registered or insured mail while in the possession of the military authorities, claims for damage to or loss or destruction of personal property bailed to the Government and claims for damages to real property incident to the use and occupancy thereof, whether under a lease, express or implied, or otherwise: *Provided,* That the damage to or loss or destruction of property, or the personal injury or death, shall not have been caused in whole or in part by any negligence or wrongful act on the part of the claimant, his agent, or employee. No claim shall be settled under this act unless presented in writing within 1 year after the accident or incident out of which such claim arises shall have occurred: *Provided,* That if such accident or incident occurs in time of war, or if war intervenes within 1 year after its occurrence, any claim may on good cause shown be presented within 1 year after peace is established. The amount allowed on account of personal injury or death shall be limited to reasonable medical, hospital, and burial expenses actually incurred, except that no payment shall be made to any claimant in reinbursement for medical or hospital services furnished at the expense of the United States nor, in the case of burial, of such portion of the expense thereof as may be otherwise paid by the United States. Any such settlement made by the Secretary of the Army, or his designee, under the authority of this act and such regulations as he may prescribe hereunder, shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary. The provisions of this act shall not be applicable to claims arising in foreign countries or possessions thereof which are cognizable under the provisions of the act of January 2, 1942 (55 Stat. 880; 31 U. S. C. 224d), as amended, or to claims for personal injury or death of military personnel or civilian employees of the Department of the Army, if such injury or death occurs incident to their service. The Secretary of the Army may report such claims as exceed $1,000 to Congress for its consideration. (See sec. 1, act July 3, 1943 (57 Stat. 372; 31 U. S. C. 223b), as amended by sec. 4, act May 29, 1945 (Pub. Law 67, 79th Cong.) and by act of June 28, 1946 (Pub. Law 466, 79th Cong.); and as repealed in part by the Federal Tort Claims Act.)

(2) *Act of June 19, 1948.* The act of June 19, 1948 (62 Stat. 496; 46 U. S. C. 740); provides that the suits in Admiralty Act and Public Vessels Act provide remedies for damage or injury on land, to person or property, caused by an Army vessel on navigable water, whether such damage or loss occurred prior to the enactment of the act of June 19, 1948, or subsequent thereto and claims for such damage or injury would fall within the exception to the Federal Tort Claims Act, and, therefore, claims for such damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land, are cognizable under the act of July 3, 1943, as amended.

(f) *Action by claimant.* Claims must be presented by the owner of the property damaged or the person injured, or his duly authorized agent or legal representative. "The word "owner," as so used, includes bailees, lessees, mortgagors, and conditional vendees but does not include mortgagees, conditional vendors, and others having title for purposes of security only, or subrogees. The claim, if filed by an agent or legal representative, should show the title or capacity of the person signing and be accompanied by evidence of the appointment of such agent, executor, administrator, guardian, trustee, or other fiduciary.

(1) *Form of claim.* Claims should be submitted by presenting in triplicate a dated statement in writing stating the claimant's address and setting forth a claim for money, in a sum certain, and, so far as possible, the detailed facts and circumstances surrounding the occurrence, indicating the date and place, the property and persons involved, the nature and extent of the damage or injury, and the agency which was the cause or occasion thereof. Department of the Army forms will be used whenever practicable.

(2) *Evidence to be submitted by claimant*—(i) *General.* The amount claimed for damage to or loss or destruction of property, or for personal injury or death, must be substantiated by competent evidence.

(ii) *Property damage.* In support of

United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570
www.nlrb.gov

February 25, 2011

The Honorable Phil Roe
Chairman, Subcommittee on Health,
Employment, Labor and Pensions
Committee on Education and the Workforce
House of Representatives
Washington, DC 20515

Dear Chairman Roe:

I have served as Acting General Counsel of the National Labor Relations Board since June 21, 2010. President Obama has also nominated me to serve a four-year term as General Counsel. I have spent my entire career with the Agency, beginning as a field examiner in 1972, and have worked for nine different Members of the Board. Prior to being appointed Acting General Counsel, I was the Director of the Office of Representation Appeals.

I appreciate this opportunity to supplement the record of the Subcommittee's February 11, 2011 hearing on "Emerging Trends at the National Labor Relations Board." The NLRB General Counsel is responsible for directing and managing the casehandling operations of the Agency. Among the matters addressed by the witnesses at the hearing were four initiatives that I have undertaken as Acting General Counsel of the Board. I have attached each of the initiatives to this letter and I ask that they be made part of the hearing record. I hope the following explanation of the genesis and rationale for each of the initiatives will be helpful to the Subcommittee as it evaluates the work of the Agency. These initiatives follow the tradition of administrative strategies undertaken by past General Counsels to more effectively enforce the National Labor Relations Act.

Deferral to Arbitral Awards and Grievance Settlements (GC Memorandum 11-05)

This initiative was begun by my predecessor, General Counsel Ronald Meisburg. See, OM Memorandum 10-13 (CH), "Casehandling Regarding Application of *Spielberg/Olin* Standards" (November 3, 2009). That Memorandum recognized that caselaw in Court of Appeals for the D.C. Circuit and the Supreme Court compelled a reexamination of the Board's standards for deciding whether to defer to an arbitral award as the resolution of an unfair labor practice charge. GC Memorandum 11-05 represents the fruits of our year long analysis of the issue.

When conduct alleged as an unfair labor practice is also the subject of a grievance alleging that the conduct violated a collective-bargaining agreement, the Board has two concerns: on the one hand, to carry out its statutory mandate to prevent unfair labor practices by investigating and deciding the charge and, on the other hand, to foster the statutory policy in favor of private resolution of disputes through the collective bargaining process. Initially, under its *Collyer/Dubo* deferral policy, the Board effectively implements both policies by suspending processing of the unfair labor practice charge, once it determines that the charge has "arguable merit," and awaiting the outcome of the grievance proceeding. Typically, the grievance-arbitration resolution is satisfactory to all parties and thus resolves the unfair labor practice charge as well. GC Memorandum 11-05 does not disturb this widely accepted practice.

Occasionally, however, grievants claim that although the grievance-arbitration process resolved the contract claim, it did not properly resolve their claim of a violation of their individual statutory right to be free of discrimination and other interference with protected activity. In that minority of cases, the Board's mandate to decide unfair labor practice allegations may be in conflict with its policy to foster collective bargaining. The Board's *Spielberg/Olin* line of cases attempts to reconcile these policies and articulate a test for deciding when to defer to an arbitral award or grievance settlement as the resolution of the unfair labor practice charge. In essence, the Board accepts the arbitral resolution of the NLRA claim if (1) the contractual and statutory issues were "factually parallel," (2) the facts relevant to the statutory claim were "presented generally" to the arbitrator, and (3) the arbitrator's award or the grievance settlement is not "clearly repugnant" to the Act or "palpably wrong", that is, it is susceptible to an interpretation consistent with the Act. By its terms, this standard permits deferral even in circumstances where the statutory issue was not considered by the arbitrator.

This test has been subjected to significant criticism. Specifically, since 1986, the D.C. Circuit has challenged the Board to articulate a convincing theory animating its decisions in this area. In frustration with the Board's adherence to the *Spielberg/Olin* test, that court has more recently adopted its own "contractual waiver" theory, under which it has refused to enforce the Board's decisions. Because any party to a Board proceeding may seek review of the Board's decision in the D.C. Circuit, both my predecessor, Mr. Meisburg, and I thought it essential to craft a response to that court's criticisms.

Another source of guidance has been Supreme Court decisions regarding the circumstances under which employees will be deemed to have waived a federal court forum for resolution of their individual statutory right claims, in favor of arbitration of those claims. The Court has made clear that for a collective bargaining agreement's purported waiver of access to the judicial forum to be enforceable, the agreement must give the arbitrator the authority to decide the statutory issue and the arbitrator must in fact do so. See, *14 Penn Plaza, LLC. v. Steven Pyett*, 129 S. Ct. 1456, 1469-1471 (2009).

These decisions do not directly control the Board's deferral policy – that policy is an exercise of the Board's discretion; §10(a) of the Act expressly preserves the Board's authority to decide unfair labor practice cases "[un]affected by any other means of adjustment." Nevertheless, they are instructive as to the prevailing view of the appropriate place of arbitration in the resolution of statutory employment claims.

Based on all of these considerations, I concluded that the Board should apply a more stringent standard for determining which arbitral awards and grievance settlements are appropriate resolutions of an unfair labor practice claim. Accordingly, I will urge the Board to change the *Spielberg/Olin* standard and to defer only if the arbitrator or parties to the grievance settlement had the authority to, and did, consider the statutory claim. The position we will advocate does not alter the "clearly repugnant" test of *Spielberg/Olin* for rejecting arbitral awards and grievance settlements that have considered the statutory issue. Nor would it affect questions of deferral in unfair labor practice cases that turn on the interpretation of a collective-bargaining agreement.

I anticipate that this change will have no adverse impact on the Agency's workload or ability to handle the entire range of cases before it. Indeed, from 2001 to date, our deferred case inventory has declined substantially, and I expect the change to affect only a small percentage of these cases.

Casehandling Procedures regarding Violations during Organizing Campaigns: Effective §10(j) Remedies for Unlawful Discharges in Organizing Campaigns (GC Memorandum 10-07); Effective Remedies in Organizing Campaigns (GC Memorandum 11-01)

Employees' right to engage in organizing activity among themselves and to decide whether to be represented is at the core of rights protected by the Act. The directives embodied in GC Memoranda 10-07 and 11-01 are designed to insure that the Agency protects this right by providing swift and effective remedies for violations calculated to "nip-in-the-bud" employees' organizing activities before they can bear fruit. As the cases described in GC 11-01 demonstrate, this initiative is aimed only at serious violations: discharge and other retaliation against employee activists, threats of discharge, closure and other adverse consequences if employees support unionization, interrogation and surveillance of union activities, as well as the solicitation of grievances and promise or grant of benefits.

Two consequences of such violations are well-recognized. First, they affect not only the individual victim of the violation but the entire workforce. When activist employees are discharged, the remaining employees are deprived of their leadership. In addition, these violations send a message to all employees that they too risk retaliation by supporting the organizing effort. Second, time is of the essence in countering these effects. With the passage of time, discharged employees become unavailable for reinstatement and support for the organizing campaign dissolves so that an ultimate Board order is ineffective to restore the status quo or safeguard the employees' rights.

My initiatives are designed to counter these serious consequences by assuring that discharges are promptly remedied and by including in the relief sought remedies that ameliorate the impact of the violations.

Neither of these memoranda represents a sharp departure from prior Agency practice. Past General Counsels have used the §10(j) program as an essential strategy for effectively enforcing the Act. Moreover, as the attached chart shows, my initiatives embody a targeted approach, not a blunderbuss. Between October 1, 2010, when the §10(j) initiative under GC 10-07 began, and January 31, 2011, Regional Offices submitted 28 nip-in-the-bud cases to the Injunction Litigation Branch in headquarters. This represents a tiny fraction of the more than 7000 charges filed in that time frame. At the same time, we were able to promptly decide the need for interim relief and obtain suitable remedies where warranted: By January 31, we had decided that §10(j) was not warranted in nine cases, obtained a district court order in one case, and settled 12 cases.

Similarly, the initiative regarding effective remedies in nip-in-the-bud cases stems from traditional remedial law. The touchstone for determining the appropriate remedy in any case is to determine what relief is necessary to restore the conditions that existed before the violations occurred. GC 11-01 is premised on the principle, discussed above, that the impact of nip-in-the-bud violations is not confined to the individual victim of the violation but resounds among all employees.

Thus, to restore the conditions that existed before the violations occurred requires more than making whole the individual victim with backpay and reinstatement. The remedy must include action to erase the adverse impact of the violations among all employees. GC 11-01 recognizes that the Board's traditional notice posting is inadequate in this respect in serious nip-in-the-bud violations. The Memorandum directs Regional Offices to evaluate the impact of the violations in each case and provides the legal analysis for determining the specific circumstances that warrant a reading remedy or – in cases involving disruption to employee/union communications – access to company bulletin boards or to employee names and addresses. Moreover, Regions are not authorized to seek more significant access remedies without authorization on a case-by-case basis by the Division of Advice in headquarters.

Contrary to the contentions of some witnesses, these initiatives do not expend additional Agency resources. The best practices for §10(j) caseprocessing outlined in GC 10-07 streamline the §10(j) authorization process and eliminate duplicative written work. The remedial investigation into the impact of nip-in-the-bud violations required by GC 11-01 is the same investigation that Board agents have been conducting for the past 15 years as part of their analysis of the need for §10(j) relief in all nip-in-the-bud cases. In sum, these remedies are carefully targeted to rectify the impact that "nip-in-the-bud" violations have on fundamental employee rights. Their use remains exceedingly rare when you consider how many charges are brought to the Agency's attention.

Use of Default Language in Informal Settlement Agreements (GC Memorandum 11-04)

This initiative is an effort to obtain more effective means of restraining recidivist violators of the Act without unnecessary expenditure of resources by the Agency. The Agency has an active settlement program that resolves complaints before litigation in over 90% of meritorious cases. The most common kind of settlement is the "informal settlement" in which the respondent agrees to explicit undertakings to remedy the violations alleged. Absent default language in such a settlement, the Agency's only recourse in the event of breach is to revoke the settlement and reinstitute litigation. The default provision provides that if the respondent breaches the settlement agreement, it will be deemed to have admitted the allegations and it consents to entry of a Board order and enforcing court judgment. It imposes no additional burden on a respondent that fulfills its obligations under the settlement. Last year, my predecessor began discussions about a similar default language proposal with the ABA's Committee on Practice and Procedure before the NLRB; likewise I consulted with that Committee before I implemented this initiative.

Contrary to the testimony of some witnesses, there is no reason to believe that this initiative will discourage settlement or lead to additional litigation. As the Memorandum explains, use of default language has been a longstanding practice in five Regional Offices and their settlement and litigation success rates are consistent with national standards.

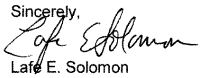
Allegations of Misconduct in Indiana Case

Finally, I wish to respond to concerns raised during the hearing by Representative Rokita of Indiana. A constituent of Mr. Rokita had alleged misconduct by a NLRB Board agent. After the hearing, my office contacted the NLRB Regional Director for Region 25 in Indianapolis, who specifically inquired of his entire staff about the allegations. No one was familiar with any such incident. I have asked Mr. Rokita for further information about his constituent's claims and will certainly follow up when I receive that information.

Further, I have consistently stated in my public speaking engagements, in addition to my meetings with the Agency's Regional Directors, that I encourage any member of the public to bring to my attention any complaint or concern about his/her dealings with any Regional personnel, and I will personally review the matter.

Again, I appreciate the opportunity to supplement the record of the hearing and I hope that this letter will be helpful to the Subcommittee as it continues its important work.

Sincerely,



Lafe E. Solomon
Acting General Counsel

Enclosures

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11- 05 January 20, 2011

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) cases

I. Introduction

In Memorandum OM 10-13(CH) "Casehandling Regarding Application of Spielberg/Olin standards," issued under former General Counsel Meisburg on November 3, 2009, we recognized that "a new approach to cases involving arbitral deference may be warranted," particularly given certain recent opinions of the Supreme Court and the Court of Appeals for the D.C Circuit. Regions were instructed to submit post-arbitral deferral cases to the Division of Advice to provide the basis for a case-by-case review in order to develop that new approach. Based on our consideration of these cases and the underlying legal issues, we will urge the Board to modify its approach in post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases, and to apply a new framework in all such cases requiring post-arbitral review. This memorandum explains that framework and the reasons for adopting it as well as guidance on handling cases that implicate these issues.

II. The Statutory Scheme of the NLRA Requires a Balance between Protecting Individual Rights and Encouraging Private Dispute Resolution within Collective Bargaining

Congress charged the National Labor Relations Board with the responsibility of protecting the Section 7 right of employees to engage in concerted activity for mutual aid and protection. Sections 8(a)(1) and (3) of the NLRA make it an unfair labor practice for an employer to discriminate against or otherwise interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Section 10(a) of the NLRA empowers the Board "to prevent any person from engaging in any unfair labor practice" and further provides that the Board's powers "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or

otherwise . . ."[1] (Emphasis added.) Thus, the Board has a statutory mandate under Section 10(a) to protect individual rights and protect employees from being discharged or otherwise discriminated against in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution arrangement.

At the same time, Section 1 of the NLRA and Section 203(d) of the Labor Management Relations Act favor collective bargaining and the private resolution of labor disputes through the processes agreed upon by the employer and the employees' exclusive representative. Section 203(d) provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." (Emphasis added). Thus, there is a potential conflict, or at least a tension, between the statutory policies protecting individual rights and the Board's enforcement of the Act, and the policy encouraging collectively-bargained dispute resolution.

To reconcile the different emphases of these statutory policies, "the Board has considerable discretion to . . . decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act" to foster collective bargaining.[2] As is evident from the language in Section 10(a) itself, however, the Board is not required to stay its hand just because an employer and a union representing its employees have resolved a dispute through an agreed-upon grievance arbitration process.[3]

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[1] As the D.C. Circuit has recognized, Section 10(a) "is intended to make it clear that although other agencies may be established by code, agreement, or law to handle labor disputes, such other agencies can never divest the National Labor Relations Board of jurisdiction which it would otherwise have." Hammontree v. NLRB, 925 F.2d 1486, 1492 (D.C. Cir. 1991) (en banc) (quoting Staff of Senate Comm. on Education and Labor, 74th Cong., 1st Sess., Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) at 3 (Comm. Print 1935) (emphasis supplied by the court).

[2] International Harvester Co., 138 NLRB 923, 926 (1962), affd. sub. nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964).

[3] Spielberg Mfg. Co., 112 NLRB 1080, 1081-1082 (1955), citing NLRB v. Walt Disney Productions, 146 F.2d 44 (9th Cir. 1944), cert. denied 324 U.S. 877 (1945).

III. Supreme Court Precedent in Non-NLRA Individual Rights Cases Allows Private Parties to Waive Access to a Statutory Forum in Favor of Arbitration Only if the Arbitrator Decides the Statutory Issue

An important source of guidance for striking an appropriate balance between the protection of employees' statutory rights and giving effect to arbitration awards is how the Supreme Court envisions the role of arbitrators deciding statutory rights in cases where federal courts have jurisdiction to decide those statutory rights. In the context of Title VII and other individual rights cases, the Court allows parties to waive their use of the statutorily-established forum, i.e., the courts, where such waivers are consistent with applicable law, but has required that an arbitrator must resolve the rights at issue consistent with the applicable statutory principles. Thus, in Gilmer,[4] the Court held that employees can waive the judicial forum for resolving a substantive right, i.e., a right guaranteed under a statute, but they cannot prospectively waive the substantive right itself. In Pyett,[5] the Court held that a union, as well, can waive employees' rights to a particular forum, as long as the waiver is expressed in clear and unmistakable terms, but the Court emphasized that such a waiver is enforceable only if the collective-bargaining agreement gives the arbitrator the authority to decide the statutory issue.

Thus, the Court made it clear that, for an arbitration agreement's waiver of access to a statutory forum to be enforceable, the collective-bargaining agreement must give an arbitrator the authority to decide the statutory issue, and the arbitrator must in fact do so.[6] The Court further highlighted this requirement by noting that judicial review of arbitration awards, while limited, enables courts to "ensure that arbitrators comply with the requirements of the statute."[7] Thus, the Court clarified that it would cede jurisdiction to arbitrators only if the arbitrator is authorized to decide the statutory issue, and does so consistent with applicable statutory principles.

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[4] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

[5] 14 Penn Plaza, LLC v. Steven Pyett, 129 S. Ct. 1456, 1469-1471 (2009).

[6] Pyett, 129 S.Ct. at 1469-1471.

[7] Id., 129 S.Ct. at 1471 fn. 10, citing Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987).

To be sure, the Pyett/Gilmer line of cases is merely instructive to the Board as an indication of the Supreme Court's view of the role of arbitration in resolving statutory rights -- it does not directly control the parameters of the Board's deferral policy. For, as discussed above, the Board's policy is an exercise of discretion in choosing to stay its hand, rather than being ousted of jurisdiction as are the courts -- the NLRA expressly provides in Section 10(a) that the Board does not lose jurisdiction even if private parties agree that it should.[8] Nevertheless, we believe the principles articulated by the Court have applicability under the NLRA statutory scheme.

IV. Olin's Standards for Deferral Do Not Adequately Protect Employees' Statutory Rights; Therefore, We Will Urge the Board to Change its Framework for Post-Arbitral Deferral

Viewed against this backdrop, the Board's current post-arbitral deferral policy is distinctly at odds with that which prevails in other areas of employment law. The Court clearly envisions that employees will receive full consideration of their statutory rights in arbitration; both Pyett and Gilmer emphasize that no waiver of statutory rights is entailed in having those rights considered by an arbitrator. The only difference at issue is whether an arbitrator or a judge applies the statute.[9]

Although, as discussed above, the Board's deferral policy is one of discretion rather than an ouster of jurisdiction, this difference only heightens the Board's obligation to ensure the protection of employees' statutory rights prior to exercising its discretion to defer to an arbitrator's award, rather than providing an even lower standard of protection of statutory rights, as does the current deferral framework. As the Board has recently reiterated in a different context, "[a]s an administrative agency establishing rules to govern a particular field of law (within the limits of the statute it administers), the

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[8] See also, e.g., Bill's Electric, Inc., 350 NLRB 292, 296 (2007) (mandatory arbitration policy violated the Act, as it would reasonably be read as substantially restricting, if not totally prohibiting, employees' access to the Board's processes); U-Haul Co. of California, 347 NLRB 375, 377-378 and fn. 11 (2006), enfd. mem. 255 F. Appx 527 (D.C. Cir. 2007) (same).

[9] Pyett, 129 S.Ct. at 1469; Gilmer, 500 U.S. at 26.

Board has a different role than the courts, operating 'on a wider and fuller scale' that 'differentiates . . . the administrative from the judicial process.'"[10] The Board's "wider and fuller" role should cause the Board to more zealously guard its mandate to protect statutory rights, in contrast to the courts, whose jurisdiction over statutory claims is more limited.

In contrast to the Court's vision of ensuring the actual arbitral consideration of the rights afforded by Title VII and other employment statutes, the Board's Olin[11] standards for accepting an arbitral award as the resolution of NLRA rights -- that the contract and statutory issues were "factually parallel" and the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice" -- do not require such consideration. In addition, the Board's Olin standards tolerate substantive outcomes from arbitrators that differ significantly from those that the Board itself would reach if it considered the matter de novo. Such outcomes can result in the denial of substantive Section 7 rights -- if the overly deferential Olin standards are met, the Board may dismiss the administrative charge even if the statutory issue has never been considered.

Viewed solely under NLRA principles, this result has long struck some courts as at least in need of further explanation and justification by the Board.[12] Some have found an actual abdication of the Board's statutory responsibilities.[13] In the intervening years, the

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[10] Kentucky River Medical Center, 356 NLRB No. 8, slip op. at 2-3 (2010), citing NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 349-350 (1953).

[11] Olin Corp., 268 NLRB 573, 573-574 (1984).

[12] See Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986).

[13] See Taylor v. NLRB, 786 F.2d 1516, 1521-22 (11th Cir. 1986) ("By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, Olin Corp. gives away too much of the Board's responsibility under the NLRA."). See also Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference); Stephenson v. NLRB, 550 F.2d 535, 538 and n. 4 (9th Cir. 1977) ("Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory issue . . . The "clearly decided" requisite is designed to enable

development of more demanding standards for the arbitration of statutory employment rights, spurred by Gilmer, has only served to heighten the need for the Board to provide a more convincing explanation to the courts and to the public for its apparent lesser valuation of NLRA rights than is the norm for statutory employment rights. This need for further explanation and justification is accentuated where Olin deferral is granted even though the collectively-bargained grievance arbitration procedures do not expressly authorize the arbitrator to resolve statutory NLRA claims or require that the arbitrator apply statutory principles, as is often the case.

We note that these considerations only apply to cases alleging violations of employee rights arising under Section 8(a)(1) and 8(a)(3) of the Act, not to cases solely alleging violations of Section 8(a)(5). In bargaining cases, as the Board has recognized, the "[r]esolution of the ultimate issue . . . [does] not rest solely on interpretation of the statute, but turn[s] on contract interpretation."[14] In such cases, given the close identity of the statutory rights and contract interpretation issues, the current deferential Olin standards adequately safeguard the statutory enforcement scheme.

Accordingly, we have decided to urge the Board to adopt a new approach. Specifically, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have adequately been considered by the arbitrator. This includes not only cases involving Section 8(a)(1) and 8(a)(3) discipline and discharge, but also all other cases involving Section 8(a)(1) conduct that is subject to challenge under a contractual grievance provision.

Further, we will urge the Board to change Olin's allocation of the burden of proof for deferral. We believe that the party urging deferral should have the burden of showing that the deferral standards articulated above have been met. This will ensure that the statutory issues have indeed been considered by the arbitrator, as well as encourage parties seeking deferral to establish an evidentiary record that will give the Board a sounder basis for reviewing arbitral awards and deciding whether to defer. Thus, the

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the Board and the courts to fairly test the standards applied by the arbitrator against those required by the Act").

[14] Mt. Sinai Hospital, 331 NLRB 895, 898 (2000), enfd. mem. 8 Fed. Appx. 111 (2d Cir. 2001).

party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board should, as now, defer unless the award is clearly repugnant to the Act. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's decision or award is not susceptible to an interpretation consistent with the Act. Such a framework would provide greater protection of employees' statutory rights while, at the same time, furthering the policy of peaceful resolution of labor disputes through collective bargaining.[15]

This is not a novel approach. Prior to Olin, the Board, with widespread contemporary court approval, required consideration of the statutory issue as a condition for deferral and placed the burden of persuasion on the party seeking deferral.[16] Thus, as early as 1963,

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[15] We note that this approach would also directly respond to the D.C. Circuit's challenge to the Board to explain the theory underlying its deferral policy (see, e.g., Darr v. NLRB, 801 F.2d at 1408-1409; Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d 744, 755-757 (D.C. Cir. 1992)), as well as to that court's "contractual waiver" approach to Board deferral cases, which does not so much balance the two competing statutory goals of the NLRA as hold that one completely trumps the other (see, e.g., American Freight System, Inc. v. NLRB, 722 F.2d 828, 832-833 (D.C. Cir. 1983); Plumbers & Pipefitters Local Union No. 520, 955 F.2d at 755-756; Titanium Metals Corp. v. NLRB, 392 F.3d 439, 448-449 (D.C. Cir. 2004)).

[16] See, e.g., Bloom v. NLRB, 603 F.2d 1015, 1020 (D.C. Cir. 1979) ("If the record contains substantial and definite indications that the unfair labor practice issue and its supporting evidence were expressly presented to the arbitration panel, and the panel's decision reflects its reliance on that evidence, then the Board and a court can determine whether the panel clearly decided the statutory issue"); Pioneer Finishing Corp. v. NLRB, 667 F.2d 199, 202-203 (1st Cir. 1981) ("Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute"); NLRB v. Magnetics Intern., Inc., 699 F.2d 806, 811 (6th Cir. 1983) ("we will examine the arbitrator's award itself and the degree of congruence

the Board held that the party urging deferral must show that the unfair labor practice issue was presented to and acted upon by the arbitrator.[17] That is, the Board would consider an unfair labor practice issue resolved only if the statutory issue was actually litigated and decided in the arbitration proceeding.[18] While the Board deviated from this policy for a period,[19] it subsequently reinstated the requirement that the party seeking deferral show that the statutory issue was "presented to and considered" by the arbitrator.[20] The Board explained that acting otherwise "derogates the [ ] important purpose of protecting employees in the exercise of their rights under Section 7 of the Act," and had been criticized "as an unwarranted extension of the Spielberg doctrine and an impermissible delegation of the Board's exclusive jurisdiction."[21]

Returning to a requirement that statutory issues be considered as a condition for deferral to an arbitral award would also require revising the standards for deferral to pre-arbitral grievance settlements. Thus, the Olin deferral standard was the express basis for the Board's decisions in

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between the award and the charges brought under the statute . . . any doubts regarding the propriety of deferral will be resolved against the party urging deferral"); Servair, Inc. v. NLRB, 726 F.2d 1435, 1441 (9th Cir. 1984) ("The arbitrator's determination . . . in no way disposes of the statutory issue . . . Thus, we hold that the Board properly refused to defer to the arbitrator's decision").

[17] Raytheon Co., 140 NLRB 883, 886-887 (1963), enf. denied on other grounds, 326 F.2d 471 (1st Cir. 1964).

[18] See Yourga Trucking Inc., 197 NLRB 928, 928 (1972); Airco Industrial Gases, 195 NLRB 676, 676-677 (1972).

[19] See Electronic Reproduction Service Corp., 213 NLRB 758, 762-764 (1974).

[20] Suburban Motor Freight, Inc., 247 NLRB 146, 146-147 (1980).

[21] Ibid. See also Professional Porter & Window Cleaning Co., 263 NLRB 136, 137 (1982), enfd. 742 F.2d 1438 (2d Cir. 1983) ("The election to proceed in the contractually created arbitration forum provides no basis, in and of itself, for depriving an alleged discriminatee of the statutorily created forum for adjudication of unfair labor practice charges").

Alpha Beta[22] and Postal Service.[23] As a result, these cases similarly provide for deferral to pre-arbitral grievance settlements that lack reference to, or other indication that the parties considered, the statutory issues. It would be inconsistent to continue to defer to pre-arbitral-award grievance settlements that the parties themselves did not intend to resolve the unfair labor practice issues. Instead, we will urge the Board to adopt a rule that gives no effect to a grievance settlement unless the evidence demonstrates that the parties intended to settle the unfair labor practice charge as well as the grievance. If the evidence does so indicate, the Board should apply current non-Board settlement practices and procedures in deciding whether to accept the non-Board settlement, including review under the standards of Independent Stave.[24]

V. Instructions for Processing Future Cases Involving Deferral to Arbitration

Providing a more thorough post-arbitral review of deferred cases necessitates certain other changes in Regional Office investigation procedures. We recognize that a full investigation and conclusive determination of merit prior to pre-arbitral deferral is not the best use of limited Agency resources. Nonetheless, because substantial time may pass while the arbitration process proceeds when a case is deferred under Collyer and United Technologies,[25] investigation of the alleged unfair labor practices at the end of the process is more difficult. To prevent any such difficulties in future cases raising allegations of Section 8(a)(1) and 8(a)(3) that will be deferred under Collyer, particularly as a heightened

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[22] 273 NLRB 1546, 1547-1548 (1985).

[23] 300 NLRB 196, 198 (1990).

[24] Independent Stave Co., 287 NLRB 740, 743 (1987) (the Board will examine all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risks of litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements).

[25] Collyer Insulated Wire, 192 NLRB 837 (1971); United Technologies Corp., 268 NLRB 557 (1984). These instructions also apply to cases deferred under Dubo Mfg. Corp., 142 NLRB 431 (1963).

standard would likely make at least some additional arbitral awards inappropriate for deferral, Regions should take affidavits from the Charging Party, and from all witnesses within the control of the Charging Party, before they make their "arguable merit" determination in considering Collyer deferral.[26] Only then, if the Region determines there is arguable merit to the charge and the other Collyer requirements are met, should the Region defer the charge.[27] If the Region concludes the charge is without merit, of course, it should dismiss the charge, absent withdrawal.

In all pending and future cases where the Region has deferred a charge to arbitration under Collyer, when the arbitral award issues, the Region must review the award to determine whether post-arbitral deferral is appropriate. The Region should determine if the party urging deferral can demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue; and (3) the arbitral award is not clearly repugnant to the Act. Upon making its determination, the Region should submit the case to the Division of Advice, along with the Region's recommendation as to whether to defer.[28]

VI. Conclusion

To summarize, we will urge the Board to modify its approach in Section 8(a)(1) and (3) post-arbitral deferral cases as follows:

1. The party urging deferral should have the burden of demonstrating that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory

[26] At the Region's discretion, it may wish to undertake a more complete investigation before deciding whether to defer.

[27] In light of the modified post-arbitral framework proposed herein, Regions should substitute the language of the attached pattern for Collyer deferral letter for that found in the Casehandling Manual Section 10118.5.

[28] An exception to this instruction occurs when the arbitral award grants full backpay and reinstatement and the charging party requests withdrawal of the charge. In this situation, as with non-Board settlements discussed above, the request for withdrawal can be approved. If the charging party does not seek withdrawal in this situation, the Region should contact the Division of Advice.

issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.

2. If the party urging deferral makes that showing, the Board should defer unless the award is clearly repugnant. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act.

3. The Board should not defer to a pre-arbitral-award grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice issues. Where the evidence demonstrates that the parties intended to settle the unfair labor practice charge, the Board should continue to apply current non-Board settlement practices and procedures, including review under the standards of Independent Stave.

In processing future cases raising allegations of Section 8(a)(1) and 8(a)(3), Regions should proceed as follows:

1. Prior to Collyer deferral, Regions should take affidavits from the Charging Party, and from all witnesses within the control of the Charging Party, before they make their arguable merit determination.

2. If there is arguable merit to the charge, and the other Collyer requirements are met, the Region should defer the charge. If there is not arguable merit, the Region should dismiss, absent withdrawal.

3. When the arbitral award issues, the Region should determine if the party urging deferral has met the burden set forth above to demonstrate that deferral to the arbitrator's award is appropriate. Upon making its determination, the Region should submit the case to the Division of Advice, along with the Region's recommendation as to whether to defer.

Please make this memorandum a subject on the agenda for your next staff meeting. Any questions regarding the implementation of this memorandum should be directed to the Division of Advice.

L.S.

cc: NLRBU
Release to the Public

Collyer Deferral Letter

[Regional Office Letterhead]

[Date letter issues]

Charging Party Legal Rep (or Charging Party if no legal rep)

Charged Party Legal Rep (or Charged Party if no legal rep)

Re: [Case name]
Case [Case number]

Salutation:

The Region has carefully considered the charge alleging that [Charged Party name] violated the National Labor Relations Act. As explained below, I have decided that further proceedings on the the charge should be handled in accordance with the deferral policy of the National Labor Relations Board as set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). This letter explains that deferral policy, the reasons for my decision to defer, further processing of the charge, and the Charging Party's right to appeal my decision.

Deferral Policy: The Board's deferral policy provides that the Board will postpone making a final determination on a charge when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. This policy is partially based on the preference that the parties use their contractual grievance procedure to achieve a prompt, fair, and effective settlement of their disputes. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Board's Regional office will defer the charge.

Decision to Defer: Based on our investigation, I am deferring further proceedings on the charge in this matter to the grievance/arbitration process for the following reasons:

1. The Employer and the (Charging Party name or insert name of the Union if charge filed by an individual) have a contract currently in effect that provides for final and binding arbitration.

2. The [insert description of each issue being deferred] as alleged in the charge (is or are) encompassed by the terms of the contract.

3. The Employer is willing to process a grievance concerning the issues in the charge, and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.

4. Since the issues in the charge appear to be covered by provisions of the contract, it is likely that the issues may be resolved through the grievance/arbitration procedure.

Further Processing of the Charge: As explained below, while the charge is deferred, the Regional office will monitor the processing of the grievance and, under certain circumstances, will resume processing the charge.

Charging Party's Obligation: Under the Board's *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly submit the grievance to the grievance/arbitration process or declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge.

Union/Employer Conduct: If the Union or Employer fails to promptly process the grievance under the grievance/arbitration process; declines to arbitrate the grievance if it is not resolved; or if a conflict develops between the interests of the Union and the Charging Party, I may revoke deferral and resume processing of the charge.

Charged Party's Conduct: If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed, or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.

Monitoring the Dispute: Approximately every 90 days, the Regional office will ask the parties about the status of this dispute to determine if the dispute has been resolved and if continued deferral is appropriate. However, at any time a party may present evidence and request dismissal of the charge, continued deferral of the charge, or issuance of a complaint.

Notice to Arbitrator Form: If the grievance is submitted to an arbitrator, please sign and submit to the arbitrator the enclosed "Notice to Arbitrator" form to ensure that the Region receives a copy of an arbitration award when the arbitrator sends the award to the parties.

Review of Arbitrator's Award or Settlement: If the grievance is arbitrated, the Charging Party may ask the Board to review the arbitrator's award. The request must be in writing and addressed to me. Under current Board law, the request should analyze whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were considered by the arbitrator, and whether the award is consistent with the Act. Further guidance on this review is provided in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984). These Board decisions are available on our website, www.nlrb.gov. However, the current standard for review may change. The General Counsel's position is that the Board should modify its its approach in Section 8(a)(1) and (3) cases and should not defer to an award unless the party urging deferral demonstrates that: (1) that the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) that the arbitrator correctly enuciated the applicable statutory principles, and applied them in deciding the issue. The General Counsel is also taking the position that the Board should not defer to a pre-arbitral-award grievance settlement in Section 8(a)(1) and (3) cases unless the parties intended the settlement to also resolve unfair labor practice issues.

Note: SAME APPEAL LANGUAGE as now.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-07 September 30, 2010

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns

An important priority during my time as Acting General Counsel will be to ensure that effective remedies are achieved as quickly as possible when employees are unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplaces. When an employer commits such unfair labor practices, it "nips in the bud" all of the employees' efforts to engage in the core Section 7 right to self-organization.

Discriminatory discharges are among the most serious nip-in-the-bud violations of the Act. An unremedied discharge sends to other employees the message that they too risk retaliation by exercising their Section 7 rights. As one court has characterized employees' reaction, "no other worker in his right mind would participate in a union campaign in this plant after having observed that other workers who had previously attempted to exercise rights protected by the Act have been discharged and must wait for three years to have their rights vindicated." *Silverman v. Whittall & Shon, Inc.*, 1986 WL 15735, 125 LRRM 2152 (S.D.N.Y. 1986). In addition, the continued absence from the workplace of unlawfully discharged union leaders means not only that the negative message from the unfair labor practices persists but also that the remaining employees are deprived of the leadership of active and vocal union supporters. And with the passage of time, the discharged employees are likely to be unavailable for, or no longer desire, reinstatement when ordered by the Board. Given all of these consequences, employee resumption of union organizing is unlikely, and the ultimate Board order is ineffective to protect rights guaranteed by the Act.

Over the years, the Agency has developed a variety of very effective strategies for minimizing these consequences. First, we have focused on prompt investigation of "nip-in-the-bud" cases and prompt settlement of meritorious charges. Such settlements are a timely and highly effective remedy. In addition, in some of the meritorious nip-in-the-bud cases which did not settle, the Board authorized Section 10(j) proceedings and we obtained injunctions. Like settlements, these Section 10(j) injunctions have provided a substantial and relatively swift remedy by requiring employers to offer interim reinstatement to unlawfully discharged employees pending the Board's order.

My goal is to give all unlawful discharges in organizing cases priority action and a speedy remedy. For years the Agency has been committed to a vigorous Section 10(j) injunction program as a highly effective tool for achieving meaningful real time remedies. As Acting General Counsel, I am committed to continue and enhance this important program for nip-in-the-bud cases. In addition, I am committed to the most expeditious administrative litigation possible for such cases. The program outlined below has been developed to streamline the processing of nip-in-the-bud cases involving discharges to assure that the passage of time does not undercut our ability to provide effective remedies in these cases.

This program covers all stages of case processing—from identification of cases as potential Section 10(j) cases by Regional Offices through Board authorization and litigation of Section 10(j) cases to trial and decision of the merits cases. This program has been developed with invaluable input from all offices of the Agency, especially from the field. I intend to continually monitor whether the program is successful in achieving effective and timely remedies in organizing cases and to see how these priorities actually function in the context of the day-to-day work of your offices. In consultation with you, I will evaluate what, if any, modifications are needed.

Set forth below is what I consider the optimal timeline for processing nip-in-the-bud cases and additional procedures to facilitate these streamlined procedures. The timeline and procedures should be considered as best practices by all branches and regional offices in handling these cases.

Optimal Timeline for Processing Nip-in-the-bud Discharge Cases

- Potential Section 10(j) organizing campaign discharge cases should be identified as soon as possible after the filing of the charge and tracked by the Region until their resolution. In addition, it is critically important that Regions identify such cases in CATS, and subsequently in NxGen, by adding "discharge organizing campaign" in Notes, which will permit reporting on the number and handling of these cases.

- Where possible, the lead affidavit should be taken within 7 calendar days from filing of charge in all nip-in-the-bud discharge cases.

- Regions should attempt to obtain all of the charging party's evidence within 14 calendar days from the filing of the charge.

- If charging party's evidence points to a *prima facie* case on the merits and suggests the need for injunctive relief, the Region should notify the charged party in writing that the Region is seriously considering the need for Section 10(j) relief and request that a position statement on that issue

be submitted to the Regional Office within 7 calendar days after the written notification. This letter can be combined with the letter putting the charged party on notice of the allegations raised by the charge and should generally be sent within 21 days from the filing of the charge.

- A Regional Director will normally make a determination on the merits of the case within 49 calendar days from the filing of the charge. If the decision is to issue complaint, the decision with respect to the need for Section 10(j) relief should be made at the same time.

- Regions will endeavor to quickly issue complaints in these nip-in-the-bud discharge cases and to set prompt administrative hearings. When estimating the length of a trial for purposes of trial schedules, Regional Attorneys should allow sufficient time to finish a trial and to avoid the possibility of a continuance. If Regions encounter any problems with obtaining early and continuous hearing dates, they should immediately contact Operations Management.

- Regions must submit to the Injunction Litigation Branch (ILB) all meritorious 8(a)(3) discharge nip-in-the-bud cases, including those currently pending in Regions and those pending before an administrative law judge, that do not settle. I will personally review and decide whether Section 10(j) authorization should be sought in all such cases. Neither discriminatees' lack of desire for interim reinstatement nor a union's abandonment of its organizing campaign are, in themselves, grounds to decline to seek Section 10(j) relief. A union's abandonment of an organizing campaign is itself evidence of chill and does not remove the negative message that discharges have on employee statutory rights. And a court order offering interim reinstatement may cause the resumption of employee interest in organizing with the previous or a new union, whether or not the offer is accepted.

- Regions may use the Expedited Hearing Procedures (GC Memorandum 94-17 and OM Memorandum 06-60) in lieu of immediately seeking Section 10(j) authorization if a non-cooperating respondent has raised a significant *Wright Line* or economic defense or if proceeding to the administrative hearing would seriously facilitate settlement. Expedited hearings in such cases should be scheduled not later than 28 calendar days after issuance of complaint. If the Region is unable to obtain a 28-day hearing from the Division of Judges, please immediately contact Operations Management.

- A short form memorandum regarding Section 10(j) relief in nip-in-the-bud cases should be submitted to ILB. Absent unusual circumstances, this memorandum should be submitted to ILB not later than 7 calendar days from the merit determination or close of an expedited hearing. Regions

will also submit to ILB the parties' position statements, if any, and party representative information.

- ILB will decide all nip-in-the-bud Section 10(j) cases within 2 business days after receipt of the Region's memorandum and will notify the Region as to whether it agrees that Section 10(j) relief is warranted. If ILB has questions for the Region before it is able to decide the Section 10(j) request, it will seek this information as soon as possible after reviewing the case.

- In these cases, ILB will prepare a 1-2 page cover memorandum, addressing briefly only relevant new facts obtained from the Region and issues not addressed by the Region that might be of interest to the Board. ILB will send this memorandum to the Acting General Counsel within 7 calendar days after receiving the last information it needs from the Regional Office. ILB will also forward a copy to the Region.

- I will review and decide the Section 10(j) case, and if I agree, I will sign the memorandum requesting Section 10(j) authorization within 2 business days of receipt from ILB. Upon my approval, ILB will submit the Section 10(j) request to the Board and notify the Region.

- Within 10 business days after receiving notice from the ILB that it agrees Section 10(j) relief is warranted in these nip-in-the-bud cases, the Region will draft its Memorandum of Points and Authorities and Proposed Order and send it to ILB for review. Within 3 business days of receipt, ILB will complete its review, make substantive comments and provide additional/different arguments, case support, and any modifications to the order and return the papers to the Region for filing with the court if the Board so authorizes.

- Regions will file papers with the District Court within 2 business days from notification that the Board has authorized Section 10(j) relief or receipt from ILB of its review of draft court papers, whichever is later. As in the past, if the Region believes that the time for filing should be postponed for good reason, such as settlement discussions, it should consult with ILB regarding whether additional time for filing should be allowed.

Additional Best Practice Procedures to Facilitate Timely Processing of Nip-in-the-bud Discharge Cases:

- When it is clear that documentary evidence or the testimony of neutral witnesses is needed during an investigation, the Region should make a request for the documents or witnesses and if it is not forthcoming, investigative subpoenas should be issued. Regions should not wait for the decision-making agenda to issue necessary subpoenas.

- Regions are encouraged to assign more than one agent, when needed, to investigate and prepare Section 10(j) cases involving nip-in-the-bud discharges.

- "Just and proper evidence" should be taken at the same time in the investigative process as obtaining the evidence on the merits of the charge.

- Because multiple charges are filed as new events unfold, the time for making a Regional 10(j) determination may become protracted. Consistent with OM 01-33, Regions should focus on the core allegations for which Section 10(j) is needed in organizing campaign discharge cases. By proceeding with the Section 10(j) case before opening the administrative hearing, including using affidavits rather than the administrative transcript, the Region may complete its investigation of later-filed non-10(j) charges and avoid *Jefferson Chemical* problems while at the same time seeking Section 10(j) relief on the core violations.

- When considering whether Section 10(j) relief is appropriate, the Region should inform the parties that the Region is prepared to seek Section 10(j) authorization seeking reinstatement of discharged employees. These conversations should be documented in the investigative file.

- To avoid adjournments and postponements, when scheduling the administrative hearing, the Region should liberally estimate the number of days required for the case to be heard.

- Once before an administrative law judge, the Region should oppose any request for postponement or extensions of time for filing documents. If a postponement is granted, the Region should contact ILB to evaluate whether a special appeal contesting the postponement should be filed with the Board.

- Regions generally should consult with ILB if Regions desire to use the administrative record instead of affidavits to try the Section 10(j) case. However, if a Region is confident that the administrative record will close within 2-3 weeks after receiving Board authorization, the Region may independently decide to try the case on the administrative record and move the court to do so when filing its Section 10(j) petition. The Region should notify ILB of its decision to do so.

The key to success of this program is the free flow of information and communication between the Region and ILB throughout the process. Regions should not hesitate to contact ILB for advice and assistance at all phases of their Section 10(j) work.

These cases can drain resources in the field. As soon as you identify a Section 10(j) case where the adequacy of your resources is an issue, please notify your Deputy or AGC in Operations Management and assistance will be provided. In addition, in evaluating your staffing needs overall, if you have an active Section 10(j) program which you believe has not been sufficiently factored in to your staffing, please consult with your Deputy or AGC. I also ask that you advise your local Practice and Procedure Committees of this program and request their full cooperation in expediting these very important cases.

I trust that you will embrace this critical program with the same high level of enthusiasm and commitment with which you perform all of your duties so that, together, we can enhance our ability to effectuate the Agency's mission.

L.S.

cc: NLRBU
NLRBPA
Release to the Public

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-01 December 20, 2010

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Effective Remedies in Organizing Campaigns

I. Introduction

The protection of employee free choice regarding unionization is a keystone of the Agency's mission, and I am committed to making the principle of employee free choice meaningful. Accordingly, as Acting General Counsel I have placed a priority on ensuring that the Agency protects employee freedom of choice with regard to unionization by obtaining effective remedies for employers' unlawful conduct during union organizing campaigns. In Memorandum GC 10-07, I outlined my commitment to seek Section 10(j) injunctive relief as a quick and effective remedy for an employer's serious unlawful conduct during union organizing campaigns. But, to fully ensure that the Agency protects employee freedom of choice with regard to unionization, we must seek remedies that enhance the effectiveness of Section 10(j) and Board relief.

In Memorandum GC 10-07, I announced an initiative to seek 10(j) relief in all discriminatory discharges during organizing campaigns (so-called "nip-in-the-bud" cases) because they have a severe impact on employees' Section 7 rights. In such cases, the discharges are often accompanied by other serious unfair labor practices such as threats, solicitation of grievances, promises or grants of benefits, interrogations and surveillance.[1] These additional unfair labor practices

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[1] See, e.g., Jewish Home for the Elderly of Fairfield County, 343 NLRB 1069 (2004) (where employer discharged an employee one day before an election, it also threatened job loss and plant closure through its chairman of its board of directors, threatened employees with arrest, created impression of surveillance, videotaped employees, interrogated employees, promised better benefits, increased wages, solicited employees to repudiate the union and revoke authorization cards, prohibited employees from discussing the union but allowed them to discuss other non-work subjects, prohibited off-duty employees access to its facility to talk to coworkers, and restricted the locations of employees' breaks to deny employees from discussing wages, benefits, and terms and conditions with fellow employees); Blockbuster Pavilion, 331 NLRB 1274 (2000) (in addition to refusing pro-union employees work, employer threatened discharge for union activity, threatened to burn its facility before allowing a union

also have a serious impact on employee free choice, as they inhibit employees from engaging in union activity and dry up channels of communication between employees. Thus, in order to provide an effective remedy in these cases, it is just as necessary to remove that impact as it is to remove the impact caused by an unlawful discharge.[2]

In many of these cases, the impact is inherent in the nature of the unfair labor practice. "Hallmark" violations such as discharging employees and threats of job loss and plant closing, for example, "can only serve to reinforce employees' fear that they will lose employment if they persist in union activity."[3] No reasonable employee would engage in any protected activity after witnessing a discharge of a fellow employee for similar conduct; and just as chilled from repeating such activity is the discharged employee, himself, who is now unemployed because he exercised his statutory rights.[4] Furthermore, threats of plant closure or job loss severely and equally affect all employees in the plant.[5] Faced with a threat of loss of work, employees will abandon unionization efforts and effectively relinquish their free choice.

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to represent its employees, and interrogated employees); United States Service Industries, 319 NLRB 231 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997) (employer discharged ten employees, refused to reinstate unfair labor practice strikers, threatened employees that their union activities would result in discharge, interrogated and surveilled employees, prohibited employees from discussing the union at worksites, and awarded bonuses to non-union employees).

[2] See Federated Logistics, 340 NLRB 255, 256-257, enfd. 400 F.3d 920 (D.C. Cir. 2005) (unfair labor practices during organizational campaigns can jeopardize the possibility that an election will accurately reflect the employees' free choice); Fieldcrest Cannon, Inc., 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65, 74 (4th Cir. 1996).

[3] Consec Security, 325 NLRB 453, 454 (1998), enfd. 185 F.3d 862 (3d Cir. 1999). See also Federated Logistics, 340 NLRB at 257 (threats of plant shutdown "serve as an insidious reminder to employees that every time they come to work that efforts on their part to improve their working conditions may not only be futile but may result in the complete loss of their livelihoods").

[4] Eddyleon Chocolate Co., 301 NLRB 887, 891 (1991) (unlawful discharges affect remaining employees who reasonably fear that they too will lose employment if union activity persists).

[5] Spring Industries, 332 NLRB 40, 41 (2000). Compare Crown Bolt, Inc., 343 NLRB 776, 777-779 (2004) (overruling Spring Industries to the extent it held that the Board would presume widespread dissemination of plant closure threats absent evidence to the contrary, while still agreeing that plant closure threats are "a grave matter" and "highly coercive of employee rights").

Similarly, an employer's promise or grant of benefits also has a devastating impact on employee free choice because "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."[6] Employees are less inclined to exercise their free choice if they know that they will gain benefits by not supporting a union and conversely, that they will lose benefits if they do support a union.

The serious effect of other, non-hallmark violations can not be overlooked. Thus, for example, an employer's solicitation of grievances chills employee unionization efforts because it demonstrates both that employees' efforts to unionize are unnecessary and that the employer will only improve working conditions as long as the workplace remains union-free.[7] In either case, an employer's sudden solicitude towards employees' needs—especially where they previously were ignored—demonstrates to employees the extent to which an employer is willing to go to avoid unionization.

Interrogations and surveillance also have an inhibiting effect on employee free choice. Interrogations have a "natural tendency to instill in the minds of employees fear of discrimination on the basis of information the employer has obtained."[8] Likewise, surveillance or the impression of surveillance inhibits employees' lawful participation in activities by highlighting "that the employer is anxious to find out about union activity which the employees wish to conceal from him to avoid retaliation."[9] If an employer engages in interrogation or surveillance, employees will be less likely to engage in protected activity and express their free

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[6] NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove"); Evergreen America Corp., 348 NLRB 178, 180 (2006) (unlawful grants of significant benefits "have a particularly longlasting effect on employees and are difficult to remedy by traditional means. . ."), citing Gerig's Dump Trucking, 320 NLRB 1017, 1018 (1996), enfd. 137 F.3d 936 (7th Cir. 1998).

[7] Center Service System Division, 345 NLRB 729, 730 (2005), enfd. in relevant part, 482 F.3d 425 (6th Cir. 2007) (solicitation of grievances influences employee choice during an organizational campaign because it raises inferences that the employer is promising to remedy those grievances); Alamo Rent-A-Car, 336 NLRB 1155, 1155 (2001) (employer solicited grievances "in order to blunt the employees' enthusiasm for, or at least perceived need for, the Union").

[8] NLRB v. West Coast Casket Co., 205 F.2d 902, 904 (9th Cir. 1953).

[9] Lundy Packing Co., 223 NLRB 139, 147 (1976), enfd. in relevant part 549 F.2d 300 (4th Cir. 1977); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 104 n.7 (5th Cir. 1963).

choice because of concern that the employer is trying to learn about their views on unionization and that an employee's actions, either by what he says to the employer, or how he behaves around the workplace, will likely be used to affect his job security or result in economic reprisal.

Finally, any employer conduct that interferes with employees' ability to communicate between themselves and with a union has a damaging impact on employee free choice.[10] Employees must be able to discuss the advantages and disadvantages of organization together and lend each other support and encouragement—such full discussion lies at the very heart of organizational rights guaranteed by the Act.[11] If an employer unlawfully limits employees' opportunities to discuss unionization, employees are unable to assert their statutory rights and talk freely about working conditions and organizing.[12]

The coercive effect of any of this conduct is often magnified by the involvement of high ranking officials,[13] the swiftness of an employer's response to a union campaign,[14] and the proximity to a union's demand for recognition or the filing of a representation petition.[15]

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[10] Republic Aviation v. NLRB, 324 U.S. 793, 803 (1945) (such rules are "an unreasonable impediment to self-organization").

[11] Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972) (the right of self-organization depends in some measure on the ability of employees to learn the advantages and disadvantages of self-organizations from others).

[12] See NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974) ("The place of work is a place uniquely appropriate for dissemination of views" by employees).

[13] NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359, 1369-1370 (1981) (noting that impact of unfair labor practices is augmented by participation of upper management). See also Excel Case Ready, 334 NLRB at 5 (involvement of upper managers "exacerbates the natural fear of employees that they will lose employment if they persist in their union activities," and is "likely to have a lasting impact not easily eradicated by the mere passage of time or the Board's usual remedies"), quoting Garney Morris, Inc., 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995); Consec Security, 325 NLRB at 454-455 ("When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten").

[14] See General Fabrications Corp., 328 NLRB 1114, 1115 (1999), enfd. 222 F.3d 218 (6th Cir. 2000) ("impact of [employer's unlawful conduct] was magnified by its proximity to the onset of the Union's organizational effort"); United States Service Industries, 319 NLRB at 232 (employer's "swift and widespread action each time its employees have attempted to enlist the aid of the Union [was] aimed at ensuring that employees think twice before doing so again"); Bakers of Paris, 288 NLRB 991, 992 (1998), enfd. 929 F.2d 1427 (9th Cir. 1991) (effect of

Because the impact of these unfair labor practices during organizing campaigns is so severe, I want to ensure that, in addition to swiftly remedying unlawful discharges, the impact of these ancillary unfair labor practices is removed as well. In order to remove the impact, we must tailor remedies to recreate an atmosphere that allows employees to fully utilize their statutory right to exercise their free choice. Therefore, in addition to seeking 10(j) reinstatement in all cases involving a discharge during an organizing campaign, Regions should also consider whether to seek additional remedies to remove the impact of the discharge(s), as well as the other Section 8(a)(1) violations. I believe that, in such cases, we have an obligation to seek remedies that are designed to eliminate these coercive and inhibitive effects and restore an atmosphere in which employees can freely exercise their Section 7 rights.

In all organizing cases, the remedial touchstone should be prompt and effective relief to best restore the status quo and recreate an atmosphere in which employees will feel free to exercise their Section 7 right to make a free choice regarding unionization. The Board has broad discretionary authority to fashion remedies that will best effectuate the purposes of the Act and are tailored, as much as possible, to undo the harm created by unfair labor practices.[16] Implicit in this statement of the Board's authority is the obligation to articulate why additional remedies are necessary.[17] The rationale for each of

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unfair labor practices increases when violations begin when employer has knowledge of union campaign).

[15] Consec Security, 325 NLRB at 454, citing Electro-Voice, Inc., 320 NLRB 1094, 1095 (1996) and Astro Printing Services, 300 NLRB 1028, 1029 (1990). See also Homer D. Bronson Co., 349 NLRB 512, 515, 549 (2007), enfd. 273 Fed. Appx. 32 (2d Cir. 2008) (employer's conduct was coercive enough to warrant additional remedies where it committed several unfair labor practices within a week of the union filing a petition).

[16] J.H. Rutter Rex Mfg. Co., 396 U.S. 258, 260-263 (1969). See also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898 (1984); Ishikawa Gasket America, Inc., 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) (Board may impose additional remedies "where required by the particular circumstances of a case"); Excel Case Ready, 334 NLRB at 5 (Board has broad discretion to fashion a just remedy to fit the circumstances of each case it decides).

[17] See, e.g., Chinese Daily News, 346 NLRB 906, 909 (2006) ("extraordinary" notice-reading remedy not appropriate, because "neither the General Counsel nor the dissent have offered any evidence to show that the Board's traditional remedies are insufficient" to remedy multiple violations, including threats of job loss, where violations happened four years prior and any "lingering effects" were "not at all clear"); Register Guard, 344 NLRB 1142, 1146 n.16 (notwithstanding multiple 8(a)(1) violations, including a hallmark unit-wide wage increase, "the

these remedies is provided below. In arguing for such remedies, Regions should articulate the lasting or inhibitive coercive impact inherent in the violations alleged, as explained above, use additional evidence adduced, where available, to demonstrate the actual impact of the violations and, as shown below, explain how the remedy sought will remove that impact.

II. Appropriate Remedies to Seek

In nip-in-the-bud organizing cases, the remedial goal should be to recreate an atmosphere free from the effects of an employer's unfair labor practices. The Board's cease-and-desist and notice posting remedies announce to employees, who have been subjected to interference, restraint, and coercion with respect to their right to select a bargaining representative, that they have a protected right to engage in such activity free from unlawful reprisal. Similarly, the reinstatement and backpay remedies aim to "make whole" an affected employee. But because unlawful discharges and other violations during an organizing drive have a lasting or particularly inhibitive effect on the exercise of Section 7 rights and on the Board's ability to conduct a fair election, we must do more to counteract the impact of that unlawful conduct. GC 10-07 provides that when a Region determines that a case involving a nip-in-the-bud discharge has merit, it should submit the case for consideration of 10(j) relief. In addition, Regions are hereby authorized, at the same time, to include in their Complaint any of the remedies listed below that are appropriate to remedy the discharge itself, as well as serious ancillary unfair labor practices. Finally, Regions should include in their 10(j) submissions a recommendation regarding seeking in Section 10(j) proceedings any of these remedies included in their Complaint.

1. Notice Reading – Appropriate in nip-in-the-bud cases

Notice-reading remedies generally require that a responsible management official read the notice to assembled employees or, at the respondent's option, have a Board Agent read the notice in the presence of a responsible management official. The public reading of a notice has been recognized as an "effective but moderate way to let in a warming wind of information and, more important, reassurance."[18] By imposing such a remedy, the Board can assure

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Charging Party has not shown a basis for imposing" a notice-reading remedy); First Legal Support Services, LLC, 342 NLRB 350, 350 n.6 (2004) (additional remedies not warranted, notwithstanding multiple violations, including repeated threats of discharge and plant closure as well as the actual discharge of two union supporters, where "[n]either the General Counsel nor our dissenting colleague has shown that traditional remedies are so deficient here to warrant imposing" additional remedies).

[18] United States Service Industries, 319 NLRB at 232 quoting J.P. Stevens & Co., v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969). See also Concrete Form Walls, Inc., 346 NLRB 831, 841 n.3 (2006) (Member Schaumber, dissenting in part) (notice-

the respondent's "minimal acknowledgment of the obligations that have been imposed by the law. . . . The employees are entitled to at least that much assurance that their organizational rights will be respected in the future."[19] A notice reading will also ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the employer's bulletin boards. A reading will also allow all employees to take in all of the notice, as opposed to hurriedly scanning the posting, under the scrutiny of others.[20]

In addition to ensuring that the notice's content reaches all the employees, a personal reading places on the Board's notice "the imprimatur of the person most responsible" and allows employees to see that the respondent and its officers are bound by the Act's requirements.[21] For example, where an employer discharged a union supporter or made threats of plant closure, hearing the Board's cease-and-desist language read will better serve to allay the employees' fear that union activity at work will be met with reprisal. Furthermore, where a high ranking manager personally committed some of the violations, hearing that manager read the notice, or seeing him present while it is read, will "dispel the atmosphere of intimidation he created" and best assure employees that their rights will be respected.[22] Finally, a notice-reading remedy is more effective at remedying violations during an organizing drive than a traditional notice posting because of its heightened psychological impact on employees; "[f]or an employer to stand before her assembled employees and orally read the notice can convey a sense of sincerity and commitment that no mere posting can achieve."[23]

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reading remedy "gives teeth to other notice provisions" that the respondent must also announce).

[19] Federated Logistics, 340 NLRB at 258 n.11. See also United States Service Industries, 319 NLRB at 232 (reading allows employees to gain assurance from a high level employer representative that they view "as the personification of the Company" that an employer will respect their rights).

[20] Regions should specifically seek language in an Order that the notice should be read to the widest possible audience. See, e.g., Vincent/Metro Trucking, LLC, 355 NLRB No.50, slip op. at 2 (2010).

[21] Loray Corp., 184 NLRB 557, 558 (1970).

[22] Three Sisters Sportswear Co., 312 NLRB 853, 853 (1993), enfd. mem 55 F.3d 684 (D.C. Cir. 1995).

[23] Teeter, Fair Notice: Assuring Victims of Unfair Labor Practices that their Rights will be Respected, 63 UMKC L. Rev 1, 11 (Fall, 1994).

2. Access Remedies – Appropriate in cases where there is an adverse impact on employee/union communication

The full exercise by employees of their Section 7 rights requires that employees be fully informed not only concerning those rights, but also concerning the advantages and disadvantages of selecting a particular labor organization, or any labor organization, as their bargaining representative. Where an employer unlawfully interferes with communications between employees, or between employees and a union, the impact of that interference requires a remedy that will ensure free and open communication. Allowing union access to the employer's bulletin boards and providing the union with the names and addresses of employees will restore employee/union communication and assist the employees in hearing the union's message without fear of retaliation.[24] These access remedies assure the employees that they can learn about unionization and can contact union representatives in an atmosphere free of the restraint or coercion generated by an employer's violations.[25]

a. Access to bulletin boards

An order requiring an employer to permit access to its bulletin boards will broaden the opportunity for employee/union communication.[26] Union access to bulletin boards permits employees to see, at the workplace, that open displays of union information are acceptable, and will better thaw the chilling impact of the violations than the bare recitation of rights in a standard notice posting.[27] Access to bulletin boards is the least intrusive of access remedies, and it "serves to

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[24] Teamsters Local 115 v. NLRB, 640 F.2d 392, 399 (D.C. Cir. 1981), enfg. 242 NLRB 1057 (1979). See also United States Service industries, 319 NLRB at 232, quoting United Dairy Farmers Cooperative Assn., 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980).

[25] See Jonbil, Inc., 332 NLRB 652, 652 (2000); United States Service Industries, 319 NLRB at 232.

[26] Where an employer customarily uses electronic means, such as an electronic bulletin board, e-mail, or intranet postings to communicate with employees, Regions should submit the case to the Division of Advice on whether to seek a remedy including union access to those electronic means of communication. See J. Picini Flooring, 356 NLRB No. 9 (2010) (electronic notice posting appropriate where employer regularly utilized electronic bulletin board to communicate with employees).

[27] Excel Case Ready, 334 NLRB at 5 (bulletin-board access remedy provides employees with "reassurance that they can learn about the benefits of union representation, and can enlist the aid of union representatives, if they desire to do so, without fear [of retaliation by the employer]").

reduce the obstacles to free union-employee communication" that were created by the employer's coercive conduct, and reassures the employees that the union has a "legitimate role to play in their decision whether to seek union representation."[28]

b. Employee names and addresses

A names-and-addresses remedy typically requires the employer to provide the union with an updated list of employees' names and addresses, for a longer and earlier time period than would be required under Excelsior Underwear.[29] If an employer's unlawful conduct during an organizing campaign disrupts Section 7 rights and election conditions, the union must restart its organizing campaign and employees will have reason to fear discussing unionization in the workplace because of the employer's past conduct.[30] "To neutralize the effect of the Respondent's face-to-face restraint and coercion, it is necessary that the employees have ready access to union organizers and other officials who can explain to them the Union's point of view with respect to organizational activities."[31] The names-and-addresses remedy "attempts to level a playing field that has been tilted against the employees' organizational rights" by the employer's unfair labor practices and enables the union to contact all the employees outside the work environment free from management's watchful

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[28] Blockbuster Pavilion, 331 NLRB at 1276. See also J.P. Stevens & Co. v. NLRB, 388 F.2d 896, 906 (2d Cir. 1967) (union access to bulletin boards appropriate to offset the company's use of bulletin boards in coercive campaign against the union and to "dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign"); John Singer, Inc., 197 NLRB 88, 90 (1972) (union access to bulletin boards necessary because additional forms of communication were needed to allow the union to reclaim allegiance lost as a result of the company's unlawful conduct).

[29] Excelsior Underwear Inc., 156 NLRB 1236 (1966).

[30] The Board has expressly rejected the argument that a names-and-addresses remedy is unnecessary because the union will obtain an Excelsior list of names and addresses in the event an election is scheduled. See, e.g., Federated Logistics, 340 NLRB at 256-258; Blockbuster Pavilion, 331 NLRB at 1275. Providing names and addresses shortly before the election, as with the Excelsior list, is insufficient. Rather, a remedial provision of names and addresses for a longer and earlier time period is designed to restore "the conditions that are a necessary prelude to a free and fair election." Blockbuster Pavilion, 331 NLRB at 1275.

[31] Heck's, Inc., 191 NLRB 886, 887 (1971), enfd. as amended 476 F.2d 546 (D.C. Cir. 1973).

eye.[32] Thus, this remedy is necessary because it facilitates communication between the union and employees outside the employer's domain, and therefore, "insulated from discriminatory reprisal."[33]

III. Instructions to Regions for Investigating and Litigating These Cases

In addition to submitting 8(a)(3) nip-in-the-bud cases for 10(j) relief pursuant to Memorandum GC 10-07, Regions should seek a notice-reading remedy in all such cases and should consider seeking a notice-reading remedy where an employer has committed serious Section 8(a)(1) violations. Hallmark violations such as threats of discharge and plant closure, and promises or grants of benefits, and other serious violations such as solicitation of grievances, high-level or widely disseminated interrogations, and surveillance or impression of surveillance have a pronounced impact on employee free choice. A notice reading remedy will effectively assure employees that their rights will be respected.

When the employer's unfair labor practices interfere with communications between employees, or between employees and a union,[34] Regions should also seek union access to bulletin boards and employee names and addresses.

Regions are authorized to plead these remedies in their Complaint. In addition, Regions should include in their recommendation regarding 10(j) relief whether they would seek on an interim basis the remedies included in their Complaint. A combination of these remedies, as part of our 10(j) relief, will ensure that employees' Section 7 rights are adequately protected and that their ability to exercise free choice regarding unionization is promptly restored.

If a Region determines that an employer's unfair labor practices have had such a severe impact on employee/union communication that bulletin board access and names and addresses are insufficient to permit a fair election, it should submit the case to the Division of Advice with a recommendation as to why additional remedies are warranted, including: granting a union access to nonwork areas during employees' nonwork time; giving a union notice of, and equal time and facilities for the union to respond to, any address made by the company regarding the issue of representation; and affording the union the right to deliver a speech to employees at an appropriate time prior to any Board election. These remedies may be warranted where an employer makes multiple

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[32] Blockbuster Pavilion, 331 NLRB at 1275.

[33] Id. at 1275 n.16, citing J.P. Stevens & Co. v. NLRB, 417 F.2d at 541. See also Excel Case Ready, 334 NLRB at 5.

[34] See Jewish Home for the Elderly of Fairfield County, 343 NLRB at 1069.

unlawful captive audience speeches or where the employer is a recidivist and has shown a proclivity to violate the Act.[35]

In order to secure a notice reading or any access remedies in Section 10(j) and unfair labor practice proceedings, Regions need to articulate why they are necessary. Regions should be prepared to argue that these remedies are needed both because of the impact on employee free choice inherent from the unfair labor practices themselves and, where available, the evidence that demonstrates that impact in a particular case. Thus, although the impact of these unfair labor practices on employee free choice may be inferred from the nature of the violations, Regions should also investigate for evidence to establish actual impact. The evidence that is currently collected during a 10(j) "just and proper" investigation will typically demonstrate the effects of an employer's unfair labor practices on employee free choice. Such evidence will also, therefore, bolster the need for these remedies by providing concrete evidence of impact upon employees.

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[35]For cases where these remedies were concurrently granted, see, e.g., Avondale Industries, 329 NLRB at 1068 (nonwork access, equal time, and a 30 minute pre-election speech ordered where employer committed 141 unfair labor practices including over 30 discriminatory discharges); Fieldcrest Cannon, Inc., 318 NLRB at 473, 490-491 (nonwork access, equal time, and a 30 minute pre-election speech appropriate because managers gave numerous unlawful captive audience speeches); Texas Super Foods, 303 NLRB 209, 209 (1991) (nonwork access, equal time, and a 30 minute pre-election speech ordered to "provide the proper atmosphere for holding a fourth election" after the employer "blatantly disregarded" the Board's finding that it violated the Act); Monfort of Colorado, 298 NLRB 73, 86 (1990), enfd. in rel. part, 965 F.2d 1538, 1548 (10th Cir. 1992), citing Monfort of Colorado, 284 NLRB 1429, 1429-1430, 1479 (1987), enfd. sub. nom. Food & Commercial Workers v. NLRB, 852 F.2d 1344 (D.C. Cir. 1988) (nonwork access, equal time, and a 30 minute pre-election speech appropriate because the large number of incidents that occurred, the many supervisors involved, the personal involvement of the employer president, and the premeditated nature of the employer's violations demonstrated its proclivity to violate the Act); S.E. Nichols, Inc., 284 NLRB 556, 559-560 (1987), enfd. in rel. part, 862 F.2d 952, 960-963 (2d Cir. 1998), cert. denied, 490 U.S. 1108 (1989) (nonwork access, equal time, and a 30 minute pre-election speech necessary where employer was a recidivist who "continued to engage in an obdurate flouting of the Act"). For cases where only one of the remedies was granted, see, e.g., United States Service Industries, 319 NLRB at 231 (union access to nonwork areas during employees' nonwork time necessary because it was the third Board case documenting the employer's unlawful response to its employees' organizing efforts); Pennant Foods Co., 352 NLRB 451, 472-473 (2008) (equal time remedy necessary for third rerun election because the employer violated formal settlement).

In addition to articulating how the impact of the violations supports the need for these remedies, Regions should also articulate, based on the discussion above, how those remedies will remove the effects of the unlawful conduct and restore an atmosphere free of coercion where employees can exercise a free and informed choice.

In summary, I believe that these remedies will further the important goal of ensuring employee freedom of choice with regard to unionization and restore the status quo where an employer has committed serious unfair labor practices in response to an organizing campaign. The Board and courts have recognized these remedies as important tools for restoring the right of employees to make a free and informed choice regarding unionization, and I am committed to seek them in fulfillment of my obligation to protect those rights under the Act.

L.S.

Interim Report on the §10(j) Initiative regarding Organizing Campaign Discharges

The initiative, outlined in GC Memo 10-07 (September 30, 2010), was launched to ensure that the Board obtains timely, meaningful remedies in so-called "nip-in-the-bud" cases – when, during a union organizing campaign at a workplace, employees are unlawfully discharged or subjected to other serious unfair labor practices designed to nip the protected activity in the bud before it bears fruit. The Memorandum sets out best practices for processing all the stages of such unfair labor practice cases so as to assure that the Agency promptly decides whether charges have merit and, in cases of unlawful discharge, the discharge is promptly remedied through settlement or §10(j) district court litigation in an attempt to quickly return the employee to work and negate the detrimental impact that the employer's conduct had on employees at that facility.

Of the 157 nip-in-the-bud charges filed since the program began on October 1, 79 charges were resolved by January 31, i.e. 57 were found to be non-meritorious and 22 were found to have merit. Of those charges having merit, 12 were fully resolved by January 31. The average case processing time from filing to resolution was 61 days.

Since the initiative began, Regional Offices have submitted recommendations concerning whether to seek § 10(j) injunctive relief in 28 nip-in-the-bud cases, including 3 cases where the charge was filed after the initiative began. Of these 3 cases, one settled before ILB's decision, one settled after Board authorization and one was not considered to warrant seeking § 10(j) interim relief. The Agency has obtained settlements in 22 nip-in-the-bud cases, including cases where the charge was filed before October 1, 2010 and a Region had submitted the matter to the Injunction Litigation Branch for §10(j) authorization. As a result of these settlements, 42 discharged employees were offered reinstatement, of whom 19 accepted the offers and 23 waived reinstatement; and, in total, they received $354,978 in backpay.

In addition, a district court ordered interim reinstatement of an additional two discriminatees.

The tables below display case processing data for the first four months of the initiative October 1, 2010- January 1, 2011:

(A) Regional processing of nip in the bud charges filed in the first four months of the initiative

(B) Injunction Litigation Branch processing of all nip in the bud §10(j) recommendations from Regional Offices *(this table includes cases based on charges filed with Regional Offices before October 1, in which the investigation was completed and the case submitted to the ILB on or after October 1)*

A. Regional Processing of Nip-in-the-Bud Charges
Filed 10/1/10-1/31/11

# charges filed - all allegations		7,348			
"nip-in-the-bud" charges filed		157			
Merit determination	Pending		78		
	No merit		57		
	Merit		22		
Resolution of merit cases					
	settlement pre-complaint			10	
	complaint issued			12	
Regional §10(j) Consideration					
	§10(j) consideration pending				4
	Expedited administrative hearing				5
ILB/GC §10(j) consideration	Submitted to ILB				3
	Submissions pending in ILB				0
	Settled before ILB decision				1
	No §10(j) at this time				1
	Board authorization sought				1
Board authorization	GC requests authorized				1
Litigation	Settled post-authorization, pre-petition				1

B. ILB Processing of Nip-in-the-Bud §10(j) Recommendations Submitted to ILB 10/1/10-1/31/11; Charges Filed Any Time before 1/31/11

# cases submitted			28				
ILB/GC determination							
	Submissions pending in ILB			2			
	Settled before ILB decision			5			
	No §10(j) at this time			9			
	Board Authorization sought			12			
Board Authorization							
	Requests pending				2		
	Requests authorized				10		
Litigation							
	petition not yet filed					1	
	settled post-authorization, pre-petition					5	
	petitions filed					4	
		settled post-petition, pre-decision					2
		injunction granted					1
		petitions pending					1

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11- 04 January 12, 2011

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Revised Casehandling Instructions Regarding the Use of Default Language in Informal Settlement Agreements and Compliance Settlement Agreements

The 2002 Best Practices Compliance Case Report, as set forth in GC Memorandum 02-04, recommended that Regions include default language in informal settlement agreements when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations. In OM 05-96, "Casehandling Instructions Regarding Use Of Default Language in Settlement Agreements," dated September 16, 2005, revised default language was set forth to address some concerns raised by then Chairman Battista in *Great Northwest Builders, LLC*, 344 NLRB 969 (2005).

Our experience is that the Board routinely has enforced these provisions when ruling on motions for summary judgment filed by counsel for the General Counsel when there has been a breach of the settlement agreement. Operations-Management recently surveyed all Regions about their use of default provisions in settlement agreements. This survey showed that five Regions routinely propose, and three of those Regions regularly insist upon, inclusion of default language in all informal settlement agreements. With a settlement goal of 95%, these five Regions achieved settlement rates in FY 2009 of 96.9, 98.3, 95.6, 96.5 and 93 percent, respectively, and in FY 2010 of 100, 96.2, 94.2, 91.6 and 95.1 percent, respectively. These Regions also achieved litigation "win rates" in FY 2009 of 100, 75, 83.3, 90 and 93.3 percent, respectively, compared to a national rate in FY 2009 of 89.9 percent, and achieved litigation "win rates" in FY 2010 of 100, 100, 87.0, 87.5 and 100 percent, respectively, compared to the national rate in FY 2010 of 91.4 percent. These statistics demonstrate that the Regions' policy on including default language in settlement agreements does not adversely impact on either their settlement rates or the success they enjoy in litigating cases they cannot settle.

Based on this experience and the input from our Regional Directors, I have decided to expand the use of default language. There is a potential for considerable savings of resources and avoidance of delays in the event of a breach of the settlement agreement in requiring the inclusion of default provisions in such agreements and enforcing such provisions in a summary proceeding in the event of a breach.

Accordingly, Regions are hereby instructed to routinely include default language in all informal settlement agreements and all compliance settlement agreements.[1]

Regional Office experience under outstanding GC guidelines demonstrates that default language is an effective and appropriate means to ensure that a charged party/respondent will comply with the affirmative provisions of the settlement agreement. Since the default language simply requires a charged party/respondent to honor the commitments it made in the settlement agreement, it is a reasonable requirement that ensures that the Agency will not be required to litigate a settled issue. In many cases, the default language will have been agreed to by a charged party/respondent only after the Regional Office has expended government resources to prepare for an administrative hearing. Failure to abide by the terms of a settlement that does not contain default language would require that the government incur the expense of preparing again for the administrative hearing and delays the provision of remedial relief. Therefore, to avoid duplicative expenses and delay, it is especially appropriate to include summary default language in informal settlement agreements.

With respect to compliance settlements, such agreements are usually concluded only after the entry of a Board Order or Court judgment.[2] At that stage of the proceeding, the arguments are even more compelling for default language in the settlement to avoid any further delays in the provision of remedial relief.

Therefore, language such as that set forth below should be included in all settlement agreements to meet these concerns:

> The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party/Respondent, the Regional Director will [issue/reissue] the [complaint/compliance specification] previously issued on [date] in the instant case(s). Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the [complaint/compliance specification]. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned [complaint/compliance specification] will be deemed admitted and its Answer to such [complaint/compliance specification] will be considered withdrawn. The only issue that may be raised before the Board is whether

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1 Regions should alternatively consider utilizing "confessions of judgment" in cases involving backpay installment plans. See OM 09-58, "Confessions of Judgment," dated April 10, 2009. In addition, Regions are reminded that in any settlement providing for installment payments, absent extraordinary circumstances, the Region should obtain some type of security from the respondent. See Casehandling Manual (Part III) – Compliance Proceedings, Section 10592.12.
2 Regions are reminded of the outstanding directions regarding the consolidation, in appropriate circumstances, of compliance matters with the initial complaint. See, e.g., Casehandling Manual (Part III) – Compliance Proceedings, Sections 10506.2(c), 10508.3 and 10646.3.

the Charged Party /Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the [complaint/compliance specification] to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte.

While in most cases the complaint will have already issued, in situations where the complaint has not issued, the default language should provide that the Regional Director will issue complaint on all allegations of the charge(s) in the instant case(s) that were found to have merit and list all the allegations and any specific remedial relief sought and should provide that by signing the settlement agreement, the Charged Party/Respondent waives any right to file an Answer.

If the compliance specification has not issued in a compliance case, the default language should provide that the Regional Director will issue a compliance specification and list all liquidated backpay or other remedial provisions and should provide that by signing the settlement agreement, the Charged Party/Respondent waives any right to file an Answer.

Filing Motions for Default Judgment

When filing a motion seeking a default judgment with the Board, it is critically important that the Region should explicitly detail in its motion for default judgment the precise remedial relief that the Region wishes the Board to provide in its order. Similarly, in such a case, to obtain enforceable remedies, it is equally important to consider this issue when drafting the language of the settlement agreement and to detail any remedial acts or requirements that respondent is expected to undertake or with which it is expected to comply.

If a Region is seeking a default judgment based on a charged party/respondent committing an unfair labor practice in violation of the cease and desist provisions of the settlement, the Region should issue a complaint on the new unfair labor practice and seek to consolidate this hearing with its motion to the Board for a default judgment.[3] If the Region prevails in showing that a new ULP was committed and that this violation breached the terms of the prior settlement agreement, the Region would seek to have the Board issue a default judgment on the prior settlement as well as remedying the new unfair labor practice.

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3 When consolidating the Motion for Default Judgment with the hearing on the new unfair labor practice, the Region should not ask the Judge to rule on this Motion. Rather, the Region should request that the Judge refer the Motion for Default Judgment to the Board when the Judge issues a decision on the new alleged unfair labor practice.

Revisions to the ULP and Compliance Casehandling Manuals will be prepared to reflect the contents of this memorandum. If you have any questions regarding this memorandum, please contact your Assistant General Counsel.

L.S.

cc: NLRBU
NLRBPA
Release to the Public

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

November 26, 2003

The Honorable Wayne Stenehjem
Attorney General
State of North Dakota
Office of Attorney General
State Capitol
600 E. Boulevard Ave., Dept. 125
Bismarck, North Dakota 58505

Re: Preemption of State of North Dakota Century Code Section 34-01-14.1 by National Labor Relations Act

Dear Mr. Stenehjem:

I am writing to apprise you of the National Labor Relations Board's concern that a North Dakota statute conflicts with the rights afforded employees by the National Labor Relations Act. The purpose of this letter is to ask for your assistance in determining whether the Board's concern can be addressed by your State.

The National Labor Relations Board was created by Congress in 1935 as an independent federal agency to administer the National Labor Relations Act, 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, as well as the right to refrain from all such activity. The Act generally applies to all private sector employers involved in interstate commerce, with limited exceptions, such as airlines and railroads. It implements the national labor policy of assuring free choice regarding union representation and encouraging collective bargaining as a means of maintaining industrial peace. Thus, under the Act, employees are entitled to majority representatives of their own choosing to bargain collectively with employers. In turn, unions serving as exclusive bargaining representatives are obligated to treat all employees they represent fairly and equally, regardless of whether the employees are members of the union. See, e.g., Richardson v. Communications Workers of America., 443 F.2d 974, 977, 981-83 (8th Cir. 1971).

A provision of the Labor Act permits unions to negotiate with employers for a "union security clause," which conditions employees' continuing employment on their payment to unions of amounts to cover the primary representational services performed by unions – collective bargaining, contract administration, and grievance processing. See 29 U.S.C. § 158(a)(3). However, the Act also permits states to forbid employers and unions from

negotiating such union security clauses. See 29 U.S.C. § 164(b). Such states are commonly known as "right to work" states, and North Dakota became such a state in 1947, by enacting Section 34-01-14 of the Century Code. In these states, employees cannot be required to make payments to unions which represent them in order to retain their employment, although they may voluntarily pay membership dues.

The North Dakota statute about which the Board is concerned is Section 34-01-14.1 of the North Dakota Century Code (attached), which was enacted in 1987, apparently to lessen the impact of the state's "right to work" law. The statute is entitled, "Collection of actual representation expenses from nonunion employees," and it authorizes unions to collect from non-union members expenses incurred on their behalf in grievance processing. Thus, this law permits unions to collect funds from employees who otherwise cannot be compelled to pay for union services. As explained below, however, this authorization by the state is not permitted under federal law.

North Dakota Century Code Section 34-01-14.1 came to the Agency's attention earlier this year as a result of an unfair labor practice charge filed by a North Dakota employee. This non-union member was fired by his employer, and was then required to pay $10,000 to the union before it would process his grievance. The union told the employee that the North Dakota statute permitted the union to do this. That particular dispute was resolved by the union's repaying the $10,000 and promising not to rely on the statute in the future. But the statute remains on the books as an invitation to other unions to similarly evade their obligation under federal law to treat all represented employees fairly and equally. Indeed, inquiries by our regional office have confirmed that the statute is relied upon regularly by other unions in North Dakota.

This North Dakota statute is preempted by federal law because it is directly contrary to the Labor Act and Board law finding that the charging of grievance processing expenses only to non-members is a violation of Section 8(b)(1)(A) of the NLRA. See Furniture Workers Div., Local 282 (The Davis Co.), 291 NLRB 182 (1988). The Board has consistently held that all represented employees are entitled to the impartial assistance of their exclusive representative in the filing and adjustment of grievances. A union evades its duty to provide such assistance when an employee must either pay a price for such help or forego it entirely. Hughes Tool Co., 104 NLRB 318, 327 (1953). The North Dakota statute licenses just such an evasion and thereby impermissibly alters the paramount federal law that requires an exclusive bargaining representative to fully and fairly represent all employees in the bargaining unit, whether or not they are fee-paying members.

Under the Supremacy Clause of the Constitution, federal statutes such as the National Labor Relations Act are binding on the states, notwithstanding conflicting state laws. See U.S. Const. art. VI, cl. 2. Because the North Dakota statute authorizes conduct that the NLRA prohibits under Section 8(b)(1)(A), it is preempted by federal law pursuant to the Supremacy Clause. See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-46 (1959); Employers Ass'n, Inc. v. United Steelworkers, 32 F.3d 1297, 1300-01 (8th Cir. 1994); see also

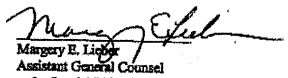
NLRB v. Nash-Finch Co., 404 U.S. 138, 144-47 (1971)(authorizing NLRB to seek declaratory and injunctive relief to invalidate state laws that conflict with rights under the NLRA).

In these circumstances, the Board is concerned that this statute is impairing the federal rights of represented, non-union members in North Dakota to: (1) not be forced to pay for representation expenses, (2) not be coerced into joining a union, and (3) have grievances processed in the same manner as that of union members. Accordingly, I am hopeful that the State of North Dakota will agree to take voluntary measures to repeal this statute.

Please contact either Dawn L. Goldstein, Senior Attorney at (202) 273-2936, or Nancy E. Kessler Platt, Supervisory Attorney at (202) 273-2937, with any questions and to discuss the Board's concern about the North Dakota statute. Thank you for your attention to this matter. I look forward to your prompt response.

Sincerely yours,

ARTHUR F. ROSENFELD
General Counsel



By: Margery E. Lieber
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Enclosure

ative\north Dakota/letter to AG

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

February 25, 2011

The Honorable Phil Roe
Chairman, Subcommittee on Health, Education,
Labor, and Pensions
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Dear Chairman Roe:

I have served as the Chairman of the National Labor Relations Board since January 20, 2009, when I was appointed by President Obama. I have served on the Board since November 14, 1997, when I was confirmed by the Senate after having been nominated by President Clinton. Since then, I was reappointed by President Bush and confirmed by the Senate to a second term in 2002 and a third term in 2006. My current term is set to expire on August 27, 2011.

On February 11, 2011, the Subcommittee held a hearing entitled "Emerging Trends at the National Labor Relations Board." I respectfully request that this letter be included in the hearing record. The views expressed in it are mine alone.

Of the witnesses who testified at the hearing, two were sharply critical of the Board's recent actions: G. Roger King and Philip A. Miscimarra, both attorneys in private practice representing management clients. I will not attempt to respond in comprehensive detail to the assertions made by Mr. King and Mr. Miscimarra. But I do feel obliged to address the main thrust of their testimony: that the Board is somehow overreaching its statutory authority, invading the province of Congress and abandoning long-established institutional norms. Such accusations are simply untrue.[1]

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[1] Mr. King, a critic of the present Board, was a champion of the prior Board, which itself was no stranger to controversy, as a hearing held by this Subcommittee in 2007 evidences. See "The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights," Joint Hearing before the House Subcommittee on Health, Employment, Labor and Pensions and

1. *The Proper Role of a Board with Fewer than Five Confirmed Members*

In his written testimony before the Subcommittee, Mr. King argues that the current Board -- because it consists of four members (not the full five provided for in the National Labor Relations Act) and because it includes one recess appointment[2] -- should not issue major decisions, reconsider existing precedent, or pursue rulemaking. Such "self-imposed restraint," Mr. King insists, is required by the Board's past practice and by "sound public policy."[3]

In fact, accepting Mr. King's view would mean a sharp break with Board tradition and would disable the Board from carrying out its statutory duty. A review of the Board's history shows why. The statute has provided for five Board members since 1947. Between August 1, 1947, and today, the Board has had five sitting members (including both Senate-confirmed members and recess appointees) less than two-thirds of the time. And vacancies on the Board have become far more common – indeed, chronic – in recent years. The last time that the Board had five confirmed members was August 21, 2003, more than seven years ago.

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the Senate Subcommittee on Employment and Workplace Safety (December 13, 2007). The contrast between Mr. King's recent testimony and his prior writings about the prior Board is striking. In 2006, Mr. King observed:

> While both management and labor interests and their advocates certainly have the right to analyze, support or criticize Board decisions, certain of the recent verbal outcries regarding Board decisions are highly partisan, and have the appearance of being part of a coordinated effort to chill and discourage present Board members from addressing many of the important issues and cases before them. Further, an equally unfortunate ancillary part of this apparent coordinated campaign is the suggestion that the Board is no longer a legitimate part of the country's administrative jurisprudence system.

G. Roger King, "'We're Off to See the Wizards,' A Panel Discussion of the Bush II Board's Decisions … and the Yellow Brick Road Back to the Record of the Clinton Board," paper presented to the Section of Labor and Employment Law, American Bar Association, at p. 1 (2006). Mr. King deplored "Board bashing," argued that "recent attempts to marginalize the Board are ill-advised," observed that the "efficiency and productivity of the Board continues to serve as a role model for many Federal agencies," and noted that "Board precedent from time to time no doubt will continue to be reversed in the future – which is not necessarily bad." *Id.* at pp. 12-13.

[2] Member Craig Becker is serving under a recess appointment. His nomination was filibustered in the Senate in the last Congress, even though a majority of the Senate favored his nomination.

The three confirmed members of the Board are myself, Member Mark Pearce, and Member Brian Hayes. There is one vacancy on the Board.

[3] G. Roger King, Statement to the Record, p. 2 (Feb. 11, 2011).

Needless to say, the Board has often issued major decisions, including decisions overruling precedent, with fewer than five confirmed members. For example, on July 17, 2002, a divided Board issued *MV Transportation*, 337 NLRB 770 (2002), eliminating the successor-bar rule and overruling *St. Elizabeth Manor*, 329 NLRB 341 (1999). At the time, the Board consisted of four members (three Republicans and one Democrat). The three-member majority that overruled precedent consisted entirely of recess appointees: then-Chairman Peter Hurtgen, Member William Cowen, and Member Michael Bartlett. I was the only confirmed Board member, and I dissented. The current Board has announced its intention to reconsider *MV Transportation.* See *UGL-UNICCO Services Co.*, 355 NLRB No. 155 (2010). Mr. King has criticized the Board for doing so, but by his own standard, *MV Transportation* – decided with less than a full Board and without a single confirmed member in the majority – would seem to have been a wholly illegitimate exercise of power.

There is no shortage of decisions in which the prior Board overruled precedent, despite the fact that the three-member (Republican) majority included one or more recess appointees. For example, in 2004, a divided Board overruled precedent in (among other cases) decisions involving the right of employees in non-union workplaces to have a coworker present during investigatory interviews,[4] the employee-status of university teaching assistants,[5] pro-union conduct by supervisors,[6] and bargaining units including joint employees of two employers.[7] The three-member majority in each case included one recess appointee (then-Member Ronald Meisburg). In 2006, a divided Board overruled precedent involving a union's photographing of employees; there were then two recess appointees (then-Member Peter Schaumber and then-Member Peter Kirsanow) in the three-member majority.[8] In 2007, a divided Board overruled precedent in several cases, including (but not limited to) decisions involving the voluntary-recognition bar,[9] the burden of proof for backpay claims,[10] the filing of decertification petitions following unfair labor practice settlements,[11] and the backpay period for union salts subjected to hiring discrimination.[12] In all of these cases and others, the three-member majority included a recess appointee (then-Member Kirsanow).

The approach of the prior Board, to be sure, was not unprecedented. Indeed, the Board has repeatedly overruled precedent when it consisted of only three members in all, but the decision was unanimous. The greatest number of examples comes from the (Republican majority) Board of 1985.[13] A leading instance is *Sears, Roebuck Co.*, 274 NLRB 230 (1985), which involved the right of non-union workers to have a co-worker present at investigatory interviews.

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4 *IBM Corp.*, 341 NLRB 1288 (2004).
5 *Brown University*, 342 NLRB 483 (2004).
6 *Harborside Healthcare*, 343 NLRB 906 (2004),
7 *Oakwood Care Center*, 343 NLRB 659 (2004).
8 *Randell Warehouse of Arizona*, 347 NLRB 591 (2006).
9 *Dana Corp.*, 351 NLRB 434 (2007).
10 *St. George Warehouse*, 351 NLRB 961 (2007).
11 *Truserv Corp.*, 349 NLRB 227 (2007).
12 *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).
13 See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, slip op. at 2 fn. 1 (2010) (concurring opinion) (collecting cases).

Let me be clear that I am not criticizing the practice of prior Boards. In none of my dissents in the more recent decisions cited did I suggest that the majority acted improperly because of how it was constituted. What I do contend, however, is that Mr. King's position has little if any support in the Board's history. The Board's tradition, rather, is not to overrule precedent with fewer than three votes to do so, as Member Pearce and I have explained in a recent concurring opinion.[14] Whether the Board consists of three, four, or five members in total, and whether the three-member majority includes recess appointees, has generally made no difference.

In his testimony at page 2, Mr. King quotes -- without explaining the context -- a statement from my partial dissent in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77 (2007). My dissent in that case in no way supports Mr. King's criticism of the current Board.

In *Schreiber Foods*, the point of contention between Member Schaumber and myself was how to interpret a statement in the Board's 2002 opposition to a petition for writ of certiorari, submitted to the Supreme Court, involving an earlier Board decision, *Meijer, Inc.*, 329 NLRB 730 (1999). In his own partial dissent, Member Schaumber argued that the Board should overrule *Meijer*. He contended that the Board, in its opposition, had essentially promised the Supreme Court that *Meijer* would be reconsidered by the Board (and thus that there was no need for the Court to review the decision). I disagreed with Member Schaumber's reading of the opposition, pointing out that at the time, the Board had only three members, and at most two of them would have supported overruling *Meijer*, since I had been in the majority in that decision. "Given the Board's well-known reluctance to overrule precedent when at less than full strength (five Members)," I wrote, "the Board could not have been signaling to the Court that full-dress reconsideration of *Meijer* was in the offing." 349 NLRB at 97. While my statement in *Schreiber* arguably could have been more precise, I was referring to the Board's tradition that three *votes* are required to overrule precedent, and not asserting that a Board of fewer than five members would never do so.[15]

All of this said, I certainly believe that the ideal situation is for the Board to operate with five, Senate-confirmed members. That ideal, however, has been increasingly difficult to achieve. In my more than 13 years on the Board, I have served as the *sole* member (for six weeks) and on two-, three-, four-, and five-member Boards. Indeed, the Board recently spent a full 27 months with only *two* members, a truly unfortunate situation that led to an adverse Supreme Court decision after Member Schaumber and I, pursuant to a prior delegation by the other Board members and relying on a legal opinion from the Department of Justice, continued to issue decisions where we could reach agreement.[16] When the Board has a lawful quorum (at least three

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[14] *Id.*, slip op. at 2 & fn. 1 (citing cases).

[15] More often than not, given the make-up of the Board, a three-vote majority is formed when the Board comprises five members and divides three-two. But, as the cases I have cited above illustrate, the Board has, in fact, reversed precedent with three votes when it was at *less* than full strength, consisting of three or four members. At the time of the *Meier* opposition, however, the Board consisted of just three members: two recess appointees, Member Bartlett and Member Cowen, and myself. I had been in the majority in *Meijer*. A two-one Board, adhering to tradition, would not have overruled *Meijer* and would not have told the Supreme Court that it intended to do so.

[16] *New Process Steel, L.P. v. NLRB*, ___ U.S. ___, 130 S. Ct. 2635 (2010).

members), it has the authority to decide any case that comes before it and to engage in any rulemaking permitted by the statute. Given the chronic vacancies that have plagued the Board in recent years, it would be an abdication of the Board's statutory duty to defer acting on important issues until, at some unknowable time in the future, it has five confirmed members. As I have pointed out, it has been more than seven years since that ideal has been realized.

2. *The Proper Role of the Board in Shaping Federal Labor Policy*

In his written testimony, Mr. Miscimarra suggests that the current Board is somehow intruding into the exclusive province of Congress. That suggestion is unwarranted.

It is indisputable that the Board has only the authority that Congress has given it in the National Labor Relations Act. The statute informs, guides, and ultimately constrains everything the Board does. The Supreme Court, in turn, is the ultimate arbiter of what the statute means.

In determining how narrow, or how broad, the Board's authority is, then, it is necessary and proper to turn to the Supreme Court's decisions applying the National Labor Relations Act. Here is what the Supreme Court has said in one, typical decision:

> This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy....
>
> This Court therefore has accorded Board rules considerable deference.... We will uphold a Board rule as long as it is rational and consistent with the Act, ... even if we would have formulated a different rule had we sat on the Board.... Furthermore, a Board's rule is entitled to deference even if it represents a departure from the Board's prior policy.

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990) (citations omitted). These principles follow from the fact that the National Labor Relations Act is, in many respects, written in general terms and, within those fairly wide limits, leaves it to the Board to develop specific legal rules regarding unfair labor practices and union representation elections. As the Supreme Court has observed, the Board, "if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978).

Mr. Miscimarra's testimony offers a view of the Board's authority as sharply limited, a view that seems to give very little weight to what the Supreme Court has said, again and again. He then criticizes certain recent decisions of the Board as amounting to policy changes that only Congress can make. It is certainly true that Congress has the ultimate authority to address any and every issue of labor law considered by the Board. Where Congress has addressed an issue, there is no question that the Board is duty-bound to apply the law. But if Congress has *not* spoken – and this will often be the case – the Board has the authority and the duty to decide the issue, as the Supreme Court has repeatedly recognized. If the Board oversteps its authority, of course, the federal courts can overturn its decision.

Mr. Miscimarra cites the Board's recent decisions finding a union's stationary display of large banners near a secondary employer's worksite to be lawful. The lead decision on this issue is *Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159 (2010). The National Labor Relations Act nowhere refers to banners. The key statutory provision, Section 8(b)(4) (ii), rather, uses very general language: a union may not "threaten, coerce, or restrain" a secondary employer. Does the stationary display of a banner violate that prohibition? That is a classic question of labor law policy -- never addressed, incidentally, by any earlier Board decision or by the Supreme Court. And it is a question that requires consideration of serious First Amendment constitutional concerns, as well, as the *Eliason* decision explains. Notably, every federal court to consider the question has found bannering displays to be lawful – rejecting the view of the prior Board General Counsel, who sought to enjoin the displays pending litigation before the Board. See *Eliason*, supra, 355 NLRB No. 159, slip op. at 1 fn. 3. The Board had the authority and the duty to decide *Eliason* and similar cases. It could not simply wait for Congress – which has not amended the Act with respect to secondary activity by unions since 1959 – to decide the question. In my view, the *Eliason* decision was correct, but it is subject to review in the federal appellate courts and ultimately by the Supreme Court.

The same is true of the Board's decision in *Dana Corp.*, 356 NLRB No. 49 (2010). Nothing in the language of the Act answers the question posed there – the legality under Section 8(a)(2) of a pre-recognition framework agreement – and neither does any previous decision of the Board or the Supreme Court.[17] Section 8(f) of the Act, invoked by Mr. Miscimarra, involves pre-hire agreements in the construction industry, and it has no bearing at all on the issue posed in *Dana*. With all due respect, his suggestion that "this is another area where policy changes should originate in Congress" is very difficult to comprehend. Meanwhile, the Board's decision has been praised by other commentators.[18]

Finally, Mr. Miscimarra points to *New York University*, 356 NLRB No. 7 (2010), which involves the question of whether university graduate assistants are statutory employees for purposes of the Act. The Act's definition of "employee," Section 2(3), says that the term "shall include any employee," except for certain specified exclusions (e.g., "agricultural laborer[s]"). No one argues that graduate assistants are specifically excluded. Again, the general language of the Act leaves the issue for the Board to decide, within appropriate limits. The Supreme Court has made that much clear, in upholding the Board's decision that union salts are statutory employees.[19] Any determination of who is, and who is not, a statutory employee necessarily involves determining the coverage of the Act. Whenever the Board finds employee status, then, it could be argued that it is somehow expanding the Act's scope. But that argument is unsound, unless one accepts the curious proposition that the Board has the authority only to find that contested categories of workers are *not* statutory employees.

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[17] The Board's decision explained with great care why an earlier Board decision cited by Mr. Miscimarra, *Majestic Weaving Co.*, 147 NLRB 859 (1964), was not controlling.

[18] See Andrew M. Kramer and Samuel Estreicher, *NLRB Allows Pre-recognition Framework Agreements*, 245 New York L.J. 4 (Feb. 23, 2011).

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

In sum, the Board has addressed, and will address, the sorts of questions that every prior Board has ruled upon. In doing so, it will be fulfilling exactly the role that Congress envisioned for the Board, when it enacted the National Labor Relations Act in 1935. And its decisions will be subject to judicial review, with the federal courts sometimes agreeing, and sometimes disagreeing, with the Board. Speaking for myself, I have previously made clear my view that the Board operates under significant constraints – the language of the statute, its own precedent, and judicial review – and that fundamental changes in federal labor law can come only from Congress.[20]

3. *The Board's Recent Requests for Briefing in Certain Cases*

Among the most perplexing of the criticisms made by Mr. King is his objection to the Board's requests in certain cases for *amicus* briefs. Mr. King describes this as "indirect rulemaking." While I do not believe that it is appropriate for me to comment publicly on cases that are pending at the Board, I have no hesitation in defending, as a general matter, the practice of inviting *amicus* briefs.

This practice plainly serves three important interests: open government, fair process, and informed decision-making. Surely it is better to tell the public what issues the Board intends to consider, and to permit interested persons to participate in the Board's decision-making process, than it is to keep the public in the dark and to exclude stakeholders from participation. And surely it is better that the Board have the benefit of the views of the larger labor-management community, not just the perspectives of the parties to a particular case.

* * *

For the reasons I have explained, I believe that the criticisms of the Board offered at the hearing are unwarranted.[21] What are the "emerging trends" at the Board? I think there are three.

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[20] For example, in remarks delivered as part of the Access to Justice Lecture Series at Washington University Law School on February 17, 2010, I said: "I do not think that fundamental changes in labor law – as opposed to incremental improvements – can reasonably be expected to come from the National Labor Relations Board, whoever serves there."

[21] I might add, however, that the Board has never been a stranger to criticism or controversy. As one commentary observed a quarter century ago:

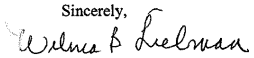
> The only change [over the years] has been in the nature of the Board's critics – sometimes management, sometimes labor, sometimes both – depending on which group felt at any given moment that its ox had been gored by the conflicting interpretations given to various sections of the law by the shifting majorities in control of the NLRB in Democratic and Republican administrations. The list of the Board's detractors is by no means confined to those directly involved in the cases before it for adjudication. The roster has embraced almost everyone at one time or another— Presidents of the United States, Congress, the federal judiciary, and that most insatiable of faultfinders, the press.

A. H. Raskin, *Elysium Lost: The Wagner Act at Fifty,* 38 Stan. L. Rev. 945, 948 (1986).

First, greater productivity in decision-making, reflecting the Board's new quorum and with it, the ability to decide cases and to avoid deadlock. Second, greater transparency and public participation in its decision-making – perhaps at the price of greater controversy, but with a corresponding gain in the fairness and quality of the Board's decision-making process. Third, a willingness to take carefully considered steps to keep the National Labor Relations Act vital, as exemplified in the Board's unanimous decision to begin awarding compound interest on backpay awards to employees victimized by unfair labor practices – more than 20 years after the Board was first urged to adopt that remedial change.[22]

Thank you for the opportunity to submit this statement. I appreciate the Subcommittee's interest in the Board's work, and I look forward to a respectful dialogue about the important issues that the National Labor Relations Act requires the Board to address.

Sincerely,



Wilma B. Liebman
Chairman

cc: Hon. Robert Andrews, Ranking Member

[22] *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

[Whereupon, at 12:01 p.m., the subcommittee was adjourned.]