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CULTURE OF UNION FAVORITISM: RECENT ACTIONS OF THE NATIONAL LABOR RELATIONS BOARD

HEARING

BEFORE THE

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, SEPTEMBER 22, 2011

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CULTURE OF UNION FAVORITISM: RECENT ACTIONS OF THE NATIONAL LABOR RELATIONS BOARD

Thursday, September 22, 2011
U.S. House of Representatives
Committee on Education and the Workforce
Washington, DC

The committee met, pursuant to call, at 10:04 a.m., in room 2175, Rayburn House Office Building, Hon. John Kline [chairman of the committee] presiding.

Present: Representatives Kline, Petri, Platts, Wilson, Foxx, Goodlatte, Roe, Thompson, Walberg, DesJarlais, Hanna, Bucshon, Gowdy, Roby, Heck, Ross, Kelly, Miller, Kildee, Payne, Andrews, Woolsey, Tierney, Kucinich, Holt, and Altmire.

Staff present: Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alex Sollberger, Communications Director; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Kate Ahlgren, Investigative Counsel; Aaron Albright, Communications Director for Labor; Jody Calemine, Staff Director; John D'Elia, Staff Assistant; Brian Levin, New Media Press Assistant; Celine McNicholas, Labor Counsel; Richard Miller, Senior Labor Policy Advisor; Julie Peller, Deputy Staff Director; and Michael Zola, Senior Counsel.

Chairman KLINE. A quorum being present, the committee will come to order. Good morning, everybody. I would like to welcome our guests and thank our witnesses for being with us today.

In late August the National Labor Relations Board introduced a series of sweeping changes to federal labor policy. Through three decisions handed down in one afternoon, the board restricted workers' right to a secret ballot election; undermined employers' ability to maintain unity in the workplace; and created new barriers for those who wish to challenge union representation.

For anyone following this Obama board, this barrage of activist decisions, however unacceptable, was not unexpected. But for workers and job creators struggling to move this country forward, it is an outrage.

Further, it is a roadblock to the strong economy our nation desperately needs. It is unthinkable that any federal board would launch such a deliberate assault on our workforce system, especially with millions of Americans unemployed. And it is unconscionable for Congress to stand by and let it happen. That is why we are here today. And we have a great deal to discuss.

In its specialty health care decision, the board discarded decades of precedent in order to adopt a strict standard for determining which group or unit of employees can vote in a union election. Union leaders have long tried to organize smaller units of employees as an incremental step toward organizing an entire business. In an effort to preserve unity in the workplace and keep labor costs low, employers often seek to expand the unit to include a greater number of employees.

Under the board's new standard it will be virtually impossible for employers to challenge the group of employees hand-picked by the union. The new standard empowers union leaders to manipulate workplaces for their own gain with dramatic consequences in the real world. Some employers will be constantly engaged in costly labor disputes, and workers will compete against their coworkers for wages and benefits.

The August onslaught also includes a decision that restricts workers' rights to a secret ballot union election. In its 2007 Dana decision, the board provided workers 45 days to request a secret ballot election if their employer had voluntarily recognized union representation.

We all know that a secret ballot election is the best way to determine the will of workers without fear of coercion and intimidation. Remarkably, the Obama board shut this 45-day window. Now, if an employee voluntarily recognizes a union, workers may have to wait months and possibly years before they can cast a secret ballot.

At a recent hearing, the committee's senior Democrat noted, "If workers want an election they should get an election. They should not be met with fear, intimidation or delay for the sake of delay." I could not agree more. And I hope that he will join me in condemning these decisions.

Meanwhile, the board is drafting new rules to govern union elections that will stifle employers' free speech and cripple workers' free choice, and is requiring employers to promote unionization in the workplace through a vague and biased notice drafted by board bureaucrats. The goal of the board's activism is clear; to expand the power of big labor by swelling the ranks of unionized workers, whatever the cost to the American people. The fact that this agenda is not supported by any sensible reading of the law does not appear to bother the board or its allies.

In closing, I would like to address what this all means for the American people, and why this hearing is so important. Across the country small employers are struggling to grow their businesses and hire new workers. The president has proposed $1.5 trillion, $1.5 trillion in tax hikes that will fall heavily on their shoulders.

Federal bureaucrats are crafting more than 200 significant new regulations, some of which will affect these small employers. And now they must contend with a federal board advancing policies that raise the cost of doing business, restrict their right to speak

with employees and undermine common-sense protections for workers.

Why would anyone create a new job in this kind of chilling environment? These are the real headwinds facing our economy. The NLRB's assault on American workers and job creators is undermining our nation's ability to grow and prosper.

Congress cannot stand by and allow an unelected board to wreak havoc on our workforce. We must stand up and do the job we were sent here to do.

And now I would like to recognize the aforementioned senior Democrat for his opening remarks.

[The statement of Chairman Kline follows:]

Prepared Statement of Hon. John Kline, Chairman, Committee on Education and the Workforce

Good morning. I would like to welcome our guests and thank our witnesses for being with us today.

In late August, the National Labor Relations Board introduced a series of sweeping changes to federal labor policy. Through three decisions handed down in one afternoon, the board restricted workers' right to a secret ballot election, undermined employers' ability to maintain unity in the workplace, and created new barriers for those who wish to challenge union representation.

For anyone following the Obama board, this barrage of activist decisions—however unacceptable—was not unexpected. But for workers and job creators struggling to move this country forward, it is an outrage.

Further, it is a roadblock to the strong economy our nation desperately needs. It's unthinkable that any federal board would launch such a deliberate assault on our workforce, especially with millions of Americans unemployed. And it's unconscionable for Congress to stand by and let it happen. That is why we are here today, and we have a great deal to discuss.

In its Specialty Healthcare decision, the board discarded decades of precedent in order to adopt a strict standard for determining which group or "unit" of employees can vote in a union election. Union leaders have long tried to organize smaller units of employees as an incremental step toward organizing an entire business. In an effort to preserve unity in the workplace and keep labor costs low, employers often seek to expand the unit to include a greater number of employees.

Under the board's new standard, it will be virtually impossible for employers to challenge the group of employees handpicked by the union. The new standard empowers union leaders to manipulate workplaces for their own gain, with dramatic consequences in the real world. Some employers will be constantly engaged in costly labor disputes and workers will compete against their coworkers for wages and benefits.

The August onslaught also includes a decision that restricts workers' right to a secret ballot union election. In its 2007 Dana decision, the board provided workers 45 days to request a secret ballot election if their employer voluntarily recognized union representation. We all know that a secret ballot election is the best way to determine the will of workers, without fear of coercion and intimidation. Remarkably, the Obama board shut this 45 day window. Now, if an employer voluntarily recognizes a union, workers may have to wait months and possibly years before they can cast a secret ballot.

At a recent hearing, the committee's senior Democrat noted, "If workers want an election, they should get an election. They shouldn't be met with fear, intimidation or delay for the sake of delay." I couldn't agree more, and I hope he'll join me in condemning these decisions.

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The goal of the board's activism is clear: To expand the power of Big Labor by swelling the ranks of unionized workers, whatever the costs to the American people. The fact that this agenda is not supported by any sensible reading of the law doesn't appear to bother the board or its allies.

In closing, I'd like to address what this all means for the American people and why this hearing is so important.

Across the country, small employers are struggling to grow their businesses and hire new workers. The president has proposed $1.5 trillion in tax hikes that will fall heavily on their shoulders. Federal bureaucrats are crafting more than 200 significant new regulations, some of which will affect these small employers. And now they must contend with a federal board advancing policies that raise the cost of doing business, restrict their right to speak with employees, and undermine commonsense protections for workers.

Why would anyone create a new job in this kind of chilling environment? These are the real headwinds facing our economy. The NLRB's assault on American workers and job creators is undermining our nation's ability to grow and prosper. Congress cannot stand by and allow an unelected board to wreak havoc on our workforce. We must stand up and do the job we were sent here to do.

Mr. MILLER. Or another version of history.

The committee meets this morning for—thank you, Mr. Chairman. The committee meets this morning for yet another partisan hearing on the National Labor Relations Board. This is the fourth such hearing on this relatively small agency that enforces Americans' labor rights. This hearing falls before action on a bill to protect corporations that unlawfully outsource American jobs in retaliation against workers exercising their rights under the law. By giving lawbreakers a free pass, the bill also disadvantages employers who play by the rules.

Mr. Chairman, I just wish the House would put half as much effort into addressing America's top concern of jobs in the economy. As I wrote you nearly 2 weeks ago, that President Obama proposed a numbers specific and historically bipartisan initiative to get America back to work, and a number of these proposals fall within this committee's jurisdiction.

For instance, we should be exploring the need for school repair and modernization funding, new ideas on job training or looking into how massive layoffs of teachers are impacting our nation's schoolchildren. Instead, we are meeting to retread the majority's attack on the National Labor Relations Board.

Listening to some of the rhetoric coming from you and others on the other side, you would think that the Obama administration cried havoc and let slip the dogs of war against the American way of life. Nothing of this sort is remotely occurring.

This campaign does nothing to create jobs, rather, it merely sews fear and false doubt among employers whose biggest problem right now is the lack of demand, the lack of customers and the lack of resources on Main Street; not the 1935 Wagner Act. But since we are here, let us address a few issues raised by the majority.

Any sober look at the recent proposals in the decisions made by the National Labor Relations Board would conclude that they have been modest, addressed real-world problems. In one case overturned the controversial Bush-year Dana decision, which itself overturned decades of precedent that gave bargaining relationships a chance to succeed without—following voluntary union recognition before entertaining decertification petitions. This decision is not radical. It is entirely consistent with the law's goal of encouraging collective bargaining and stable labor relations.

Another decision appropriately ruled that certified nursing assistants can be considered a bargaining unit by themselves like any other profession. The specialty decision applies the same traditional community of interest test to non-acute health care facilities

as generally used in other workplaces. The decision borrows from a recent D.C. Court of Appeals opinion offered by a Republican judge.

Applying the law equally to nursing assistants as every other American worker is hardly radical. Likewise, many corporate special interests have objected to the board's decision that upholds the workers' basic First Amendment right to free speech. A worker should not have to give up his or her First Amendment rights when they peacefully hold up a banner or pass out leaflets outside a workplace.

And despite the overblown title of this hearing, the current board has issued a number of decisions favorable to organized labor, favorable and unfavorable to organized labor, and favorable and unfavorable to employers. They have both won and lost before this board.

Finally, the National Labor Relations Board has issued requirement that businesses post a free notice in the workplace outlining the basic rights and responsibilities of both workers and employers under the National Labor Relations Act.

The poster is balanced, and clearly states that workers have a right, one, to form a—to form, join and assist a union; to bargain collectively; to strike and picket; and to engage in or refrain from other activity. The notice also makes it clear that workers have a right not to join a union or engage in any of these activities.

Clearly too many workers do not know their rights. And it is obvious that neither do many of the employers. If you read some of the statements received during the public comment period on the rule. One employer wrote that belonging to a union is a privilege and a preference, not a right. Wrong. Another commented that if a person so desires to be employed by a union company they should take their explicative deleted to a union company and apply for a union job.

These comments make it clear why it is important that the protection that is written into the law should not remain a secret. In addition to informing employees of their rights, the notices may have the beneficial side effect of informing employers and perhaps some members of Congress about the law.

In conclusion, this committee should be doing whatever it can to grow and strengthen our nation's middle class because we know that when working families are doing well, the country is strong. But you do not strengthen middle class if you fear American workers and their rights to organize. And you do not strengthen middle class if you pass bills to make it easier to outsource their jobs. And you do not help working families when you ignore our nation's job crisis.

Mr. Chairman, there is still time to get the committee back on track with the American people's agenda. But that time is running short.

And I yield back the balance of my time.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Senior Democratic Member, Committee on Education and the Workforce

The committee meets this morning for yet another partisan hearing on the National Labor Relations Board. This is the fourth such hearing on this relatively small agency that enforces Americans' labor rights.

This hearing follows floor action on a bill to protect corporations that unlawfully outsource American jobs in retaliation against workers exercising their rights. By giving law breakers a free pass, this bill also disadvantages employers who play by the rules.

Mr. Chairman, I just wish this House would put half as much effort into addressing America's top concern of jobs and the economy. As I wrote you nearly two weeks ago, President Obama proposed a number of specific and historically bipartisan initiatives to get America back to work. And a number of these proposals fall within this committee's jurisdiction.

For instance, we should be exploring the need for school repair and modernization funding, new ideas on job training, or looking into how massive layoffs of teachers are impacting our nation's schoolchildren.

Instead, we are meeting to retread the majority's attacks on the National Labor Relations Board.

Listening to some of the rhetoric coming from the other side, you would think that the Obama administration has cried havoc and let slip the dogs of war against the American way of life.

Nothing of this sort is remotely occurring. This rhetoric is entirely overblown and often downright misleading. It is dangerous and irresponsible, and appears to be part of a cynical effort to avoid taking action on jobs.

Let's be frank. A great deal of money is being made by using the National Labor Relations Board as a political whipping post. And a great deal of money is being made off of needlessly frightening employers and the American people.

This has to stop. And stop now.

This campaign does nothing to create jobs. Rather, it merely sows fear and false doubt among employers whose biggest problem right now is lack of demand, not the 1935 Wagner Act.

But since we are here, let's address a few issues raised by the majority. Any sober look at recent proposals and decisions made by the NLRB would conclude that they have been modest and address real-world problems.

One case overturned the controversial Bush-era Dana decision, which itself overturned decades of precedent that gave bargaining relationships a chance to succeed following voluntary union recognition before entertaining decertification petitions. This decision is not radical. It is entirely consistent with the law's goal of encouraging collective bargaining and stable labor relations.

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The poster is balanced and clearly states that workers have the right:

- To form, join, and assist a union;
- to bargain collectively;
- to strike and picket; and
- to engage in—or refrain from—other protected activity.

The notice also makes it clear that workers have the right not to join a union or engage in any of these activities.

Clearly, too many workers don't know their rights. And it is obvious that neither do many employers if you read some of the statements received during the public comment period on this rule. One employer wrote that "belonging to a union is a

privilege and a preference—not a right." Another commented that "if a person so desires to be employed by a union company, they should take their [expletive] to a union company and apply for a union job."

These comments make clear why it's important that the protections written into law shouldn't remain a secret. In addition to informing employees of their rights, the notice may have the beneficial side effect of informing employers—and perhaps some members of Congress—about the law.

In conclusion, this Committee should be doing whatever it can to grow and strengthen our nation's middle class. Because we know that when working families are doing well, the country is strong.

But you don't strengthen the middle class if you fear America's workers and their right to organize. You don't strengthen the middle class if you pass bills to make it easier to outsource their jobs. And, you don't help working families when you ignore our nation's jobs crisis.

Mr. Chairman, there is still time to get the Committee back on track with the American people's agenda. But that time is running short.

I yield back.

Chairman KLINE. I thank the gentleman.

As such, the Committee Rules 7C, all committee 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 statements, questions to the record and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses.

Mr. Curtis L. Mack is a partner with McGuireWoods and an adjunct professor of labor law at the University of Michigan Law School. Prior to entering private practice, from 1976 to 1981, Mr. Mack served as director of the NLRB's Region 10 office.

Ms. Barbara Ivey is an employee of Kaiser Permanente Northwest. After Kaiser Permanente voluntarily recognized the Service Employees International Union, Local 49, Ms. Ivy requested a secret ballot election. When the election was scheduled, pursuant to the holding in Lamons Gasket, Ms. Ivy's request has been dismissed.

Mr. Arthur J. Martin is a partner with Schuchat, Cook & Werner, and is an adjunct professor at the St. Louis University School of Law. He is an active member of the AFL-CIO Lawyers Coordinating Committee, and contributing editor of the AFL-CIO Building and Construction Trades Campaign Guide.

Mr. G. Roger King is a partner with Jones Day. Prior to moving to the private sector, Mr. King served as a labor counsel in the U.S. Senate.

Welcome all of you. Before I recognize each of you to provide your testimony, let me briefly explain our high-tech lighting system.

You will each have 5 minutes to present your testimony. When you begin the light in front of you will turn green. When 1 minute is left, the light will turn yellow. When your time has expired the light will turn red, at which point I would ask that you please wrap up your remarks as best you are able and as quickly as you can.

After everyone has testified, members will each have 5 minutes to ask questions of the panel. And I would remind all of you that your entire written testimony will be included in the record if you do not have a chance to get through it in your 5 minutes of oral testimony.

Now, we will start with Mr. Mack. Sir, you are recognized for 5 minutes.

STATEMENT OF CURTIS L. MACK, PARTNER, MCGUIRE WOODS, LLP

Mr. MACK. Good morning, Mr. Chairman and members of the committee. Thanks for the invitation to testify before the group today.

As the chairman pointed out, I was formerly regional director of the National Labor Relations Board in Atlanta, Atlanta, Georgia. I would also like to point out to the chairman and members of the committee that I am one of those 1960s, left-wing, liberal Democrats, and strong supporter and admirer of the president and this administration.

Now, having said that, I would like to move on to talk about three cases by the NLRB during the last year, primarily the month of August, and talk about two sets of rules at the NLRB, one they promulgated and one that is being contemplated. I find both of my experience as a regional director and a lawyer, those cases really do not have the process of collective bargaining, and they tend to ignore and trample the rights of employees.

Starting first I would like to talk about the Lamons Gasket company case, which overruled the Dana company's case, which I thought was a very good decision. In the Dana case the board had held, correctly so, that whenever an employer in a union entered into voluntary recognition employees had 45 days to file a petition.

Lamons Gasket overruled that decision, and it really shut the employees out from any possibility of calling the employer and union to task about the validity of the union recognition. So, that is a bad decision.

The second one I would like to talk about is the Euweo case, and that deals with a so-called special bar. Under said law prior to this case an employer acquiring an operation became a successor, had an obligation under certain circumstance to bargain with the union. At the course of the bargaining the employer concluded that the union no longer represented the majority. Of the employees' desire to get rid of the union, no longer wanting its services they could file a petition and go to an election.

In this case, overrule that body of law and in effect it required the employees and the employer to continue to deal with the union, which was no longer desirable, and did not give the employees the opportunity to rid themselves of that union. So, it locks the employees into this relationship for 2, 3 or 4 years, even though they may no longer want the union.

The last case I want to talk about is the specialty health care case. Special health care essentially gutted from the board jargon, the board jurisprudence all cases dealing with the doctrine of community of interest, notwithstanding the board articulation to the contrary. What the board said in the special health care case is any group of employees, so long as they are earning the same salary, similar salary, perform the same job, they have a community of interest and they are stuck and they have to be certified as a union—unit.

In my experience as regional director of the board, I would have been compelled to certify any group of employees that the union filed a petition for. That is not good labor relations; not good for the employer and the union. It is horrendous for the employees. It crippled the opportunity for the employees to move from one job to another, for the wise utilization of employees and their skills. So, it too is a bad decision.

Moving then to the board rules and regulations, one of the ones the board is contemplating is shortening the time to get to an election, i.e. from here going forward all election must be conducted in 14 days. That is contrary to what the board policy is now. Whenever a petition is filed the regional directors strive to get to an election in 42 days.

The 42 days makes good sense because it gives the employer an opportunity to address the employees regarding the feasibility, the desirability of having a union. And more importantly, it gives the employees an opportunity to talk and cajole each other about whether they want or do not want a union. By reducing this time down to 14 days, it really eviscerates Section 8C of the National Labor Relations Act, which give the employee the opportunity to communicate.

Under the 14-day rule the board says it is contemplating not deciding very important questions until after the election. So, bargaining unit employees have no idea whether they are in or out of the unit until after the election. So, they have no desire to compete or campaign for a union.

And then we move to the rule which the board has put in place now that you got to post a notice to employees, advising them of the right to form or join a union. We need to point out that the NLRB has existed for about 75 years without the need of such rule, and there is nothing in the statute that contemplate the posing of such a ruling.

The board tries to ride itself on a case that came out of the ADEA. But clearly the ADEA specifically says by Congress that the employer shall post a notice. There is no similar comparable language under the National Labor Relations Act.

So, I think this rule, in addition to exceeding the board's authority, it fails to articulate in any reasonable way all the employees' rights with respect to joining and not joining the union, what happens if they join a union, how they can extricate themselves for a union. It is just a bad rule.

Thank you, Mr. Chairman and members of the committee.

[The statement of Mr. Mack follows:]

Prepared Statement of Curtis L. Mack, Partner, McGuireWoods LLP [1]

Chairman Kline and members of the Committee, thank you for inviting me here to testify today. My name is Curtis Mack. I am a partner with the law firm of McGuireWoods LLP, where I represent employers in the public and private sectors. I served as regional director of Region 10 of the National Labor Relations Board (hereinafter "the Board") from 1976 to 1981. I served as an NLRB trial attorney from 1970 to 1972 in Cleveland, Ohio. I would like to preface my remarks by stating that I am a life-long liberal Democrat and a loyal supporter of President Obama.

I appreciate the opportunity to appear before this Committee to address three (3) recent Board decisions, a proposal to change election procedures and a new rule requiring employers to post a notice purporting to advise employees of their rights under the National Labor Relations Act (hereinafter "the Act.") I believe these rules

and decisions come at the expense of employees and emasculate Section 7 of the Act. They will interfere with employees' rights to decide for themselves whether to join a union or refrain from joining or supporting a union. These actions will also interfere with employers' rights to communicate with their employees regarding unionization issues. In short, the only beneficiaries of these new rules and decisions are unions.

It is no secret that the percentage of American workers participating in unions has declined steadily for years.[2] The Board is aware of that trend and is responding by setting an agenda of its own to reverse it. These changes will come at a cost to employers and to employees.

The rule regarding notice posting and the proposed rule to shorten the timeframe preceding the election completely ignore the fact that when enacting the Act, Congress conferred on working Americans not one, but two, rights: the right to support and form unions and the right to refrain from such activities. There is nothing in the Act which evidences any Congressional intent to give either right any greater value than the other. It is beyond any doubt that neither right can be intelligently exercised without the employee having the opportunity to obtain appropriate information regarding the value and cost of unionization. Even more important, employees must have sufficient time to discuss and debate among themselves the pros and cons of unionization. The Board's proposed rules setting an arbitrary timeframe for holding an election after the filing of a petition eliminate this opportunity without offering any compelling justification.

Congress initially designed the Act to encourage unionization, but in 1947, it amended the Act to bring to the fore the right of employees to choose. Today, the Board is refusing to recognize Congressional action and is ignoring a Congressional mandate.

I. An expedited election will abrogate employee rights under Section 7

The Board has proposed accelerating the timeframe for a representation election. There is no justification for holding a secret ballot election in fourteen (14) days. Holding an election in fourteen (14) days is unfair to all parties. Currently, the Board strives to hold elections within forty-two (42) days after a petition is filed.[3] Other than the bald assertion that the proposed rule will shorten the process and eliminate pre-election litigation, the Board has failed to articulate any reason for fixing that which is not broken. Unions won 67.6% of representative elections in 2010 and have won more than half of all representative elections in each of the past fourteen (14) years, according to the Bureau of National Affairs. As discussed below, the Board's articulated reasons do not withstand scrutiny.

Shortening the process is a bad idea. The accelerated timeframe would sharply reduce the time for employees to weigh whether or not to support a union. Employees would have significantly less time to conduct independent research and debate the pros and cons of collective bargaining with co-workers, who may work on different shifts and schedules. Employees are entitled to scrutinize the union and to converse with each other about joining or not joining a union. The Board should not cut short this valuable process. Unionization results in a significant change in the circumstances of an individual's employment. Monthly dues and possible strikes become realities. Once a union is voted in, employees no longer represent themselves.[4] Two or three weeks is simply not enough time for an employee to decide whether joining a union is the right choice.

Second, the accelerated election schedule would interfere with employers' right to discuss collective bargaining with employees and employees' right to discuss collective bargaining among themselves.[5] A union could campaign quietly for months, with the employer learning of the campaign only after the petition is filed with the Board and find itself facing a secret ballot election in just a few days. The Act gives employers the right to communicate facts about unionization and their beliefs to employees and employees to discuss unionization among themselves.[6] The employer has less time to respond to the union's misrepresentations.[7] The proposed rule shortening the time for the election would force employers to convey its position on unionization to employees in just a few days and stifle the employees' rights guaranteed under the Act.

Further, employees need to be fully informed about the realities of a strike, collective bargaining and even monthly union dues. Employees are unlikely to hear of the cold realities of collective bargaining from the union. Employees have a right to communicate their views to each other. If the timeframe is shortened to as little as fourteen (14) days, the Board will wipe out the employer's right to share important facts with the employees or respond to misrepresentations made by the union during the short campaign period.

Another problem with the Proposed Rule is that it postpones most challenges to the proposed bargaining unit until after the election.[8] In almost every campaign, there is debate about which employees should be in a bargaining unit. Unions have notions about who should be in the bargaining unit, and generally try to keep the unit size as small as possible. Employers have ideas about who should be in the unit. Under the statute, the employees in a collective bargaining unit must share a "community of interest." There is almost always disagreement regarding which groups of employees share a "community of interest." Waiting until after the election to resolve these disputes denies employees the opportunity to make an informed choice before exercising their Section 7 rights. Employees may not want to be in a unit that includes particular job classifications. Importantly, the delayed decision has the potential of leaving large numbers of employees uncertain with regards to their interest in the election or how they will be affected by the outcome.

Postponing bargaining unit challenges is particularly problematic with respect to supervisors. If an employee is incorrectly classified as a supervisor and not allowed to vote in the election, he is disenfranchised. If a supervisor is improperly included and campaigns during the election for either side, the election is tainted and may be set aside.[9] Case law demonstrates that intimidation and coercion by supervisors have tainted elections in the past.[10] These issues should be resolved before the election, out of fairness to everyone.

II. The notice requirement advising them of their rights under the act is unnecessary

On August 30, 2011, the Board, without any justification or reasoned rational, decided to deviate from a longstanding practice and to require employers to post a notice to employees. The posting is not required by the Act and does not serve the purposes of the Act. The Board has existed for seventy-five (75) years but only now has found it necessary to require employers to post a notice advising them of their rights under the Act. Employees, whether through television, newspapers or other media sources, know about their rights to unionize. Information about the right to join a union or refrain from joining a union is freely available on the Board website. Requiring employers to post this notice presumes that employees are ignorant about unions and the Board, which, clearly, they are not.

The content of the notice, which employees are mandated to post effective November 14, 2011, is slanted in favor of unions. It emphasizes the right to join unions while relegating the equal right to not join a union as an aside. It suggests that employees need not remain members of a union but gives no hint about how to pursue that complicated option.

The first sentence informs employees of their right "to organize and bargain collectively with their employers and to engage in other protected concerted activity." It ignores employees' equal right to communicate directly with their employer. The poster assumes that the right to join a union trumps the right not to join a union. It says nothing about employees' rights after a union is voted in.[11] Under the new rule, failing to post the notice qualifies as an independent Unfair Labor Practice. It would also toll the statute of limitations for ULPs filed against employers who fail to post the notice. This suggestion by the Board is in complete derogation of an express mandate by Congress that all Unfair Labor Practices must be filed within 180 days after the incident occurred.[12] The punitive nature of the rule demonstrates that its goal is not to notify employees but to further union efforts to gain traction at the expense of employee choice.

The poster also oversimplifies the Unfair Labor Practice (ULP) process. It discusses what the Board can do with the charge against an employer, but makes virtually no reference to charges filed against unions. It fails to tell them that, without a union, they can instead speak with their employer directly to get issues resolved. The poster does not discuss that the regional director may dismiss the charge, that the Board can find no merit to the charge and that it can take two or three years or more before a court of appeals ultimately dismisses the charge. The poster makes no mention of monthly union dues or of the reality of strikes or of prolonged collective bargaining.

In short, the poster creates the impression that the Board favors unions and is not neutral. This is not the message the Board should be sending to American workers, who often need protection from unions as well as employers.

III. The Board erroneously overruled Dana and has violated employees' right to vote for or against collective bargaining

The Board returned to a rule barring elections for a "reasonable time" after an employer voluntarily recognizes a union in Lamons Gasket Co., 357 NLRB No. 72. The decision overrules Dana Corp., 351 NLRB 434 (2007) and creates a bad labor policy and does not effectuate the purpose of the Act. To put the Lamons decision

in context, in Dana the board held that employees have the right to file a decertification petition after a voluntary recognition and then vote on union representation in a secret ballot election. Dana required the posting of an official Board notice informing employees of their employer's voluntary card-based recognition of a union bargaining representative and the employees' right within forty-five (45) days to test the union's claim of majority support through a Board-conducted secret-ballot election. If no petition is filed within that period, electoral challenges to the union's representative status would thereafter be barred for a reasonable period of time. This was a good policy because over the years, there have been many cases in which employees have been misled or coerced into signing authorization cards.[13]

Dana informed employees who were unaware of or who disagreed with voluntary recognition of their right to petition for a secret election. The secret ballot elections are the best way to resolve all questions concerning representation.[14]

In addition to insuring that employees had a right to vote on the union, Dana provided a safeguard against severe consequences of recognizing a union without majority support. The consequences of recognizing a minority union were described by the Board in McLaren Health Care:

an employer who recognizes and bargains with a minority union, as the exclusive bargaining representative of a unit of its employees pursuant to Section 9(a), violates Section 8(a)(2) and (1), and the employer's knowledge or ignorance of the union's minority status is irrelevant to the question whether the recognition constitutes an unfair labor practice. Likewise, a union which accepts recognition as the exclusive bargaining representative of a unit of employees pursuant to Section 9(a), and bargains on behalf of those employees, without majority status, violates Section 8(b)(1)(A).

333 N.R.R.B. 256, 257 (NLRB. 2001).

A collective bargaining agreement is not always entered into immediately after voluntary recognition. In International Ladies' Garment Workers' v. NLRB, 366 U.S. 731 (1961), the employer and union entered into an agreement under which the employee voluntarily recognized the union based on the union's misrepresentation that it secured authorization cards from a majority of employees. Six weeks later, the two sides entered into a collective bargaining agreement. The Supreme Court found that a collective bargaining agreement executed by the parties failed because it was obtained based on an erroneous claim. The Court held that the employer activity violated the Act by interfering with and restraining employees' exercise of rights under Section 7. The Court found that the fact that petitioner and employees asserted good-faith beliefs in petitioner's majority status was not a defense because scienter was not an element of the statute.[15] The decertification process provided for in Dana created a safeguard to ensure that a union has achieved voluntary majority support.

Nothing in Dana undermines the voluntary recognition process itself. However, it also serves as a safeguard against union manipulation of authorization cards and other misrepresentations that create a false picture of union support.[16]

The Board waxes on about the importance of remaining neutral. I can tell you, as a former regional director, the Board's role is not one of neutrality.[17] The Board's role, and I quote directly from its web site, is to "safeguard employees' rights." Giving the employees the opportunity to decertify a minority union is in keeping with safeguarding rights. In overruling Dana Corp. the Board has betrayed its mission, and it has taken a position that is incompatible with the statutory purpose of the Act. As the Supreme Court reasoned in NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322, 326 (1974), "it is the Board's function to strike a balance among 'conflicting legitimate interests' which will "effectuate national labor policy," including those who support versus those who oppose the union." Another August 2011 Board decision, UGL-UNICCO Serv. Co., 2011 NLRB LEXIS 488 (NLRB Aug. 26, 2011) also takes rights away from workers by barring decertification for up to one year following a sale or merger.

Dana allowed employees to exercise their right to decertify 17 unions voluntarily recognized by employers. The Board justified overturning Dana with the argument that this number is statistically insignificant. The Board's argument ignores the purpose of Dana and its own mission: to allow workers to exercise their rights.

IV. Specialty Healthcare will balkanize businesses with small bargaining units

In Specialty Healthcare & Rehab. Ctr. of Mobile & USW, 2011 NLRB LEXIS 489 (NLRB Aug. 26, 2011), the Board decided that a regional director must find that any unit that the union petitions for is appropriate, if the employees performed the same task or earned the same or similar pay. This will wreak havoc on employers. Specialty Healthcare will give unions the ability to organize multiple small collective bargaining units within one facility, Balkanizing the business and making it

impossible for an employer to make hiring, promotion and transfer decisions. Costs will increase as the employer is forced to deal with multiple unions. This ability to carve out small units will adversely affect or perhaps completely eliminate opportunities for employees to advance in the workplace or learn new skills. Moreover, I can tell you from my experience as a regional director, a regional director looking at a representation petition would be compelled to hold a representation election for any unit supported by the union.

In early cases the Board considered whether employees had a "community of interest" when defining units. The Board looked at job titles, salary, compensation, benefits and skills and considered how the employees with different job titles related to the integrated nature of the employer's work enterprise. We concede that the statute has never required the Board to select the most appropriate unit—the unit need only be an appropriate unit with a clear community of interest among the employees. With this approach, the Board avoided separating small groups of employees carved out only for the purpose of union organizing from other groups that performed related tasks for similar pay. The new test under Specialty Healthcare is a poor policy that serves no useful purpose other than to make it easy for unions to organize.

I believe that Specialty Healthcare, Lemons Gasket Co. and the proposed rules are the Board's response to the failure of the Employee Free Choice Act. That proposal would have bypassed secret ballot elections and required employers to recognize a union on the basis of cards signed by employees publically. Congress appropriately refused to deny American workers their right to a secret ballot, but the Board's proposals and decision seems to be an attempt to salvage the heart of EFCA.

In conclusion, I want to thank you for the opportunity to appear before the Committee. I would be happy to answer any questions you might have.

ENDNOTES

[1] I would like to thank my law partner, Halima Horton, and associate, Nancy Fonti, for all of their hard work in preparing this presentation. Moreover, I appreciate the help and comments of my law partners in the labor section of McGuireWoods LLP.

[2] In 2010, the percent of wage and salary workers who were members of a union fell to 11.9% from 12.3% percent a year earlier, according to the Bureau of Labor Statistics. *http://www.bls.gov/news.release/union2.nr0.htm*

[3] The Proposed Rule acknowledges that the median timeframe between a petition and an election is thirty-seven (37) to thirty-eight (38) days. 76 FR 36812, pg. 5.

[4] Steele v. Louisville & NR Co., 323 U.S. 192, 200 (1944) ("The labor organization chosen to be the representative of the craft or class of employees is thus chosen to represent all of its members, regardless of their union affiliations or want of them.").

[5] See ITT Industries v. NLRB, 413 F.3d 64 (D.C. Cir. 2005) (holding that the Act gave employees working at one facility the Section 7 right to visit another facility owned by their employer and appeal to their co-workers regarding the union), enforcing 341 NLRB 937, 941 (2004)(finding that security concerns did not justify the restriction of access to non-site employees, reasoning "* * * we are equally mindful of our responsibility to protect the statutory rights of employees at such times, and at all times"); NLRB v. Magnavox Co., 415 U.S. 322 (1974)(employees have Section 7 rights to oppose a union).

[6] NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 (1941)(holding that neither the Act nor the Board can enjoin an employer from expressing its views regarding the union); NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)("an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board"); Gallup, Inc., 349 NLRB 1213, 1240-41 (2007)(chief executive may warn employees unionization would put the company's future at risk without violating the Act); Action Mining/Sanner Energies, 318 NLRB 652, 657 (1995)(employer's comment that it did not know how customers would react once they learned of unionization was not unlawful); Airstream, 192 NLRB 868 (1971) ("Section 8(c) protects an employer's right to criticize a labor organization during a pre-election campaign"); NLRB v. Lampi, 240 F.3d 931, 936 (11th Cir. 2001)(executive's comment to a television reporter that the company "did not particularly like unions" and was "against them" was not evidence of a unfair labor practice).

[7] The following cases demonstrate the type of misleading statements made during campaigns. See Hollywood Ceramics Co., 140 NLRB 221 (NLRB 1962); Formco, Inc., 233 NLRB 61 (1977)(union distributed a letter that falsely reported the employer had been guilty of unfair labor practices); Purolator Prods., 270 NLRB 694 (1984)(union handbill incorrectly stated status of union's pending charge against employer by implying the employer had been found guilty of an unfair labor practice act).

[8] The proposed rule would defer eligibility questions "affecting no more than 20% of eligible voters." See 76 FR 36812, pgs. 20-21.

[9] NLRB v. Regional Home Care Servs., 237 F.3d 62, 68 (1st Cir. 2001)("A pro-union supervisor presents two possible scenarios which could interfere with a fair and free election. The first is confusion; the second is coercion. There may be confusion felt by employees about the message from management if one of management's own, a supervisor, urges the union upon employees. Or there may be a second effect, that a supervisor may explicitly or implicitly coerce employees into voting for the union."); Fall River Sav. Bank v. NLRB, 649 F.2d 50, 56 (1st Cir. 1981) ("The

Board has found pro-union activity by supervisors objectionable on two possible grounds: first, it may lead employees to the false conclusion that their employer favors the union; and second, it may cause employees to support the union out of fear of retaliation by the particular supervisors rather than out of free choice.").

[10] The board and courts found that supervisors interfered with elections in the following cases: Millard Refrigerated Servs., 345 NLRB 1143, 1147 (2005)(setting aside an election when supervisors with broad authority over unit employees solicited authorization cards and warned employees "if the union does not get in, everyone will probably be fired"); Harborside Healthcare, Inc., 343 NLRB 906 (2004) (setting aside an election because a supervisor threatened employees with job loss if the union lost the election); SNE Enters., 344 N.LR.B. 673, 674 (2005)(finding that supervisors solicited authorization cards and remanding to regional director to determine if solicitation constituted objectionable conduct); National Gypsum Co., 215 NLRB 74 (1974)(finding that supervisors solicited authorization cards and controlled the distribution of cards and tainted the union's showing of interest).

[11] See Communications Workers of America v. Beck, 487 U.S. 735 (1988)(union cannot require workers to pay fees for its political activities or fees beyond the costs of negotiating a collective bargaining agreement).

[12] In its attempt to justify tolling of the statute of limitations, the Board incorrectly relies on a decision by the Third Circuit, Bonham v. Dresser Industries, 569 F.2d 187, 193 (3rd Cir. 1977) that interprets the Americans With Disabilities Act. In that case, according to the Board, the Third Circuit held that the ADEA posting requirements was undoubtedly created by Congress for the benefit of employees. There is a remarkable difference between Congress creating a posting requirement and the Board creating a posting requirement seventy-five (75) years after it began administering the Act. The Board decisions regarding the tolling of the statute makes no mention of Supreme Court jurisprudence articulated in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), which held that the statute of limitation commences when a discrete act of discrimination occurs.

[13] Montgomery Ward & Co., 288 NLRB 126, 169,180 (1988)(some authorization cards invalidated because union solicitor told employees that authorization cards were only for the purpose of getting information about the union or for obtaining the election); NLRB v. Riviera Manor Nursing Home, Inc., 1972 U.S. App. LEXIS 8434, at * 3 (7th Cir. 1972)(finding that the union could not show that some authorization cards were signed by individuals employed at the time of the signing); Brookland, Inc., 221 NLRB 35,35-36 (NLRB 1975)(authorization cards invalid when the union solicitor told employees "the only thing the card was for was so that the Union could keep in touch with us through literature of what was going on in the union itself"); Serv-U-Stores Inc., 234 NLRB 1143, 1145-1147 (1978)(finding an authorization card invalid when union president told the employee it would only be used solely for the purposes of obtaining an election); Calplant Constructors, 279 NLRB 854 (NLRB 1986)(election set aside when union representative misled employees telling them "if you sign now you won't have to pay the initiation fees").

[14] McLaren Health Care Corp., 333 NLRB 256, 257 (2001)("secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support"), citing NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969); Levitz Furniture Co. of the Pacific, 333 NLRB 717, 723 (2001) ("Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions"); Underground Service Alert, 315 NLRB 958, 960 (1994)(reasoning that a decertification election was superior to an employer's withdrawing recognition since elections "provide, through the objection and challenge procedures, an orderly and fair method for presentation and reasoned resolution of questions concerning the fairness of the process and whether particular individuals are eligible to have their preferences on union representation counted").

[15] See also International Ass'n of Machinists v. NLRB, 362 U.S. 411, 425-226(U.S. 1960)(Bryan Manufacturing's agreement with a minority union required to remain in force since UPLs based on violation of the Act were barred by a six-month statute of limitations); See also NLRB v. Trosch, 321 F.2d 692 (4th Cir. 1963)(upholding a Board decision finding that employer violated the Act by entering into a CBA with a union that did not have majority support, reasoning "Maryland News recognized a minority union and negotiated a labor agreement with it. The facts that the employer's actions were taken in good faith and that a majority of the employees later signed the final version of the agreement do not help Maryland News"); Human Dev. Ass'n v. NLRB, 937 F.2d 657 (D.C. Cir. 1991)(employer violated act by recognizing a union with minority support); Regency Grande Nursing & Rehab. Ctr., 2009 NLRB LEXIS 167 (NLRB, May 28, 2009) (same); Raymond Interior Sys., 2008 NLRB LEXIS 366 (NLRB Nov. 10, 2008).

[16] Dayton Hudson Dep't Store Co., Div. of Dayton Hudson Corp. v. NLRB, 987 F.2d 359 (6th Cir. 1993); NLRB v. Gormac Custom Mfg., Inc., 190 F.3d 742 (6th Cir. 1999).

[17] See SNE Enters., 344 NLRB 673, 674 (NLRB 2005)("We recognize that setting aside a union victory in an election does represent a setback for the union. However, at bottom, it is employee free choice that is at issue, not the victory or loss of any particular party.").

Chairman KLINE. Thank you very much, Mr. Mack.

Ms. Ivey, you are recognized.

STATEMENT OF BARBARA A. IVEY, EMPLOYEE, KAISER PERMANENTE

Ms. IVEY. Thank you. Mr. Chairman—excuse me. Mr. Chairman, ladies and gentlemen of the committee, thank you for allowing me

to speak before you regarding this very important issue. My name is Barbara Ivey, and I have been an employee of Kaiser Permanente for over 21 years, 19 of which I have been in membership services.

Let me start off by saying that the bottom line really is that everything involved in this card check scheme was handled in a very sneaky manner. All employees should have had the opportunity to see all the vital information that was going on to impact their jobs, incomes and the opportunities to vote in a secret ballot.

I am not in favor of the union, but if the majority of my coworkers truly wanted it, I would have accepted that decision. However, I know that through the card check scheme used at Kaiser Permanente everyone in our department did not have a vote.

On July 20th this year Kaiser Permanente sent out an email stating that there would be 2 days in the Portland Medical Office attending would be—a meeting. Attending would be Scott Allan, Director of Labor and Relations; and—of the Northwest Kaiser Permanent; and Sarah Thompson, an internal organizer from the SEIU union.

For many of us, this email was the first indication of any effort to unionize our workplace. We thought this meeting was simply the first step in what we believed would be a lengthy process. We thought something as important as a union representation election would never be rushed.

During the July 22 meeting at the Portland office, the majority of my coworkers and I were still at work. We had to call in from the outside clinics; example, Salem, Vancouver, and Long View, during our breaks and or after work. We were not informed that SEIU was going to visit Kaiser Permanente employees at work and ask them to sign cards to indicate that they wanted SEIU to have monopoly bargaining power.

During the telephone conference, I asked a few questions regarding benefits and the SEIU's union work rules. I also asked if there was any if we did not fill a card-count was known should be a vote. I was advised at that time that there was the Dana ruling that protected my rights to request a secret ballot certification election.

To my surprise, just 13 days later I received an email from Kaiser Permanente director, Belinda Green, announcing the outcome of the SEIU vote count held the day before. According to her email, 49 signed cards were needed to give the SEIU union monopoly, had received 50 signed cards.

In those 13 days, I never received a card or request to sign a recognition card for SEIU. It appeared to me that the union had stacked the deck before the July 22nd meeting was even held.

When we were told that in only 12 days SEIU had become our monopoly bargaining agent, many of my coworkers and I were stunned and frustrated that we did not have a say in this card count and never had a real vote. I offered to contact the NLRB to inquire about signing a Dana petition to force a secret ballot election.

We never found out how the Bargaining Committee was selected. Somehow these folks' names just appeared on the ballot that was forwarded to us. The names were preselected. Why was not everyone in the office offered an opportunity to be on the ballot? The

whole process seemed to take place in such a small window of time, although we heard that there were organizing meetings going on in the evenings prior to SEIU coming into the office.

Let me say again, we were stunned and frustrated that we had not been given a vote. And that is why, with the help of The National Right to Work Legal Defense Foundation attorney Glenn Taubman, we began the process to petition for a secret ballot election.

With no expectations, a coworker and I approached fellow employees about signing a petition for a secret ballot election. We were not sure if we would be able to obtain the necessary signatures of 30% of our coworkers, but it was the only way to ensure that our voices were heard fairly.

Amazingly, we quickly obtained the signatures of 45% of our fellow employees and filed the Decertification Petition with the NLRB on August 8. It was exciting to see that so many of my co-workers wanted the opportunity to have time to vote.

On August 26, we received confirmation from the NLRB that all parties had agreed to a mail-in secret ballot vote that would occur on September 20th. The ballots were to be counted on October 4th. Everything was set for a vote in which everyone could participate, one where everyone could vote their conscience knowing it was confidential.

However, on August 31st, I learned that the Dana rights had been overturned by the NLRB in a case called Lamons Gasket. I was shocked and quite upset. I thought how could this be? All we were asking for was a fair vote and a private vote, giving everyone a voice.

If the union is so confident that a simple majority of workers wants to be represented by them, why would it insist on a card count instead of a secret-ballot election?

I have voted in every Presidential Election, and most of the other elections, since I was 18. Each time, I either had to be present at the polling station or mail my ballot for my vote to count. And, every time I was reassured by the knowledge that my vote was confidential.

In the United States we have been taught that if we vote, our voices will be heard, our identities will be protected, and most importantly that we can make a difference. Why should the SEIU or any union be allowed to represent workers in any other way? The card check process undermines the privacy and voices of every worker that they seek to represent.

In the email I sent coworkers announcing the decertification petition had been approved, I stated that we were going to have the time and opportunity to review the Union contract and then vote whether we wanted to be represented by the SEIU Union or not.

Chairman KLINE. Excuse me, Ms. Ivey. Could you wrap up, please?

Ms. IVEY. Sure.

Chairman KLINE. Thank you.

Ms. IVEY. And on my statement I gave some examples of how my coworkers felt about the union. But in the end, I just want to thank you—allow me the opportunity to share my personal experience. And I look forward to answering any of your questions.

[The statement of Ms. Ivey follows:]

Prepared Statement of Barbara Ivey, Employee, Kaiser Permanente Northwest

Mr. Chairman, ladies and gentlemen of the Committee, thank you for allowing me to speak before you today regarding this important issue.

My name is Barbara Ivey and I've been an employee of Kaiser Permanente for over 21 years, 19 of which I've been in the Membership Services Department.

Let me start off by saying that the bottom line, really, is that everything involved in this "card-check" scheme was handled in a sneaky manner. All employees should have had the opportunity to see all the vital information that was going to impact their jobs and incomes, and the opportunity to vote by secret-ballot.

I am not in favor of the union, but, if the majority of my coworkers truly wanted it, I would have accepted that decision. However, I know that through the card-check scheme used at Kaiser Permanente, everyone in our department did not have a vote.

I think the following facts back up my concerns:

On July 20, 2011, Kaiser Permanente sent an email stating that there would be a meeting in two days, July 22nd, from 4-6 pm in the Portland office of Kaiser Permanente. Attending would be Scott Allan, Director of Labor and Employee Relations for Kaiser Permanente Northwest, and Sarah Thompson, an internal organizer from the Service Employees International Union (SEIU).

For many of us, this email was the first indication of any effort to unionize our workplace. We thought this meeting was simply the first step in what we believed would be a lengthy process. We thought something as important as a union representation election would never be rushed.

During the July 22 meeting at the Portland office, the majority of my coworkers and I were still at work. We had to "call-in" from the outside clinics, i.e. Salem, Vancouver, and Long View, during our breaks and or after work.

We were not informed that SEIU was going to visit Kaiser Permanente employees at work and ask them to sign cards to indicate that they wanted SEIU to have monopoly bargaining power.

During the telephone conference, I asked a few questions regarding benefits and the SEIU's union work rules. I also asked if there was any option for a vote, if we did not feel that the "card count," also known as the card-check, method was a valid way to "vote" to join a union. I was advised during that call that there was the "DANA" ruling that protected my rights to request a secret ballot certification election.

To my surprise, just thirteen days later I received an email from Kaiser Permanente director, Belinda Green, announcing the outcome of the SEIU "vote count" held the day before. According to her email, 49 signed cards were needed to give the SEIU union monopoly recognition and SEIU had received 50 signed cards.

In those thirteen days, I never received a card or request to sign a recognition card for SEIU. It appeared to me that the union had stacked the deck before the July 22nd meeting was even held.

When we were told that in only twelve days SEIU had become our monopoly bargaining agent, many of my coworkers and I were stunned and frustrated that we did not have a say in this card count and never had any "vote". I offered to contact the NLRB to inquire about signing a "DANA" petition to force a secret ballot election.

We never found out how the Bargaining Committee was selected. Somehow these folks' names just appeared on the ballot that was forwarded to us. The names were preselected. Why wasn't everyone in the office offered an opportunity to be on the ballot?

The whole process seemed to take place in such a small window of time, although we heard that there were organizing meetings going on in the evenings prior to SEIU coming into the office. Let me say again, we were stunned and frustrated that we had not been given a "vote," and that is why, with the help of The National Right To Work Legal Defense Foundation attorney Glenn Taubman, we began the process to petition for a secret ballot election.

With no expectations, a coworker and I approached fellow employees about signing a petition for a secret ballot election. We weren't sure if we would be able to obtain the necessary signatures of 30% of our coworkers, but it was the only way to ensure that our voices were heard fairly.

Amazingly, we quickly obtained the signatures of 45% of our fellow employees and filed the Decertification Petition with the NLRB on August 8. It was exciting to see that so many of my co-workers wanted the opportunity to have a true vote!

On August 26, we received confirmation from the NLRB that all parties had agreed to a mail-in secret-ballot vote that would occur on September 20th. The ballots were to be counted on October 4th.

Everything was set for a vote in which everyone could participate, one where everyone could vote their conscience knowing it was confidential.

On August 31st, I learned that the "DANA" rights had been overturned by the NLRB in a case called "Lamons Gasket." I was shocked and quite upset. I thought, "How could this be?" All we were asking for was a fair vote and a private vote, giving everyone a voice.

If any union is so confident that a simple majority of workers wants to be represented by them, why would it insist on a "card count," instead of a secret-ballot election?

I have voted in every Presidential Election, and most of the other elections, since I was 18. Each time, I either had to be present at the polling station or mail in my ballot for my vote to count. And, every time I was reassured by the knowledge that my vote was confidential.

In the United States we have been taught that if we vote, our voices will be heard, our identities will be protected, and most importantly that we can make a difference.

Why should the SEIU or any union be allowed to represent workers in any other way—the "card-check" process undermines the privacy and voices of the very workers they seek to represent?

In the email I sent coworkers announcing the decertification petition had been approved, I stated that we were going to have the time and opportunity to review the Union contract and then vote whether we wanted to be represented by the SEIU Union or not. This was a chance to have EVERYONE'S VOICE HEARD, without any doubt that this was an election! Everyone would know what they were voting for!

In fact, following my announcement, Sara Thompson, an SEIU representative, sent two emails stating "I encourage everyone to vote and for every voter to be well-informed before making this decision". She went on, "just like in a presidential election, abstaining is no vote at all, either way." These statements clearly show that SEIU knows what a vote is supposed to be. So, I ask you this—how could they ever consider "card-check" to be a fair vote?

It is not right to deny workers the opportunity to be fully informed, and the protections afforded by a secret-ballot election on such important decisions. In revoking the "DANA" decision, the NLRB has taken away one of the last guarantees workers have of a fair and honest vote in workplace elections.

For me and my fellow employees however, snatching away those rights just as an election has been agreed to and a date had been set was cruel and unethical.

Let me close with some of my colleagues' complaints and concerns regarding the meetings and Card-Check process.

A couple of employees were approached specifically with cards and told that they should sign the cards because the Union will provide better pay and benefits. One coworker said that she felt pressured, so she signed the card because she was led to believe that she was just requesting more information by signing.

At least two other staff members said they were on vacation when the meetings and card-check count took place, and no one informed them of what was occurring.

One person stated that she had no idea what was going on and was surprised to read the email that advised that we were now in a Union.

Many did not receive a card and the ones who did either attended a meeting or were singled out, (or were specifically chosen by SEIU).

A person who attended an "informational" meeting said the SEIU representative couldn't really answer any questions and had only a copy of the 2009 contract which she kept referring to even though there was already a 2010-2013 contract.

Many of my colleagues were given the impression that signing was simply a request for more information. Several coworkers reported rude treatment when they asked to have their cards retracted. One was told that "it didn't matter because they couldn't find her card anyway."

I thank you for your time and the opportunity to share my experience, and I look forward to answering any of your questions.

From: Belinda L Green/OR/KAIPERM

To: NW SYS MS ALL-IREG

Date: 08/04/2011 11:11 AM

Subject: Please read

Hi Everyone,

Several of you have asked about the outcome of the SEIU vote count yesterday.

With 96 staff, 50% + 1 vote (49 votes) were needed to join the SEIU bargaining unit. There were 50 votes in favor.

Very soon, you will see a posting in the call center from the National Labor Relations Board outlining the next steps in the process.

If you have any questions in the meantime, please direct them to Scott Allan, KPNW Director of Employee and Labor Relations. Scott can be reached at 49-4402.

Thank you for being here every day to take care of our members,
Belinda

Belinda L Green
Interim Vice President, Health Plan Service and Administration
Northwest Region

Kaiser Permanente
Health Plan Service and Administration
[redacted]
---
kp.org/thrive

NOTICE TO RECIPIENT: If you are not the intended recipient of this e-mail, you are prohibited from sharing, copying, or otherwise using or disclosing its contents. If you have received this e-mail in error, please notify the sender immediately by reply e-mail and permanently delete this e-mail and any attachments without reading, forwarding or saving them. Thank you.

INTERNET FORM NLRB-502 (2-08)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

FORM EXEMPT UNDER 44 U.S.C.

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
36-RD-1754	8-17-11

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- ☐ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☑ **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - **A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.**
- ☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) ☐ In unit not previously certified ☐ In unit previously certified in Case No. _____
- ☐ **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer: Kaiser Permanente Northwest
Employer Representative to contact: [redacted]
Tel. No.: [redacted]

3. Address(es) of Establishment(s) Involved (Street and number, city, State, ZIP code): [redacted]
Fax No.: [redacted]

4a. Type of Establishment (Factory, mine, wholesaler, etc.): Healthcare/ Medical Insurance
4b. Identify principal product or service: Customer Service
Cell No.:
e-Mail:

5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.)
Included: Membership Services Department
Excluded:

6a. Number of Employees in Unit:
Present: 95
Proposed (By UC/AC):

6b. Is this petition supported by 30% or more of the employees in the unit? ☑ Yes ☐ No *Not applicable in RM, UC, RD, AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent (If none, so state.): SEIU Local 49
Affiliation:
Address: [redacted]
Tel. No.: [redacted]
Cell No.:
Date of Recognition or Certification: 8/3/2011
Fax No.: [redacted]
e-Mail:

9. Expiration Date of Current Contract, if any (Month, Day, Year):

10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year):

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes ☐ No ☑

11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel. No.	Fax No.
		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number): Barbara Ivey

14a. Address (street and number, city, state, and ZIP code): [redacted]
14b. Tel. No. [redacted] EXT
14c. Fax No.
14d. Cell No.
14e. e-Mail: [redacted]

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print): Barbara Ivey
Signature: Barbara Ivey
Title (if any): An individual
Address (street and number, city, state, and ZIP code): [redacted]
Tel. No. [redacted]
Cell No.
Fax No.
e-Mail: [redacted]

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

United States Government
NATIONAL LABOR RELATIONS BOARD
Subregion 36
601 Southwest Second Avenue - Suite 1910
Portland, OR 97204-3170

Telephone: (503) 326-3085
Facsimile: (503) 326-5387
Toll Free: (866) 667-6572
Agency WEB site: www.nlrb.gov

September 1, 2011

Ms. Barbara Ivey
[redacted]

Re: Kaiser Permanente Northwest
36-RD-1754

Dear Ms. Ivey:

The above-captioned case, petitioning for an investigation and determination of representative under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

As a result of the investigation, I find that further proceedings are unwarranted. The investigation disclosed that:

The instant decertification petition was filed on August 17, 2011, subsequent to the Employer's August 3, 2011 voluntary recognition of SEIU Local 49 as the exclusive collective bargaining representative of a unit of membership services representatives. The voluntary recognition was based upon an arbitrator's examination of signed authorization cards, which demonstrated that the Union has majority status. The decertification election was scheduled to be conducted by mail ballots, with the ballot count on October 4, 2011.

On August 26, 2011, the National Labor Relations Board issued its decision in *Lamons Gasket Co.*, 357 NLRB No. 72, overruling its decision in *Dana Corp.*, 351 NLRB 434 (2007). In the *Lamons Gasket* decision, the Board returned to the rule that an employer's voluntary recognition of a union, based on a showing of the union's majority status, bars an election petition for a reasonable period of time. This rule is retroactively applicable to all pending cases, except those in which an election was held and the ballots have been opened and counted. As the election in the instant case has not been held, the Board's decision in *Lamons Gasket* is controlling and further processing of the petition is barred.

Therefore, I am dismissing the instant petition.

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary,

National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **September 15, 2011**, at 5:00 p.m. Eastern Time, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website **is accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[1] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. *Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Very truly yours,

Richard L. Ahearn
Regional Director

By Linda L. Davidson
Linda L. Davidson
Officer in Charge

[1] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

2011-09-02 18:04 IVETTRAINING 5033653896>> 703 3219319 P 3/4

36-RD-1754, D/L
Page 3

cc:

[redacted]

[redacted]

[redacted]

[redacted]

2011-09-02 18:04 IVETRAINING 5036538896>> 703 3219319 P.4/4

Chairman KLINE. Thank you.

Mr. Martin, you are recognized.

STATEMENT OF ARTHUR J. MARTIN, PARTNER, SCHUCHAT, COOK & WERNER

Mr. MARTIN. Chairman Kline, Ranking Member Miller, thank you very much for the invitation to——

Chairman KLINE. Microphone.

Mr. MARTIN. Thank you very much for the invitation to participate today. Let me say that I think the evidence is that in the year-and-a-half that the Obama board has been operating that

there is no evidence that it is union favoritism. Every time there is a change, there is a sway back and a sway forth. And that is all reviewable by the federal courts, and I do not think anybody will contend that the federal courts are in the pocket of big labor.

Nevertheless, to address some of the matters that have been raised today, Lamons Gasket is simply a return, after 4 years of Bush precedent under Dana, it is a return to 40 years of precedent operated by Republicans and Democrats. There has never been any prohibition against voluntary recognition where employees freely and unencumbered authorize a union to represent them and an employer with evidence of majority support for the employer to go ahead and to bargain with the union.

Ms. Ivey will have her chance to file her decertification petition. If the union cannot reach an agreement, she can file a decertification petition. Ms. Ivey, if it turns out that there is a collective bargaining agreement reached, when that bargaining agreement expires, she will be able to file a decertification petition. It just preserves, returns to 40 years of precedent where voluntary recognition is considered a free and open way to proceed.

The UNICO case that was mentioned is simply a return to again precedent successor doctrine. What actually happens when an employer is purchased in the successor case, that is a case where companies go out and buy another company and there is a transfer or forced takeover.

That is when the employees are most vulnerable. That is when they should have a right—they should have every right. It should not be vulnerable to have their protection—their representative working on every ask when the successor employer takes over.

We are all familiar with cases where the successor employer takes over and finances the purchase with the employee benefits, lose their pension plan, rearranges their health care and pay for it. And that is when we need protection.

Specialty health care is a return to 70 years of community of interest. With all due respect to the former NLRB officer, in fact the way you determine who is an inappropriate bargaining unit is community of interest. And the specialty health care case was simply a case where the nurses freely and openly chose to be represented by a union, and did not necessarily care to be—to include the janitors and the other help. That is—it is incumbent upon the board to simply to determine what is an appropriate unit in that community of interest standard has not changed.

Frankly, the complaining about the notice, I went to our lunchroom and got the notice. It was hard to find because it is up there with the unemployment notice, with the ADA notice, with the family notice and every other notice. And it just simply says what rights are.

And frankly, what it also includes, interestingly enough, it directs employees to the duties of fair representation that it is incumbent upon the union to represent the employees. That is not in the statute, but that is the law. And so it advises people, and it also advises people that they do not have to participate in the union. So, it makes it clear. It is no different than advising people that they cannot be discriminated against.

The proposed rulemaking about an election simply moves along the election process. Every employer knows that every employee serves at their will. And those employers can compel them to attend a meeting under penalty of discipline to hear out their position on the union.

There is no problem with employer communication. If we really wanted clear communication and a full disclosure of what has been going on you would have to invite the union to those captive audience meetings. But this board is not going to do that, and I am sure the committee is not going to do that.

But, if you really wanted to air it out, that is the way you would do it. But ever employer has the right to continue their captive audience meetings where employees are compelled to attend and hear their view.

One of the things that the proposed rule does is limit the opportunity for multiple litigation by employers and their attorneys. Not suggesting anybody here would indulge in this, but it is a practical matter. I have actually had to litigate the existence of my client.

I have had a case run out where the union has produced the cards, the union has made a position to represent the people, we are trying to get an election. Well, that is not even a union. So, okay, we got to litigate. That gets appealed. That delays.

And then we go to the election, and then there is a whole series. There is an opportunity for litigation after that. As a practical matter—I mean the board, like every other agency has got to do more with less. And to eliminate the opportunity for multiple litigation is something we should avoid, and the board's proposed rules simply streamline that.

And as a practical matter, the unions that I represent are engaged every day in job preservation, working with employers, especially since the 2008 collapse, working with employers to preserve our jobs, shoulder-to-shoulder, cheek-to-jowl with employers. Thanks.

[The statement of Mr. Martin follows:]

TESTIMONY
BEFORE THE COMMITTEE OF EDUCATION AND THE WORKFORCE
UNITED STATES HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2011

HEARING ON
"CULTURE OF UNION FAVORITISM: RECENT ACTION OF THE NATIONAL LABOR RELATIONS BOARD"

ARTHUR J. MARTIN
SCHUCHAT, COOK & WERNER
ST. LOUIS, MISSOURI

Chairman Klein, Ranking Member Miller, and members of the Committee, thank you for your invitation to appear before you today. My name is Arthur J. Martin and I am a partner in the St. Louis labor law firm of Schuchat, Cook & Werner. In my practice I represent labor unions and individual employees in their dealings with employers primarily in Missouri and Illinois. I have served as Chair of the Labor Law Section of the Bar Association of Metropolitan St. Louis and I have been an Adjunct Professor of the St. Louis University School of Law since 1994. During law school I worked as an Intern for Judge Theodore McMillian of the United States Court of Appeals for the Eighth Circuit and afterwards as a Clerk for United States District Court Judge William Hungate. I received my law degree from St. Louis University in 1984. From 1972 to 1981, I served as an Organizer, Business Agent, and District Manager for the International Ladies Garment Workers' Union, AFL-CIO.

The title of today's hearing is the "Culture of Union Favoritism for the National Labor Relations Board." I believe that this is a serious misnomer. In my testimony today I will address the claim that the National Labor Relations Board (NLRB or the Board) has radically changed the way the Act is administered in order to advance the

interests of labor at the expense of employers and individual employees. Let me assure you, as a labor lawyer for almost thirty years representing workers and labor unions, this is most definitely not the case. The NLRB has issued some decisions that labor has applauded and some that labor has criticized. It has taken modest steps to modernize and streamline its procedures. But it has by no means changed the landscape of labor relations.

1. **NLRB decisions have implemented policies traditionally shared by both Republican and Democratic administrations.**

Courts have long recognized that it is proper and desirable for independent adjudicatory agencies, such as the Board, to administer the Act through decisions within the scope of their expertise. The decisions issued by the Board in the past year and a half have been sometimes unanimous, sometimes along party lines – much as past Boards have done – and sometimes split but not along party lines. In some cases, the position adopted by employers has prevailed and in others the position advanced by labor unions has prevailed. It would be wildly inaccurate to claim that the Board's decisions have always favored labor unions. Recent Board decisions have been well within the bounds of the Board's authority and the parameters within which that authority has been exercised by past Boards.

Certain Board decisions have restored doctrines that existed prior to Bush era decisions which overturned decades of established precedent. For example, in *Lamons Gasket Co.* 357 NLRB No. 72 (2011), the Board reinstated its voluntary recognition doctrine which had existed for forty years prior to the Bush era Board's decision in *Dana Corp.*, 351 NLRB 434 (2007). That Bush era decision, by a sharply divided Board, had the effect of undermining the right of an employer to voluntarily recognize a union freely

selected by a majority of its employees to represent them. The result encouraged litigation, created uncertainties for employers and workers alike, destabilized the bargaining relationship, discouraged good faith efforts to mutually and successfully resolve collective bargaining issues, and added layers of regulation that did not exist before. The recent decision merely returned to the prior, established doctrine that had existed since 1966, and which had been uniformly sustained in the federal courts.

Similarly, in *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), the Board restored the successor bar doctrine which had been overruled by the Bush era Board's decision in *MV Transportation*, 337 NLRB 770 (2002). The Board returned to its prior practice of allowing a successor employer and union representing the employees of a company to bargain without interference for up to a year after the transition. The Board reasonably concluded that, consistent with the Act's primary goal of stabilizing labor-management relationships, the union and the employer should have an opportunity to work out the details of the transition without interference or litigation that would add to the uncertainty and confusion that occurs when an employer is sold or taken over. In connection with this decision, the Board modified its long-standing contract bar doctrine in order to ensure that represented workers have adequate and periodic access to the Board's election process to exercise their free choice.

New York, New York Hotel & Casino, 356 NLRB No. 119 (2011), raised the right of employees to protest against their employer when their employer happens to be located inside a casino owned by another employer. In this case, off-duty restaurant workers, who were regularly employed at a restaurant on casino property, handbilled restaurant and casino customers in nonworking areas of the casino which were open to

the public. The Board sought to accommodate the statutory rights of the workers with the property and managerial rights of the casino. In a ruling it described as very narrow, it concluded that the casino could lawfully exclude the off-duty restaurant employees upon a demonstration that the employees' activity significantly interfered with the casino's use of the property or where the exclusion was justified by another legitimate business reason, such as the need to maintain production and discipline.

A Board ruling in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011), clarified the criteria for determining appropriate units in health care facilities other than acute care hospitals, which are covered by the Board's Health Care Rule. The Board rejected a prior special test which had been used for determining bargaining units in nursing homes and returned to its traditional community-of-interest standard, long-used in other workplaces. Contrary to concerns raised when the Board requested briefs in this case, the Board did *not* create new criteria for determining appropriate bargaining units outside of health care facilities.

Some have criticized the Board's recent bannering decisions. In *Carpenters Local 1506* (*Eliason and Kanuth of Arizona, Inc.*) 355 NLRB No. 159 (2010), the Board held that a union's peaceful display of a banner in front of a secondary employer's place of business – without obstruction or coerciveness – does not constitute picketing prohibited by Section 8 (b)(4) of the Act. It should not be a surprise to anyone that when a union is not engaged in picketing, it is entitled to engage in the same First Amendment free speech activity as any other organization or group of people. Hardly a day goes by that I don't drive by a sign or a banner criticizing some conduct or entity from Planned Parenthood to, in my area of the country, eminent domain. Even if it so

desired, the Board may not infringe upon free speech rights. Indeed, several federal district courts and the Ninth Circuit Court of Appeals had already rejected previous Board petitions to enjoin these peaceful informational displays on just such grounds. A contrary decision by the Board would have faced a very hostile reception by these federal courts when it attempted to enforce its decision.

It is important to note that most Board decisions are unanimous. For example, a unanimous Board held, in *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010), that back pay awards would be computed using interest compounded on a daily basis, as is done with damage awards in other areas of the law. In another unanimous decision, [Liebman, Pearce and Hayes], in *Garden Grove Hospital & Medical Center*, 357 NLRB No. 65 (August 26, 2011), the Board ruled that an employer violated the Act by unilaterally discontinuing employees' reserve sick leave benefit without bargaining with the workers' union and it ordered the change be rescinded.

Other Board decisions have been divided, but not always along party lines. For example, in *Los Angeles Times Communications, LLC*, 357 NLRB No. 66 (August 25, 2011), former Chairman Liebman and Members Becker and Hayes agreed to overrule a Regional Director and reinstate a petition for a vote to rescind a union-security provision – a ruling contrary to the union's interest; then-Member Pearce dissented and would have dismissed the petition. And in *Continental Auto Parts*, 357 NLRB No. 78 (August 26, 2011), former Chairman Liebman and Member Hayes overturned an Administrative Law Judge and held that an employer did NOT unlawfully terminate a worker for union activities – another ruling contrary to the union's position; while Member Becker dissented.

Even as some argue that the Board is in the pocket of organized labor, the Board continues to issue decisions with which unions vehemently disagree. For example, in *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47 (August 9, 2011), the Board held that backpay may not be awarded to undocumented workers discharged in violation of the Act even where the employer employed the workers with knowledge that they lacked work authorization. The U.S. Supreme Court decided in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 US 137 (2002), that the NLRB could not award backpay to undocumented workers in a case in which the workers had presented fraudulent work-authorization documents to obtain employment, in violation of federal immigration laws. The court arguably left open the question of whether the NLRB could award backpay to undocumented workers where the employer knowingly employed them in violation of immigration laws. Nevertheless, the Board concluded that the Supreme Court's decision in *Hoffman Plastics* closed the door on backpay for undocumented workers regardless of whether the workers or their employer had violated immigration law. The Board concluded that "awarding backpay to undocumented workers lies beyond the scope of our remedial authority, regardless of whether the employee or employer violated the IRCA."

In *Stericycle, Inc.*, 357 NLRB No. 61 (August 23, 2011), the Board held that a union engages in objectionable election misconduct when it finances a lawsuit on behalf of unit employees during the critical period between the filing of an election petition and the date of the election. In adopting this new rule, the Board overruled its existing precedent and overturned the union's 23-12 election victory. Member Hayes concurred

in this result and in overruling existing precedent, but dissented from the remainder of the decision.

Unlawful conduct by a union was found in *SEIU Nurse Alliance Local 121RN (Pomona Valley Hospital Med. Ctr.)*, 355 NLRB No. 40 (June 8, 2010). The Board reversed an administrative law judge and found that the union had unlawfully coerced employees by circulating a flyer that implied they would be fired or demoted if they stopped paying union dues where the union security clause had expired.

The rights of non-member dues objectors under *CWA v. Beck*, 487 U.S. 735 (1988), were addressed in *Machinists Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (Aug. 27, 2010). The Board ruled that a union could not require a non-member objector, who had informed the union of his continuing objection, to renew his objection annually unless the union demonstrated a legitimate justification or otherwise minimized the burden imposed. A similar decision was reached in *IBEW Local 34,* 357 NLRB No. 45 (Aug. 10, 2011).

As these decisions illustrate, the Board has hardly pandered to the interests of labor unions. Instead, this range of outcomes is strong evidence that it has engaged in a thoughtful, reasoned, effort to apply the Act's provisions fairly.

2. The Board has engaged in rule-making regarding notifications of employee rights and its election procedures in order to better inform, streamline its processes, take advantage of efficiencies and cost-savings from modern communications technology, and ensure that workers who want to vote to form a union have a chance to do so.

In late August, the Board issued a Final Rule requiring employers to post a notice of Employee Rights under the NLRA. The notice is similar to one required to be posted by federal contractors pursuant to an Executive Order issued in 2009. One major

change was made to the NLRB's final notice – specific language was added to inform workers that they have the right "to refrain from engaging in any" union or other protected activities under the Act. The notice lists examples of illegal conduct by employers and by unions and advises workers of their rights under the Act, including their right to "choose not to do any of these activities, including joining or remaining a member of a union." The Board's notice is in line with and little different from those required by various state and federal employment agencies. In our office, like any other employer, the notice is posted among Missouri state–required notices regarding the minimum wage, unemployment benefits, workers' compensation, and discrimination in employment; and federal notices regarding equal employment opportunity, OSHA, polygraph protection, military family leave, and the Family Medical Leave Act. I believe that complaints about this posting requirement reveal that criticism of the Board on this matter is a political attack rather than an objective view that the Board should not inform employees of their federally protected rights.

In my practice, I hear from employees who are disciplined or retaliated against because their employers are simply unaware of the Section 7 NLRA rights. We recently had cases where employers disciplined employees, independent of any labor union, because they had protested overtime scheduling or inquired about employee benefits. The notice posting will serve the very important and very necessary purpose of informing all parties in the workplace of conduct that may be inappropriate.

In June of this year, the Board issued a Notice of Proposed Rule-making regarding its election procedures. These proposed changes are necessary, commonsense proposals to ensure a fair process for workers who want to vote on

whether to form a union. The proposed rules will update and modernize a process that has remained relatively unchanged for decades and are consistent with modern standards of administrative and judicial procedure. The current election process incentivizes frivolous and irrelevant litigation and rewards pointless and duplicative appeals with delays, delays, and more delays, both before and after an election.

I have witnessed employers manipulate the Board's election process to create delays where no real dispute exists. There have been occasions where I have actually had to litigate the existence of my client before we could proceed to an election. The proposed rules will, in most cases, allow the election to go forward and leave the parties free to litigate afterward. In addition, the proposed rules will streamline the process by incorporating the use of electronic transmittals and modern evidentiary procedures to achieve substantial savings to the parties and the Board in time, costs and resources. It is apparent that the Board like other government agencies will be expected to continue to do more with less. Rules that streamline agency processes and avoid duplicative litigation by consolidating review serve everybody's interests. For example, in the event the union is not successful in the election, resources will be saved that would otherwise have been expended litigating in advance of the election.

We were recently involved in a case where the employer refused to give the Region its position as to any issues prior to the representation hearing, forcing the union to guess as to what the employer would argue. At the hearing, the employer contended that its project supervisors and project managers (involving less than 20% of the unit) were employees and not supervisors. Notwithstanding the positions it took in the election case, the employer subsequently argued at the related unfair labor practice trial

that various crew leaders that worked under these project supervisors and managers, and which the employer had fired for their union activity, were statutory supervisors. That is, the employer took the exact opposite position as to the status of the same individuals in two, virtually contemporaneous NLRB proceedings. *ADB Utility Contractors*, 355 NLRB No. 172 (2010) - (subsequently settled on appeal). The proposed election rules would avoid this useless waste of resources and minimize such duplicitous litigation strategies.

The argument that post-election rules somehow take away the employer's voice is a political talking point without any basis in fact. We all know that employees in a workplace without a union serve purely at the pleasure of their employer; they are "at will" employees. The employer has unfettered access to the employees at any and all times at the employer's sole discretion. Employers may and do routinely require their employees to listen and be attentive to their position under pain of discipline – whether workers are trying to form a union or not. If there is a genuine interest that all parties are properly informed prior to an election, one could require that a representative of the union – which otherwise is barred from workplace opportunities to communicate with employees – be allowed to participate in the employer's captive audience meetings. In my experience, employers have ample opportunities to provide information to employees, from day one when an employee is hired and through the entire effort by workers to form a union.

3. **The NLRB Acting General Counsel has acted to remedy violations of the Act; preserve the Act's jurisdiction; and provide guidelines for the Board's constituencies.**

This spring the Acting General Counsel of the Board filed a complaint against the Boeing Company related to Boeing's plan to transfer airplane assembly jobs, allegedly in retaliation for its workers' exercise of their federally protected rights. I believe that efforts to thwart this case are premature and inappropriate. Premature because the case is currently being heard by an Administrative Law Judge in a trial that started on June 14; and inappropriate because this is an on-going prosecution being conducted in accordance with due process protections.

I will tell you that one of my brothers, Tony, works on an aircraft assembly line at Boeing's facility in St. Louis County. I spoke to him and his wife before coming out here this week and they are well aware of statements made by Boeing executives that the assembly work from Seattle was transferred to South Carolina because the workers in Washington state exercised their federally protected rights. If that is proven to be the case and there is no remedy, the message is loud and clear: You may have rights under the law but if you exercise them, you risk losing your job.

The complaint filed by the Acting General Counsel against Boeing seeks a remedy no different than the remedy the Board routinely seeks in similar cases for similar violations of employee rights. It is a long-standing and well-established remedy that has been endorsed and approved by the U.S. Supreme Court. To argue that the Board is somehow out of control by seeking such a remedy distorts the facts and ignores decades of Board precedent. Even though Boeing is a huge company, it should be obligated to abide by the same rules and be required to follow the same process and

be subject the same penalties that everyone else is: Let the process work, make your case at a hearing on the facts and if you're guilty take your medicine.

Eliminating the only effective remedy that the Board can impose when an employer violates workers' rights by illegally transferring or relocating work, whether to a subcontractor, independent contractor, or off-shore company, will gut the National Labor Relations Act. The Board's remedies are very circumscribed; it has no authority to impose fines or penalties and no other meaningful remedy for such illegal conduct. We recently had a case where the employer unilaterally increased its hiring of lower paid, non-unit temporary staff instead of hiring better paid full-time employees during bargaining for a first contract. The employer then transferred work to non-unit temporary employees, taking it away from bargaining unit employees. The Board found merit to the charge filed by the Union and the parties then worked out a settlement by agreeing to a first contract. Boeing is likewise free to defend its conduct or work out a settlement. A requirement to restore work which has been illegally transferred is simple justice.

Since the courts have instructed that, as a federal statute, the NLRA preempts conflicting state and local governmental action, one of the important roles of the NLRB is to protect the Act from such encroachments. Republican and Democratic-appointees alike have done this throughout the Agency's history. The Bush era Board successfully argued that a state statute in North Dakota requiring non-union members to pay for the cost of processing their grievances conflicted with federal law. *NLRB v. State of North Dakota*, 504 F.Supp.2nd 750 (D.N.D. 2007). The Board has taken similar positions in support of other state actions as well, including a challenge brought by the Chamber of

Commerce arguing that a California statute was pre-empted by the NLRA and should be declared void, *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008); against an ordinance in Milwaukee which had been supported by labor unions, *Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005); and in opposition to other statutes the Board believed impaired employees' rights, *Livadas v. Bradshaw*, 512 U.S. 107 (1994); *NLRB v. State of Illinois Dep't of Emp't Sec.*, 988 F.2d 735 (7th Cir. 1993).

Despite this extensive history of taking such action in similar circumstances, the Board's recent decision to authorize the Acting General Counsel to file lawsuits to protect employees' federal rights has come under attack. Four states, Arizona, South Carolina, South Dakota and Utah, have approved constitutional amendments which directly conflict with the NLRA by changing the way that workers can choose union representation. To date, one lawsuit has been filed; it seeks to enjoin enforcement of the state constitutional amendment in Arizona insofar as it conflicts with the federal statutory rights of private-sector employees to designate a union to represent them. The U.S. Supreme Court has upheld the Board's authority to seek federal court injunctions against state actions that conflict with federal rights. *NLRB v Nash – Finch Co.*, 404 U.S. 138, 144-147 (1971).

Another important function of the Office of the General Counsel is to provide guidance in new and unsettled areas of the law. The current Acting General Counsel has undertaken to do just that. In August 2011, he issued a report summarizing recent case developments arising in the context of today's social media. The report provides helpful guidance that serves to put parties on notice of the position of the Office of the General Counsel regarding what is and what is not protected in the context of various

social media, such as Facebook, blogs, etc. The Acting General Counsel is to be complimented for adapting the Board's traditional policies to electronic media in the 21st century workplace, and most importantly, for his transparency and diligence in making this information available for use by the Board's stakeholders. Employers, workers and labor unions need the predictability and stability that this guidance provides.

4. **As a practical matter, employees, the unions that represent them, and employers are doing their best to work together through difficult times; the Board is playing a critical role in facilitating that process and helping it to be successful.**

The claim that somehow the Board is engaging in conduct that hamstrings business and costs jobs has no basis in fact. This Board – as the Boards before it - simply administers a process, which is ultimately completely voluntary. There is no requirement that employers enter collective bargaining agreements; nor does the Board attempt to dictate what must be included in a collective bargaining agreement. The parties are free to choose the terms that suit them.

I would like to make sure you understand that in the world in which I live, and in communities like mine all across the country, unions have worked hand in hand with their employers since the economic collapse in 2008 to save jobs and preserve work. I have been involved in many negotiations where unions and employers have routinely and successfully dealt with extremely difficult issues involving employee benefits, retirement security, work jurisdiction, wage freezes, involuntary employee furloughs, wage cuts, and so on. At the heart of this process, all parties understand that their rights are secure and protected by the Board. It is within this framework and because of this framework that they have the freedom to work out their differences as they see fit.

Chairman KLINE. Thank you.
Mr. King, you are recognized.

STATEMENT OF G. ROGER KING, PARTNER, JONES DAY

Mr. KING. Thank you, Mr. Chairman, Ranking Member Miller. Thank you for having me here again today.

First, we are all frustrated with the National Labor Relations Board. Democrat, Republican, Independent, labor management alike. This board has vacillated back and forth over the years, continues to do so. No question that we need to look at the NLRB—direction.

Mr. Miller, I noted your remark that this is a small agency. Yes, it is, compared to the reset of the federal government. But the Boeing Initiative by this acting general council has sent shockwaves through this business community and this country and internationally.

Employers in this country are concerned about whether they can move a plant without getting to years of litigation and being accused of being a lawbreaker. Ford employers are now questioning whether they are even going to put capital in this country.

This agency is having a very dramatic, albeit negative impact upon the economy of this country. And I commend this committee for having this hearing. This agency does need to be reviewed.

Yes, there are a lot of very fine civil servants that have worked for years with this agency. They do a good job in processing election petitions. But it cannot be argued that this particular board is one of the most activist boards in the history of the National Labor Relations Act.

And the speed of which its trying to process this agenda is without precedent. There are no less than eight or nine major policy initiatives being pursued by this board. That has not occurred in the past, whether it be a Democrat or Republican board.

One example is rulemaking. In the history of this agency there have only been two rulemaking initiatives in the entire history of the board, 75 years. This particular board in a matter of a few months is engaged in two rulemaking initiatives, and I will touch upon both in a moment.

There is no way that anyone objectively could conclude that this board has not been extremely active. Indeed, from the perspective of the employer community and others, way too active in one direction.

With respect to specifics, this board has created artificial issues, issues that are not even before—in the cases that come before the board for adjudication, and then using these artificially created issues to then issue major policy reversals.

I do want to identify with the remarks of Mr. Mack. Curtis Mack was one of the most distinguished National Labor Relations Board civil servants to serve in the agency's history. I agree totally with his analysis of the case law mentioned.

I cite in my testimony cases where the board has attempted to artificially create issues. The most glaring are the proposed new elections rules. The National Labor Relations Board, for all of its other problems at the regional level at the career civil service level processes petitions very efficiently, and has improved upon that record year in and year out.

We have included in our testimony the win rate indeed that the unions have had under this processing of petitions. It is well over 60 percent. And the data, that is not refuted by anyone, of the efficiency of the processing of these petitions is excellent. There is no need—no documented record whatsoever for these new proposed election rules.

Mr. Mack covered quite adequately the Dana case, the successorship case. I would only note that there have been more and more recognition agreements in this era than there have even 10 or 15 years ago. And a recognition agreement between an em-

ployer and a union is not necessarily bad. But it should in most cases permit an election. And that is really the problem with the overturning the Dana case.

With respect to the posting of this notice, well it is hard to argue. I would concur with a notice being posted. But the issue is much broader than that. This notice is not fair and balanced. It does not really articulate all the rights that employees have under the Act.

There are questions, legal questions whether the board even has the statutory authority to do this. And those are being challenged by the United States Chamber of Commerce and other entities. So, we will see how that litigation proceeds.

But the board not only has this new poster, it is saying if you do not put the poster up, you are guilty of an independent unfair labor practice charge. And the statue of limitations on any other pending unfair labor practice could be pulled, could be extended.

And furthermore, this what I think is really something we need to think about, if the employer does not put the poster up, it is going to be somehow deemed to be against unions generally, union animus. So, that is not right. So, if we are going to do a posting, let us do it right, indeed if the board even has that authority.

Finally, on specialty health care, that decision probably is the most impressive written decision I have seen in a long time, but it is simply wrong. It overrules years of board precedent. We would disagree on that. At least 30 years of precedent. It will result in highly fragmented micro bargaining units throughout the country.

Finally, on specialty health care, we could see up to seven or eight units on that theory. This particular decision needs legislative attention. It is wrong. It will result in a very negative impact on the economy of this country, particularly on the small employer up to the large employer.

Mr. Chairman, that concludes my prepared remarks. I will be happy to answer questions.

[The statement of Mr. King follows:]

Prepared Statement of G. Roger King, Partner, Jones Day

Good morning Committee Chairman Kline, Mr. Miller and Members of the U.S. House Committee on Education and the Workforce. It is an honor and pleasure to appear again before the Committee as a witness. My name is G. Roger King,[1] and I am a partner in the Jones Day law firm. My testimony today should not be construed as legal advice as to any specific facts or circumstances. Further, my testimony is based on my own personal views and does not necessarily reflect those of Jones Day or its attorneys. 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 mix of union and non-union work forces. I have been a member of various committees of The American Bar Association, 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 my testimony as Attachment A.

[Attachment A may be accessed at the following Internet address:]

[1] Mr. King can be reached at rking@JonesDay.com. He would like to acknowledge his Associate, Scott Medsker, also of the Jones Day Labor & Employment Practice Group, for his assistance in the preparation of this testimony.

http://www.jonesday.com/gking/

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

Mr. Chairman, my testimony this morning addresses the following points regarding the recent initiatives undertaken by the National Labor Relations Board ("NLRB", "the Board", or "Agency").

• *The unprecedented activist and pro-labor record of the current Board*

The unpredictability and ever-changing nature of Board case law has been a cause of frustration and a concern for employers, labor organizations and employees for many years. Further, the procedural and substantive problems associated with the Board frequently having to meet its statutory obligations with less than a full complement of members and the highly politicized process to fill Board vacancies has proven to be a detriment to the Agency, including the public perception of its ability to carry out its mission in an unbiased and even-handed fashion. Substantial policy changes in the direction of the Board, or as certain academic commentators have noted, "policy oscillation" by the Board have continued to increase in recent years resulting in allegations from both the labor and management community of the Board being "highly politicized." Indeed, given the statutory framework with which the Board was created, and the authority of a sitting president to nominate a majority of the members of the Board from his party, or representative of his labor and management philosophy, it is not surprising that the Board faces substantial obstacles in carrying out its statutory duties.

The direction of the current Board, however, is troubling. Indeed many from the employer community believe that the Board will not judge the merits of any case before it on an unbiased basis. Irrespective of one's feelings and position on labor-management issues, objectively, the current Board, through adjudication, rulemaking and proposed rulemaking, has implemented one of the more active agendas pursued by any Board in the history of the Agency. Further, it has engaged in these initiatives in a timeframe that is perhaps also unmatched in any other period in the over 75 years since the Board was established. Such recent activism reached an unfortunate high point on August 26 of this year.[2] On that day, the Board overturned substantial precedent in at least three cases.[3] These decisions furthered an already activist agenda and represented part of a regulatory approach that has resulted in at least nine major policy initiatives by the Board in the last few months, all designed to further the ability of a union to either become the representative of employees in a small or fragmented bargaining unit, or to avoid altogether a secret ballot election. Such regulatory activism comes at a time when President Obama and other in his administration have instructed federal agencies to reduce regulatory red tape and enhance, however possible, measures to ensure job retention and job creation. One example of the current Board's activist agenda is its initiatives to pursue two rulemaking proposals within a period of a few short months, contrasted with the cautious and thoughtful approach that Boards in both Republican and Democrat administrations have taken in this area. Indeed in the history of this Agency it has only engaged in two rulemaking initiatives, only one of which was successful—the Acute Healthcare Bargaining Unit Rules.

Mr. Chairman, I know there are certain viewpoints in the employer community that would welcome the demise of the National Labor Relations Board. Certainly I have heard comments welcoming the Board's shutdown if it is reduced to a two-member status at the end of this year, which is possible given the fact that Member Becker and nominee Terence Flynn's nominations are still pending in the Senate, and Member Becker's recess appointment expires on December 31. As you are aware, pursuant to the U.S. Supreme Court's decision in New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (June 17, 2010), the Board will not be able to adjudicate cases in such a status. I do not agree with this line of thinking, as I believe it is quite important to have an adjudicatory body in this country available to resolve workplace disputes. Notwithstanding the current controversies surrounding the Board, I believe that representatives of management, labor, and other constituencies would concede that the Board over the years has helped contribute to the overall labor relations stability in this country, particularly compared to the constant labor unrest and difficulties evidenced in other parts of the world. There are many fine employees that carry out the Board's mission of promptly and efficiently conducting

[2] Former Chairman Wilma Liebman's term expired on August 27, 2011, leaving the Board with now-Chairman Mark Pearce and recess-appointed Member Craig Becker, both Democrats, and Member Brian Hayes, a Republican.

[3] There may be other cases in which former Chairman Liebman participated but the Agency has yet to formally release such decisions.

elections and resolving, in an expeditious manner, day to day workplace disputes. Perhaps the structure of the Board and its underlying statutory framework do need to be reexamined. But it is exceedingly important that we have a neutral and unbiased agency available to resolve issues that arise between labor and management. For the reasons outlined below, Mr. Chairman, however, the current direction of the Board, including the ill-advised complaint issued by the Board's Acting General Counsel against the Boeing Company, needs to change course. All parties—labor, management, and employees—that bring matters before the Board deserve to have their disputes adjudicated and resolved in an unbiased and consistent manner.

• *Artificial creation of issues by the Board for policy change*

While the Board certainly has the authority to engage in both adjudication and rulemaking, a deeply troubling trend has emerged from the current Board wherein it has been deciding issues that are not actually before it, and even more troubling, making changes to law and procedure where no changes are warranted.

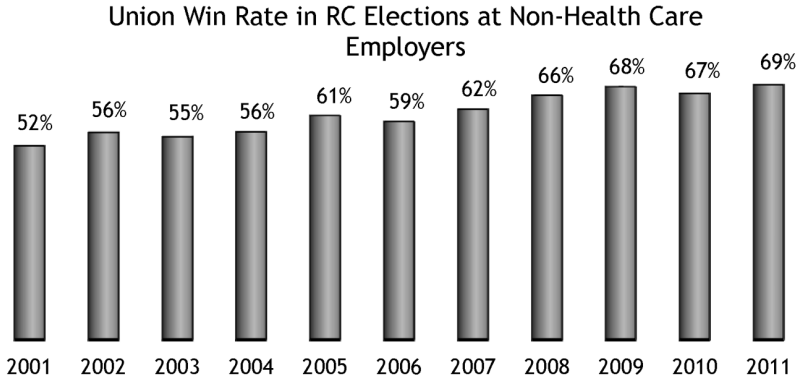
For example, in Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (Aug. 26, 2011), no party to the case asked the Board to overturn Park Manor Care Center, 305 NLRB 872 (1991), nor did they ask the Board to consider the Park Manor standard, which had been applied for twenty years by both Republican and Democrat Boards. Rather, the party seeking review in that case asked the Board to consider whether the Regional Director erroneously failed to apply the standard at all. See 357 NLRB No. 83, at *18. Nonetheless, the Board, of its own volition, posed the question of whether Park Manor should continue to be followed and then proceeded to overturn Park Manor. Additionally, on an even more important note, the Board created a particularly disturbing new element to the community of interest test for bargaining unit determinations, which I will discuss in a moment. Member Hayes suggested that the Board's actions were intentional, stating that "[t]hey know full well that a petitioned-for CNA unit would ordinarily be found inappropriate under the Park Manor test, but it serves their greater purposes to overturn that test to get to the issue they really want to address, that is, a reformulation of the community-of-interest test." Id.

Likewise, in Roundy's Inc., Case No. 30-CA-17185, the Board asked interested parties to comment on "[w]hat bearing, if any, does Register Guard, 351 NLRB 1110 (2007), enf. denied in part, 571 F.3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in non-employee access cases?" While Register Guard's first holding that employer e-mail systems should be treated as employer property for Section 7 purposes under the National Labor Relations Act ("NLRA" or "the Act") is not even arguably at issue in Roundy's, Inc., it would be improper for the Board to attempt to reverse Register Guard's second holding, which defined "discrimination," through Roundy's Inc.

Further, the Board's Notice of Proposed Rulemaking (NPRM) regarding representation case procedures may be the most egregious example of the Board overreaching to change precedent and procedure without any basis whatsoever for doing so. Indeed, based on the Board General Counsel's Annual Summary of Operations, the Board is routinely exceeding its own time targets for representation cases. The NLRB's internal objective in representation cases is to complete elections within 42 days of the filing of a petition. See NLRB General Counsel, Summary of Operations (Fiscal Year 2010), G.C. Mem. 11-03, at 5 (Jan. 10, 2011). In 2010, regional offices of the Board exceeded this objective completing initial elections in representation cases in a median of 38 days from the filing of the petition and conducting 95.1% of all initial representation elections within 56 days of the filing of a petition.[4]

Finally, the union win rate in petitions going to an election has consistently exceeded 60% in recent years as demonstrated by the following chart relying on Board statistics.

[4] Decisions or supplemental reports issued in cases involving post-election objections and/or challenges requiring a hearing were issued in a median of 70 days, exceeding the Board's goal by 10 days. Decisions or supplemental reports issued in cases addressing post-election objections and/or challenges not requiring a hearing were issued in a median of 22 days, also exceeding the Board's goal by 10 days. See NLRB General Counsel, Summary of Operations (Fiscal Year 2010), G.C. Mem. 11-03, at 5 (Jan. 10, 2011)



Simply stated, the Board, in recent months, has proceeded to create its own agenda, irrespective of the issues presented to it in its case adjudication and in the rulemaking area has also proceeded to attempt to implement change without an established need or record to support such initiatives.

- *Establishment of "gerrymandered" bargaining unit determination standard that will result in fragmented and numerous micro or small units*

On August 26, 2011, the Board released its decision in Specialty Healthcare. The Board in this 3-1 decision, over the dissent of Board Member Brian Hayes, not only overturned the standard for unit appropriateness determinations in the non acute health care industry which had been in place for 20 years, but also significantly altered its traditional community of interest test explaining that the Board would no longer address whether the petitioned-for unit is "sufficiently distinct" to warrant a separate unit. The latter part of this holding, additionally, reverses a 30-year old standard that had been applied by Republican and Democrat Boards and that the current Board cited with approval as recently as last year. Indeed, such approval included an affirmative vote by then Chairman Liebman. See Wheeling Island Gaming, 355 NLRB No. 127 at *1 fn. 2 (Aug. 27, 2010) (citing, Newton Wellesley Hosp. 250 NLRB 409, 411-12 (1980)). The Board's decision in Specialty Healthcare may turn out to be one of the most significant reversals of precedent in recent Board history and may, in fact, lead to a multiplicity of small and fragmented bargaining units in virtually every employer's workforce in the country. One would be hard pressed to think of an initiative by a federal agency that could have had a more of a negative impact on job retention, job creation, and productivity in this country. For example, as Member Hayes noted in his dissent, the employer in Specialty Healthcare beyond now being required to recognize a union that represents only its certified nurse assistants,[5] could also find itself dealing with separate bargaining units of RNs, LPNs, cooks, dietary aides, business clericals, and residential activity assistants. See 357 NLRB No. 83 at *19. Further, those units would be incredibly small, with the dietary aides having only 10 members, the cooks three members, and the activity directors unit consisting of only two employees.

- *The Board's proposed expedited (quickie) election rules lack a factual foundation, are not consistent with the federal rules of civil procedure and sound administrative law principles, and violate fundamental due process rights of employees and employers*

The Board, on July 22, 2011, in another 3-1 decision, again over the dissent of Member Hayes, published an extensive and far reaching number of proposed new election rules—the most extensive proposed rulemaking changes in the Board's history. Such proposed rules would modify over 100 sections and subsections of the current Board Regulations and include changes which span over 35 3-column pages of the Federal Register. Further, the Board, over the objection of a number of employer groups, including HR Policy Association (HR Policy), SHRM, the U.S. Chamber of Commerce and other similar groups, required all interested parties to file comments

[5] The Board recently opened the ballots that were impounded in the Specialty Healthcare election and the union prevailed by a vote count of 39-17.

regarding such proposed rule changes within only a 60-day period and refused to extend such comment period. Indeed, the 60-day period for comments is the minimum amount of time under President Obama's Executive Order 13,563 and, given the extensive nature of such proposed rules, such time period should have been extended.

Likewise, Executive Order 13,563 requires that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." (Emphasis added.) However, the Board did not do so for the vast majority of the proposed rules in the NPRM.[6] The Board's disregard of the requirements of Executive Order 13,563 not only demonstrates administrative agency arrogance, but is also a one-sided and extremely biased approach with respect to how the important process of conducting secret ballot elections should be carried out by the Agency.

If the Board intends to publish a Final Rule, it must affirmatively vote to do so while it still has a quorum of three members before December 31, 2011. The last comments submitted to the Board were submitted on September 7, 2011. Based on the number of working days remaining between September 7 and December 31, the Board would need to review over 650 comments per day to consider all 51,576 comments. Simply put, if the Board proceeds to issue a Final Rule in such a time frame, it will be hard for individuals to accept that the Board actually read and thoughtfully considered the comments submitted.

The proposed rules are literally a procedural and substantive "mine field" for employers. There are a considerable number of procedural and substantive deficiencies with such proposed Board rules, which are outlined later in my testimony.

- *The Board's reversal of precedent in its Lamons Gasket and URL-Unicco Service Co. decisions also evidences its ideological approach to case law adjudication, and such decisions inappropriately will delay or deprive employees of the rights to vote in Board-conducted secret ballot elections*

Again, on August 26, 2011, the Board reversed its 2007 decision in Dana Corp., 351 NLRB 434 (2007) (Dana I). The decision in question, Lamons Gasket Co., 357 NLRB No. 72 (Aug. 26, 2007), eliminated a 45-day period for employees to exercise their Section 7 rights to file a decertification petition or for a rival union to file a petition after an employer voluntarily recognized a union and before the Board's recognition bar could take effect. Under this decision, employees will now be prohibited from filing a petition for election for "a reasonable period of time," which the Board defines as "no less than 6 months after the parties' first bargaining session and no more than one year." Id. at *10. Member Hayes, again in dissent, characterized the Board's decision as "a purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise." Id. at *11.

There are numerous policy considerations that encourage and support employers and unions from entering into recognition agreements. A wide variety of such agreements have resulted in labor relations stability between unions and employers, including particularly those that culminate with a Board-conducted secret ballot election. Under such agreements, if the union is successful, it obtains the "election bar" protection for a minimum of one year, in most circumstances, restricting the right of a rival union to intervene and to permit the parties to negotiate a collective bargaining agreement. However, it is difficult to understand Labor's negative reaction to the Board's holding in Dana I and the Board's subsequent criticism of Dana in Lamons Gasket Co. As the majority in Lamons Gasket Co. noted, election petitions were only filed in 102 of the 1,333 requests for Dana notices. Id. at *4. Moreover, elections only occurred in 62 cases, with the voluntarily-recognized union winning the vast majority of those elections. Simply stated, it is difficult to understand why providing employees with notice of their rights to an election in Dana cases was so repugnant, particularly when the Board was contemporaneously requiring the posting of employee rights in other scenarios.

In the third decision, also issued on August 26, 2011, on another 3-1 vote, again over the dissent of Member Hayes, the Board considerably narrowed the opportunity for employees to determine, by secret ballot election, whether an incumbent union should continue to be recognized after the sale of a business. UGL-UNICCO Service

[6] The only areas where the Board did solicit input in its rulemaking proposals included (i) a request for interested parties to comment on a change in the Board's "blocking charge" policy, which pertains to the procedure where elections are held in abeyance during the pendency of resolution of unfair labor practice charges; (ii) what remedies, if any, should be imposed on improper release of confidential employee information; and (iii) whether the Board should permit electronic signatures on union authorization cards.

Co., 357 NLRB No. 76 (Aug. 26, 2011). This case involves the federal labor law "successorship doctrine" wherein an employer that purchases the assets of a unionized business and retains at least a majority of the seller's unionized workforce must recognize and bargain with the incumbent union. Under this doctrine, an employer has the legal option not to accept the current terms and conditions of employment and bargain with the incumbent union for a new contract. Such employer also has the option to adopt the existing bargaining agreement. If the employer elects the option to bargain for entirely new terms and conditions of employment, it now will be penalized, as will the employees in question, by the imposition of a bar prohibiting an election for one year after the commencement of bargaining. If, however the employer accepts the collective bargaining agreement as the starting point for bargaining with the incumbent union, such an election would only be barred for six months. In either case, the impact is that employees will lose the rights that they previously had to have a secret ballot election conducted shortly after the transaction in question and may ultimately be denied all together, any right to participate in a Board-conducted secret ballot election to determine whether the incumbent union still represents a majority of bargaining unit members.

- *The Board's language in its new mandated workplace poster is not balanced, and the Board, in all likelihood, has exceeded its statutory authority by implementing such rule*

On August 30, 2011, on a 3-1 vote, again over the dissent of Member Hayes, the Board published a Final Rule requiring all employers subject to the NLRA to post notices informing their employees of the right to unionize under the NLRA and to engage in collective bargaining. See 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. § 104). The Board engaged in this action despite President Obama's Executive Order 13,563, which directs federal agencies to minimize the imposition of new rules and follow certain requirements, as discussed above. This new rule also creates a new category of unfair labor practices dictating that employers who fail to post the required notice will be found to have violated 29 U.S.C. § 159(a)(1). Additionally, the Board will consider, under such new rule, ignoring the six-month statute of limitations period contained in 29 U.S.C. § 160(b) if an employer fails to post the notice. Finally, under such new rule, an employer that fails to post the notice may also be found by the Board to have illegal motives and "animus" toward a union in a wholly independent unfair labor practice proceeding, thereby shifting the presumption of guilt on to an employer in such a proceeding.

This new rule has already been challenged by a number of employer groups in federal district court and even if such courts ultimately conclude that the Board has the statutory authority to require the posting of such notices, the language in the Board's poster does not include a complete statement of all of the rights that employees have under the NLRA, nor does the Board's required language include a clear and concise statement of the rights of employees to decide not to form and join a union or to decide not to continue to remain in a union. Member Hayes, in his dissent to the new rule, estimated that such rule will impose new obligations on approximately six million employers, the vast majority of whom are small or mid-size employers.

- *The Board's activist agenda demonstrates a disregard for sound public policy, has resulted in rejection of Board precedent with less than a full complement of members and undermines the agency's credibility and neutrality*

As noted above, prior to the expiration of former Chairman Liebman's term, the Board only had three confirmed members (Chairman Liebman, Member Mark Pearce and Member Hayes). Member Becker was serving, and continues to serve, on a recess appointment basis. It is submitted that the Board should not proceed to overturn precedent and engage in such an activist agenda with only three members, particularly since only two have been confirmed by the United States Senate. I realize that there are differing views on what the Board practice has been in the past with respect to overturning precedent without a full Board being confirmed. When I previously testified before this Committee on a similar topic, I quoted former Chairman Liebman's dissent in Teamsters Local 75 (Schreiber Foods), 349 NLRB 77, 97 (2007), where she stated that, "[g]iven 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." In a February 25, 2011, publicly-released letter to Subcommittee Chairman Roe, then Chairman Liebman took issue with my citation to her quote. See Ltr. to Chairman Roe, February 25, 2011, attached hereto as Attachment B. Although the cite to former Chairman Liebman's quote was correct, she went on to explain her position by stating that "[t]he Board's tradition * * * is not

to overrule precedent with fewer than three votes to do so," citing to Hacienda Resort Hotel & Casino, 355 NLRB No. 154 at *2 fn. 1. In that footnote, she and then Board Member and now Chairman Pearce explained that "[d]uring those relatively rare periods when it has had only three members, the Board has not hesitated to reverse prior decisions, where there was a unanimous vote to do so." Id. (emphasis added). Given the fact that there are now only three sitting members of the Board (including only two confirmed Board Members), one would expect the Board to follow its "tradition" not to reverse precedent—whether by adjudication or rulemaking—without three votes to do so. Will the present Board, under the leadership of Chairman Pearce, follow his previous commitment on this point?

[Attachment B may be accessed at the following Internet address:]

http://www.laborrelationstoday.com/uploads/file/chairmancommitteeletter.pdf

• *Additional considerations regarding the Board's specialty healthcare decision*

The Board's decision in Specialty Healthcare is, as noted above, flawed for a number of reasons. Not only did the Board reach an issue that was not actually before it—whether to reverse Park Manor—but the Board then went further to apparently modify the long and well accepted community of interest standard as applied to all employers.[7] The Board's decision appears to invite unions to petition for the narrowest-possible unit and is particularly flawed for a number of legal reasons. Such substantive legal issues and concerns are outlined in detail in the amicus brief filed with the Board in this case by the Coalition for a Democratic Workplace and HR Policy Association. A copy of such amicus brief is attached hereto as Attachment C.

[Attachment C may be accessed at the following Internet address:]

http://www.nlrb.gov/case/15-RC-008773

The Board's decision in Specialty Healthcare attempts to establish an entirely new and difficult standard—the overwhelming community of interest test—for an employer to meet if it attempts to expand a unit which is petitioned for by a union. The Board stated such new standard as follows:

When employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

357 NLRB No. 83 at *12-13 (emphasis added) (footnotes omitted). One significance of this description of the post-Specialty Healthcare unit determination analysis is that it omits a critical step that the Board reaffirmed just last year. In Wheeling Island Gaming, Inc., 355 NLRB No. 127, then-Chairman Liebman and Member Schaumber wrote that:

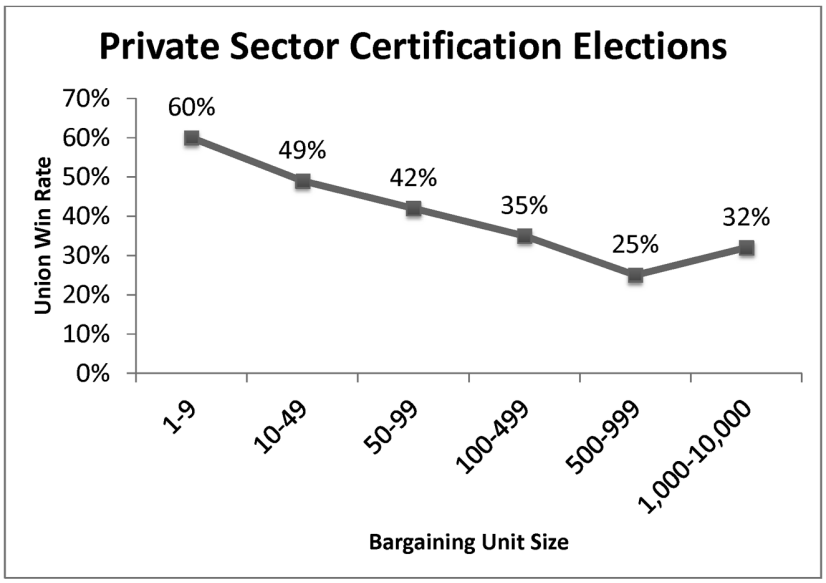
the Board's inquiry never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests in common. Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant establishment of a separate unit. The Board has a long history of applying this standard in initial unit determinations.

Id. at *1 fn. 2 (internal quotation and citation omitted).

After Specialty Healthcare, it appears that a union is no longer required to identify a unit that is "sufficiently distinct" from other employees to warrant considering them an appropriate unit. As a result, it is reasonable to expect that unions will seek smaller or micro units with fewer employees, making it far easier to win elections and obtain a foothold in previously unorganized employers or to expand union

[7] Employers in the acute care industry, where unit appropriateness determinations are governed by separate Board regulations, will continue to apply those regulations. See 29 C.F.R. § 103.30.

presence in partially unionized work settings. Indeed, it is easy to track the objective of the Specialty Healthcare majority here by reviewing historical NLRB data that establishes clearly that the smaller the voting unit, the greater the chance the union has to prevail. A chart outlining such data, prepared by Professor Bronfenbrenner of Cornell University, states as follows:



SOURCE: The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison, Kate Bronfenbrenner and Tom Juravich, Cornell University ILR School, Oct. 1, 1994.

The increased potential for gerrymandered numerous smaller units, however, also presents additional significant issues for both employers and employees. In Specialty Healthcare itself, Member Hayes noted that the majority's rule could produce separate appropriate units for registered nurses, licensed practical nurses, cooks, dietary aides, business clericals, and residential activity assistants. See 357 NLRB No. 83 at *19. Thus, counting the CNA-only unit approved by the majority, Specialty Healthcare—an employer of approximately 100 employees, see id. at *13—could find itself with seven bargaining units, seven collective bargaining agreements, seven discipline schemes, seven wage and benefits schemes, etc. Each bargaining unit will also likely seek to protect work performed exclusively by unit members, attempting to put contractual walls around the unit's work. Doing so impairs an employer's ability to assign work in the most efficient manner, resulting in a loss of productivity that detracts from, rather than enhances, economic competitiveness.

Beyond facing these administrative burdens, employers would find themselves at increased risks of work stoppages at the hands of multiple units, each of which could halt the employer's operations if their bargaining demands were not met. See Continental Web Press, Inc. v. NLRB, 742 F.2d 1087 (7th Cir. 1984) (noting that "[t]he different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike.") Thus, an employer balkanized into multiple units faces not only the costly burden of negotiating separately with a number of different unions, but also with the attendant drama and potential work disruption, coupled with a threat that its operations could be ceased by self-interested fractions of the workforce. See id. Such risk is particularly high for small businesses, who almost certainly would lack the long-term reserves to withstand a shutdown. Their options—capitulate or close shop—are bleak not only for the business owners, but also for the employees of those small businesses.[8]

[8] The Board's NPRM concludes that the proposed representation case procedures will not have a significant impact on a substantial number of small entities and, as such, the Board is not required to comply with the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. See 76 Fed. Reg. 36,833. Such statement is simply unsupportable. For all the reasons stated herein and in the

An increase in the proliferation of bargaining units also limits the rights of employees within the workforce. Allowing the type of narrow units approved by Specialty Healthcare creates the risk that the workforce will fracture based on the communities of interest as defined by a regional director, rather than on the underlying functional realities of the positions. I am most troubled, however, by the potential freezing effect that fragmented units would have on employee advancement. When the varied collective bargaining agreements inevitably have differing provisions on transfers, promotions, seniority, position posting and preference, etc., it will be extremely difficult—if not impossible—for an employee whose unit is limited to his or her unique job description to develop his or her career.

Unfortunately, as reflected in the attached brief submitted by Coalition for a Democratic Workplace and HR Policy Association, these arguments were submitted to the Board and were rejected. The Board's decision creates real threats not only to labor relations, but also to the ability of employers to remain competitive in this economy and provide the jobs the current Administration seeks. I encourage the Committee to seriously consider whether the Board's decision in Specialty Healthcare is true to the Labor Management Relations Act's goals of regulating dealings between employees and employers while "promot[ing] the full flow of commerce. * * *" 29 U.S.C. § 141(a). It appears that legislative relief will be needed to correct this unfortunate decision.[9]

• *Additional considerations regarding the Board's proposed election rules*

While the Board's rulemaking regarding representation case procedures is still pending, there is reason to be concerned that, as with the notice posting rulemaking, there will be very little change between the Board's Proposed Rule and the Final Rule. Indeed, as noted above, the scope and reach of such proposed rules are unprecedented and exceedingly complex. They are also extremely controversial. For example, as of Monday, September 19, 2011, the Board's rulemaking docket on www.regulations.gov contained 51,576 public submissions or comments in response to the Board's Notice of Proposed Rulemaking. I encourage the Committee and its staff to review a sampling of the comments. Some comments, particularly those submitted by individual citizens, reveal a deep-seeded distrust of the Board's motives in the rulemaking, indicating that the Board is, in fact, losing institutional credibility. But other comments illustrate that the Board's Proposed Rule makes for poor labor policy both procedurally and substantively. Excerpts from the comments submitted by HR Policy Association and SHRM are attached as Attachment D.

[Attachment D may be accessed at the following Internet address:]

http://www.hrpolicy.org/downloads/2011/NPRM_Representation_Case_Procedures.pdf

From a procedural standpoint, the Board has engaged in this rulemaking on an highly accelerated timetable, without first soliciting input from interested parties, apparently to make a decision while the Board still has an operating quorum—albeit with one Member whose nomination stalled in the Senate. The Board's NPRM proposed to modify over 100 sections and subsections of the current Board regulations—changes which spanned over 35 three-column pages of the Federal Register. As discussed above, the Board's allowance of 60 days may be a permissible amount of time for an agency to accept comments, and is the minimum amount of time under Executive Order 13,563. But, when various organizations filed a request to extend the comment period, the Board denied the request, requiring parties to comment on extensive modifications to the Board's representation case procedures in an

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comments submitted by numerous small business, the Proposed Rule would have a profound impact on small businesses. The Board's similar decision to not comply with the Regulatory Flexibility Act with respect to the Notice Posting Final Rule is one of the bases for the U.S. Chamber of Commerce's lawsuit challenging the Final Rule.

[9] If, as expected, the Board has only two sitting members at the end of 2011 and, therefore, pursuant to the U.S. Supreme Court decision in New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (June 17, 2010), will be precluded from engaging in adjudication, the decision in Specialty Healthcare will continue to be Board law for the foreseeable future and therefore will be applied by the Board's various regional directors. An employer faced with application of Specialty Healthcare at that point would not have an avenue for appeal, given the fact that the Board in Washington would not be permitted to issue a decision in the case in question until a third Board member is either appointed or confirmed. Further, given the fact that the only avenue for an employer to contest such unit determination matters is to refuse to bargain, have the Board's General Counsel issue a Section 8(a)(5) refusal to bargain charge and appeal the ultimate issuance of a complaint by the Board on such charge to a United States Circuit Court of Appeals, there may be more than the usual delay in having the decision in Specialty Healthcare overturned.

unreasonably short period of time. The Board's additional failure to follow the Executive Order's requirement of seeking input from interested parties before issuing an NPRM is also unfortunate.

Another procedural flaw with the rulemaking involves the Board's current composition. While, as discussed elsewhere, the Board may decided to adopt, on a 2-1 vote, a rule that reverses precedent, doing so would violate the Board's "tradition" of requiring at least three votes to reverse precedent, as recognized by former Chairman Liebman and current Chairman Pearce, and would be exceedingly poor public policy and create unfortunate precedent. As the Board's NPRM notes, there have been few, if any, substantial changes to the Board's representation case procedures for the past 70 years. See 76 Fed. Reg. 36,813-14. It is difficult to understand what reason there is to change the rules now, in a matter of months, other than opportunism.

Substantively, certain comments submitted to the Board, including those of HR Policy Association and SHRM, objected that the Board's proposed changes were in excess of the Board's rulemaking authority, were substantively unnecessary, were contrary to the Act, or all of the above. Further, the proposed rules evidence exceedingly poor public policy and, in all likelihood, will exacerbate, rather than alleviate, labor tension between employers and employees and, in the pursuit of faster elections, it sacrifices the Board's appearance as a neutral party.

For instance, one of the central changes contained in the NPRM is the requirement that the non-petitioning party—almost always the employer—raise every potential issue at the initial election hearing or waive those issues. As a result, there is a significant risk that the employer will follow the approach of civil defendants in lawsuits and litigate every potential issue to avoid the risk of waiver. Doing so would only extend, rather than accelerate, pre-election hearings.

Another central change is the so-called 20% rule, which would require an election hearing officer to close the hearing and the regional director to direct an election when the only issue in dispute involves the voter eligibility of less than 20% of the voting unit. It appears that the result of the 20% rule is that an election would occur with the voting eligibility and unit placement of those individuals in doubt, only to be resolved in the event that their votes would determine the outcome of the election, in which case a hearing would be held and none of the NPRM's desired time saving would have been achieved. Accordingly, the likely result of the proposed rule change is that the dispute will have been prolonged with the status of the employees in question remaining in dispute. Not only does this increase labor tension in the workplace and on specific individual employees, but it also is contrary to the Act's goals of "encouraging practices fundamental to the friendly adjustment of industrial disputes." 29 U.S.C. § 151.

The Board's Proposed Rule is also flawed in that it conflicts with portions of the Act and, by doing so, likely violates both the Board's rulemaking authority under Section 6 and Section 706(2)(A) of the Administrative Procedure Act, which requires that any rule promulgated by the Board must not (1) conflict with any other portions of the Act; or (2) be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 29 U.S.C. § 156; 5 U.S.C. § 706(2)(A). Specifically, by so drastically limiting the scope of the pre-election hearing and allowing the regional director or hearing officer to deny the non-petitioning party a meaningful pre-election hearing through the 20% rule, the Proposed Rule is directly contradictory to Section 9(c)(1) of the Act, which requires the Board to hold "an appropriate hearing" prior to an election.

The Board's NPRM on representation procedures also requested parties to comment on what sanctions, if any, should be imposed on organizations that impermissibly utilize or disseminate employee confidential information that would be required in the lists to be furnished to such organizations in the pre-election period. 76 Fed. Reg. 36,821. Hopefully the Board will reconsider its new requirement that employers provide personal telephone numbers and personal e-mail addresses to the Board and the petitioning party. However, if the Board should ultimately implement a rule requiring dissemination of such information, in addition to available state and federal legal remedies, the following sanctions should be imposed:

- Any organization improperly utilizing or disseminating employee confidential information should be prohibited, for one year following the misuse of such information, from filing any petition for representation for any bargaining unit with the NLRB.
- Any organization improperly utilizing or disseminating such employee confidential information should be required to take all reasonable and appropriate steps to remedy the violation.
- Any organization improperly utilizing or disseminating such information should be required to send, to each employee whose information has been improperly used

and disseminated, a letter of apology. Such letter should describe what steps have been taken to remedy the improper use of the information.

The potential information that an employer may be required to furnish to the Board and petitioning parties regarding its employees, however, is not just information of great importance to employees. Such information also constitutes important employer property. Indeed, the inappropriate release and utilization of such information could lead to improper recruiting of valuable company employees not to mention other interference by third parties with the employer's workers. As such, petitioning organizations should be required to treat such employer property with the utmost care.

Additionally, not only does the NPRM make substantial changes to the rules of representation cases, but it also then strips the right to review of decisions made under those new rules. The Proposed Rule strips from employers any right to review the hearing officer's determinations prior to an election and, in nearly all cases, even after an election. Instead, if an employer believes that the election was improper, the fastest avenue to review will be to refuse to bargain—clearly contrary to the Act's goals of resolving disputes—and litigate the resulting Section 8(a)(5) violation through an administrative law judge, the Board, and finally a U.S. Court of Appeals. In that instance, again, the desired time-saving aspects of the NPRM are lost.

The Board's proposed changes—ending the hearing when only 20% of the unit is left in dispute, stripping appeal rights, etc.—are all in the sake of holding faster elections. The Proposed Rule requires that the pre-election hearing be held within seven days of the petition being filed—an unreasonably short amount of time—and, once the hearing is completed, an election directed without post-hearing briefs, decisions on open issues, or further appeal on "the earliest date practicable consistent with th[e] rules." See 76 Fed. Reg. 36,838 36,842 (to be codified at 29 C.F.R. §§ 102.63(a)(1), 102.67(b)). Such a truncated "quickie" election process threatens to eliminate the "appropriate hearing" required by Section 9(c)(1) of the Act and does so unnecessarily, given the Board's current success against its own targets for representation case processing as discussed previously above.

Further, but perhaps most substantively problematic, is the one-sidedness of the proposed changes. Under the proposed rule, the employer has an obligation to raise every potential issue or waive raising it at a later date. The employer also has the obligation to propose what unit it would stipulate was appropriate, assuming that the employer does not consent to the petitioned-for unit. Indeed, this obligation will now be even more challenging with the Board's confusing "overwhelming community of interest" standard established in its Specialty Healthcare decision. The proposed rule requires the employer to provide voter eligibility lists within hours of an election being directed, and requires that the list include private information of the employer's employees, including home addresses, telephone numbers, and e-mail addresses.

Finally, it is important to understand the potential dual impact of the Board's decision in Specialty Healthcare and its objective with respect to the proposed new election rules. Simply stated, the proposed rule provides unions with faster elections and Specialty Healthcare gives the unions smaller units that are easier to win. Such two-pronged approach will result in all probability in numerous highly-fragmented voting units with virtually no time for employers to state their position and more importantly for employees to intelligently communicate with one another regarding the merits or lack thereof of unionization. As noted above, the Board has been extremely efficient in the processing of petitions for election and, as also noted, the union's "win rate" is already in excess of 60%. Accordingly, there simply is not a documented need or logical reason for the Board to proceed to adopt its proposed new election rules.

• *Other pending Board cases of significance*

In addition to the above outlined-matters, there are other cases pending before the Board that raise significant legal and policy issues. In each of these cases, the Board has requested participation by interested parties in the form of requests for amicus briefs.[10] Such cases include the following:

• Roundy's Inc.—In Roundy's Inc., the Board proposes to return to a line of cases twice rejected by a United States Court of Appeals. Specifically, the Board is considering a return to the rule that "an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation." The Board also appears to be consid-

[10] Copies of the Board's Notices and Invitations to File Briefs and filed briefs can be found on the Board's website at *http://www.nlrb.gov/cases-decisions/invitations-file-briefs.*

ering whether to use Roundy's Inc. as a vehicle to overturn Register Guard, 351 NLRB 1110 (2007), setting forth the definition of "discrimination" over then-Member Liebman's dissent.

• DR Horton, Inc.—In DR Horton, Inc., the Board will address whether an employer violates Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement requiring employees, as a condition of employment, to (1) submit all employment disputes to individual arbitration, (2) waive their rights to a judicial forum for such disputes, and (3) waive the right to consolidate claims or proceed as a class or collective action.

• Hawaii Tribune-Herald—The Board in Hawaii Tribune-Herald appears poised to expand whether, and if so when, an employer has an obligation to provide a union with statements it obtains during an investigation into employee misconduct. The Board's Notice and Invitation to File Briefs explains that current Board precedent does not require employers to produce "witness statements" that it obtains during an investigation. The Board has stated it is seeking a clearer definition of what constitutes an exempt "witness statement."

• Chicago Mathematics & Science Academy Charter School, Inc.—Chicago Mathematics & Science Academy Charter School involves issues regarding the Board's jurisdiction, and appears to affect only charter schools, a small but growing number of employers. In a dispute between CMSA and the AFL-CIO, the Board will address whether the school is a "political subdivision" and exempt from the Board's jurisdiction. Alternatively, CMSA seeks to be covered by the Board, rather than the Illinois Educational Labor Relations Board.

Hopefully, as noted above, the Board will follow past practice and procedure and not issue any decisions in these cases unless there is unanimity of the current sitting three Board Members. Indeed, if precedent is to be overruled in any pending case, the past practice of requiring three affirmative votes to overrule precedent certainly should be followed.

• *Conclusion*

In conclusion, Mr. Chairman, I would be happy to take any questions the Committee might have regarding my testimony.

Chairman KLINE. Thank you, sir.

I thank all the witnesses for their testimony. And trying to stay with the light system, I will try to stay with the light system myself for myself and my colleagues as we go forward. And I will recognize myself for questions.

I want to pick up, Mr. King, with the specialty ruling, which is where you completed your testimony. And I have got several questions written down here. But let us just start to sort of unravel it here in the 4 and a half minutes that I have got.

Prior to specialty, what standard did the board use to determine an appropriate bargaining unit? Prior to specialty what was the standard?

Mr. KING. Mr. Chairman, it was the traditional community of interest test. There had to be very distinct analysis undertaken. But it never, ever had an overwhelming community of interest test.

Chairman KLINE. And that is the standard now under specialty, correct?

Mr. KING. That is what the board said.

Chairman KLINE. Okay. So, specialty was obviously a single case. We heard about it was nurses and nurses did not want to be with janitors or something. But what industries are affected by this ruling?

Mr. KING. Every employer, Mr. Chairman, in the country except for acute care hospitals, whether it be a restaurant, whether it be a small hardware store, whether it be a medium sized factory or whether it be Boeing. Every, every employer in this country but for acute care is impacted.

Chairman KLINE. Until specialty, when did the board use overwhelming community of interest as a test?

Mr. KING. Only in accretion cases. And pardon me for being just a bit technical, but accretion is a formula or a standard where a small group of unrepresented employees are folded into or brought into a larger represented group of employees. That is when the overwhelming community of interest test was used.

This is a dodge and weave game by the majority. I know people will say this is not a change, that is flat wrong. Read the opinion.

Chairman KLINE. Mr. Mack, let me—we are going to keep talking about specialty here and take advantage of your years of experience. As a regional director, is there any circumstance under which you would have denied a union petition bargaining under the standard that is now in specialty health care? I think you addressed this in your testimony. If that standard had been in place, would you have denied any union bargaining units?

Mr. MACK. Under the specialty health care test you could not turn down any unit. The two employees working in the back doing the same kind of work, even though there are 50 employees in the group, you would have to certify those two employees.

Chairman KLINE. And so, you could end up with a workplace with 100 employees. Under that example you would have theoretically 20, 30 bargaining units?

Mr. MACK. Yes, sir. Absolutely correct, Your Honor.

Chairman KLINE. Mr. Martin—pardon me?

Mr. MARTIN. May I comment?

Chairman KLINE. You may.

Mr. MARTIN. That is just not so. What specialty health care says is they return to the community of interest. The overwhelming community of interest that is raised in that case says that if somebody is left out of the unit and they have an overwhelming of interest they cannot be excluded.

So, for example, if the certified nurses had said, well we only want the nurses on the first shift and the second shift, and you were to exclude them on the third, you said you cannot do that. But the community of interest test does not provide that there could be——

Chairman KLINE. I am sorry. We are playing with my time. We have got clearly a difference here among experts. Mr. Mack has had an awful lot of experience, was a member of the NLRB and is saying that you could in fact have a circumstance where you have got bargaining units of two or three or four. And there is nothing the board could do about not recognizing that.

Mr. MACK. You would be required to do that.

Chairman KLINE. And would in fact be required to do that.

So, it is an overwhelming community of interest test and not the community of interest test. And that is sort of the heart of this issue.

So, back to you, Mr. King; we are dealing with a number of rulings here. One of them, in addition to specialty is the June 22nd Notice of Proposed Rule Making, the expedited, the quickie elections. What is the relationship between those two rulings, specialty and ambush?

Mr. KING. Excellent question, Mr. Chairman. They really fit together if you look at this big picture.

Under special health care, small units; I just looked back again at the board decision. At the end of the opinion it says overwhelming community of interest. We cannot ignore that. But small, micro units there and on page 10 of my testimony, I show the chart that shows the correlation between the size of the voting unit and the union election win rate. This is based on historical board data going back many years.

The smaller the unit, the much greater the opportunity for the union to prevail in an election if an election is held. Couple that, Mr. Chairman, with your question of a very quick election. So, that two-pronged approach: extremely small units, very quick elections, much quicker than what we have today. And the employer is at a disadvantage. But more importantly, like we heard from a witness today, employees are left out in the cold. All this goes right by.

So, these two are designed to work together, unfortunately, to both employers and employees.

Chairman KLINE. Thank you. My time is expired.

Mr. Miller?

Mr. MILLER. Mr. Martin, for a moment to give you some of my time to respond.

Mr. MARTIN. I was just going to point out that what happened in specialty health care was back in 1974 there were rules that the board adopted about how acute care hospitals were supposed to operate. They came up with a set of rules just for acute care hospitals.

And one of the things that happened in the Park—in the Park Manor case, which was overturned by specialty health care, is the Park Manor case sort of blended and discussed those rules that applied to acute care hospitals and sort of applied them to nursing homes, which was not the intent of the rules. It is clear, and court decisions make it absolutely clear that those rules do not apply to nursing homes.

So, what happened was there was this ongoing debate about the extent to which you could only have one unit in a nursing home. The nurses, for example, the CNA nurses could not be in their own unit; they could not choose to do that. They had to include in that unit people that did not have a community of interest with them.

So, what this case, specialty health care simply says is we are going to return to the traditional community of interest standard that determines—about 10 factors to determine or not there is a community of interest so it would be possible, not required, that the nurses could add—the nursing systems could have their own unit and not have to—and not be forced by the government to have other people in the unit other than they petitioned for. And that is it.

And I—and everybody should read it because this overwhelming community of interest simply says that when you are determining the community of interest under the traditional standard, you cannot keep out people who have an overwhelming community of interest. And that is the example with the different shift.

Mr. MILLER. Your explanation seems contrary to both Mr. King's suggested that the goal here was to get smaller and smaller units.

You are suggesting that the overwhelming community of interest says you cannot keep out.

Mr. MARTIN. Well, this is speculation to dry criticism of the board——

Mr. MILLER. Mr. Mack suggested this would make the board unable to reject any unit, any.

Mr. MARTIN. There is absolutely no legal basis for coming to that conclusion. In fact, what you will hear from both of them is them to speculate about what might happen in the future. And there is not any basis for doing that other than to attempt to demonize this decision and the board's decision.

Mr. MILLER. The title of this hearing is that there is a culture of union favoritism operating at the board. How would you respond to that? Are the unions winning all of their cases in front of the board?

Mr. MARTIN. No. We have lost—in fact, most of the board's cases have been unanimous where everybody is agreeing. There have been a number of cases where the union or the Democrat representatives on the board have disagreed with one another. And there have been a number of cases where we have got handed our heads.

We think that we are entitled to—you know, we have to give people notice of their Beck rights. And we think we should have people renew that every year. And our friends on the board said no, you are not going to get that.

You have had cases where unions have been criticized for their pre-election conduct, had elections set aside. It simply is not that way.

Mr. MILLER. I guess the—we have been over this road about four different times. But the suggestion in previous panels has been that there has been a sort of a traditional operating norm with the board. And is this radically different? I mean, that is the suggestion in the title of this hearing.

Mr. MARTIN. No. I mean, what happens is each time there is a change in administration, there is a change in the personnel on the board. And it would be fair to say that the Democrats are more likely to see it my way and the Republicans are more likely to see it the other way. But the way that——

Mr. MILLER. I assume that is why Congress gets involved and the Senate holds up people they think are going to rule one way or another. So, that is very hard——

Mr. MARTIN. Yes, we have heard that.

Mr. MILLER [continuing]. To get to the board.

Mr. MARTIN. We have heard about that. Of course all this is supervised by the, as I mentioned before, by the federal courts of appeals. Any decision of the board that is so out of line or is playing favorites is appealable to the Circuit Court of Appeals in the D.C. Circuit and/or the circuit where the decision comes up. And frankly, there is nothing to indicate those folks are in the pocket in any way of big labor.

Mr. MILLER. The other suggestion here is that on the election changes, suggested election changes that there is a hard 14-day rule. I think we went through this committee before and when we

got done with the panels it seemed to me that people recognized that this was a flexible time that the board had provided.

Mr. MARTIN. No. There is no hard rule. It would be nice if it would happen in 2 or 3 weeks instead of a month and a half, which is what it generally takes now. And you know, frankly I think people are capable——

Mr. MILLER. But there is nothing in that——

Mr. MARTIN. No.

Mr. MILLER [continuing]. In the board that says this is a 14-day——

Mr. MARTIN. Not 14 days.

Mr. MILLER. Thank you.

Chairman KLINE. Dr. Desjarlais, you are recognized.

Mr. DESJARLAIS. Thank you, Mr. Chairman.

I was just thinking about the ranking member's responses—we opened the hearing or his statement saying that this was a partisan hearing and that we had more important things that we should be doing. But I am sure my good friends and colleagues from South Carolina, Mr. Gowdy and Mr. Wilson will probably have a lot to say about what has happened with the Boeing situation and whether that is an impediment to job growth.

I am thinking about the president's American Jobs Act that was proposed to a joint session about 2 weeks ago and has yet to be given a title or a number, even by the Democratic side of the aisle, and then brought up in the House for any kind of vote.

So, clearly this hearing is important because job creation——

Mr. MILLER. Get a vote on that.

Mr. DESJARLAIS [continuing]. Is——

Mr. MILLER. Are you offering us a vote?

Mr. DESJARLAIS [continuing]. Is bipartisan.

So, what I guess I would ask Mr. Martin, do you feel like the federal government over-regulates businesses?

Mr. MARTIN. No, I do not. And in fact, you know the interesting thing about the collective bargaining process is that it is ultimately voluntary. There is no requirement that anybody enter into a collective bargaining agreement. And a collective bargaining agreement always ends up a voluntary agreement between the parties.

As I mentioned to you that one of the things that we are doing day in and day out, especially since the collapse, is working closely with employers on——

Mr. DESJARLAIS. Did you talk to employers? Have you been out in the workforce? Have you been to industries, businesses, manufacturing and ask them what is standing in the way of job creation?

Mr. MARTIN. Do it every day.

Mr. DESJARLAIS. Okay. And none of them are telling you that they need to get government out of the way, that they are over-regulated? They are all saying, you know, the government is doing a good job and we need more posters in our break room.

Mr. MARTIN. It depends what party they belong to.

Mr. DESJARLAIS. Okay. Well, I do not know that that is the case because I talk to people from both parties in Tennessee's 4th district. I have talked to 30 plus businesses. And I have talked to people who are staunch Democrats, and they feel that the government is standing in the way of job creation.

But I like the fact that you mentioned the word voluntary because, Mr. Mack, you made a comment in your written testimony that—in regards to the National Labor Relation Act. You said that gives workers two rights: the right to support and form unions, and the right to refrain from such activities.

Your point was that nothing gives government the right to give one right more value than the other. Can you briefly highlight a few of these inconsistencies?

Mr. MACK. Yes. And I think that is so important when we are talking about the statute. It says employees have the right to join or the right to refrain from joining. And when we look at what the board is doing right now, it is eliminating or making smaller and smaller the refrain part.

Let us take for an example the successor bar case. In that case, the board says well, if you are a successor and you acquire a company, if you go ahead and assume the contract or agree to certain principles, we will allow you to file a petition in 6 months to get rid of the union or for the employees to vote. If you do not accept a portion of the existing collective bargaining agreement, the employees know the employer can file a petition for 1 year down the road.

Second, when you talk about this requiring employers to post this notice, which really does not explain the employee rights, the focus of that notice is employees essentially have to join the union to get through here.

Mr. DESJARLAIS. And you have see the poster?

And Mr. Martin, you have seen the poster?

Mr. MARTIN. Yes. I have got it right here, and that is not what it says.

Mr. DESJARLAIS. Well, how much of the text is dedicated to telling the employees that they do not have to unionize, versus how much is dedicated to telling them that they can? Just percentagewise.

Mr. MARTIN. The entire poster addresses a whole range of things.

Mr. DESJARLAIS. So, there are about three sentences that say that they do not have to. And about the majority—it is fairly slanted, right?

Mr. MARTIN. It is what?

Mr. DESJARLAIS. It is fairly slanted. I mean, it gives about three sentences saying they do not have to.

But I guess let us get back to the voluntary point. We have introduced—or I have introduced the bill H.R. 2854, the Employer Free Choice Act and used the word voluntary. And that is exactly what I used in this bill. It gives the employer the right to voluntarily hang the poster or not. Does that sound fair?

Mr. MARTIN. No. I think that—I think that if you are going to notify people what the law is——

Mr. DESJARLAIS. So, it is fair——

Mr. MARTIN. I think this should——

Mr. DESJARLAIS. [Off mike.]

Mr. MARTIN [continuing]. Because I think there is a law against discrimination there ought to be a poster on it. If you are entitled to worker's comp there ought to be a poster on it. If you are enti-

tled to unemployment you ought to be a poster on it. And if you are entitled to organize a union there ought to be a poster.

Mr. DESJARLAIS. And it ought to be slanted highly to one side.

Mr. MARTIN. It is not slanted at all.

Mr. DESJARLAIS. Oh, okay.

Mr. MARTIN. It takes from the statute. In fact, it adds things that are not included in the statute to advise people that the union has the duty of fair representation.

Mr. DESJARLAIS. Well, I am about out of time, so I have to yield back. But maybe somebody can answer that in further testimony.

I yield back, Mr. Chairman.

Chairman KLINE. Gentleman yields back.

Mr. Andrews, you are recognized.

Mr. ANDREWS. Thank you, Mr. Chairman. I would like to yield to our ranking member.

Mr. MILLER. I just noted in the notice provision the first six things are the things that employees get fired for every day of the year, and it is illegal to fire them for those reasons. The next one says you can choose not to do any of these activities, including joining and remaining a member of the union. You can leave. You do not have to join.

But the first two things, if you go up to an employer and say that you would like to form a union you can get fired. And they get fired every day for that. That is why it is posted that way so people understand. They do not get to fire you for exercising your rights that they have given to you under the law.

Thank you.

Mr. ANDREWS. There are 15 million unemployed Americans. Fifteen days ago the president of the United States came to the Congress, made a proposal to create jobs. We have not had a hearing. There has been a bill introduced by Mr. Larson. No hearing, no vote. We are arguing about what a poster says is going to be put up in people's workplaces.

But let me ask Mr. King a couple questions. The premise of this hearing is that the NLRB is kind of running amuck, and is terribly biased against employers and in favor of unions. And you have highlighted the specialty health care case as one of the pieces of evidence in favor of that proposition.

And when they were considering specialty health care, you and others filed an amicus brief that clearly made it—you did not want the board to address the issue at all because you felt it was outside the scope of the case, if I understand it correctly. But then you said, if the board—if despite your objections if the board does address those questions, you urge the board to refrain from abandoning the community of interest test that has guided employers and labor organizations for decades.

The decision, I am reading the conclusion of the decision that the board in fact reached, says that "we hold that the traditional community of interest test to which we adhere will apply." So, did not the board do what you asked them to do?

Mr. KING. It did on one hand, Mr. Andrews. But if you go to the end of the decision, and I am quoting, "the board will find that the petition for a unit to be an appropriate unit despite a contention

that employees in the unit could be placed in a larger unit, which would also be appropriate or even more appropriate——

Mr. ANDREWS. Well——

Mr. KING [continuing]. "Unless the parties so contending demonstrates that employees in a larger unit share an overwhelming community of interest——

Mr. ANDREWS. That is so——

Mr. KING [continuing]. "With those in petition for a unit."

Mr. ANDREWS. You think that what distinguishes your request from what the board decided is the importation of this overwhelming interest test. Is that right?

Mr. KING. Yes, Mr. Andrews.

Mr. ANDREWS. I want to read from you a case from 2008 before the United States Court of Appeals for the D.C. Circuit that is called the Blue Man Vegas case. I think it is cool just to say Blue Man Vegas, by the way, for those of you music fans.

And I want to read from the majority opinion in that case. "A unit is truly inappropriate if, for example, there is no legitimate basis upon which to exclude certain employees from it." The case goes on to say, "If, however, the excluded employees share an overwhelming community of interest with the included employees, then there is no legitimate basis upon which to exclude them from the bargaining unit.

This case is from 2008. It addresses the question of the scope of the bargaining unit. It was written by the noted left wing judge, Judge Ginsburg, who was nominated by Ronald Regan for the United States Supreme Court. The nomination kind of went up in smoke as I recall.

But why is Judge Ginsburg wrong? Why is he wrong?

Mr. KING. Judge Ginsburg is an excellent jurist, agreed. But what you really have to do is get into the footnotes. Mr. Andrews, as one of my law professors used to say, unless you read the footnotes, the same law school you went to——

Mr. ANDREWS. The Cornell law students always read the footnotes. I have read them too. What are you——

Mr. KING. Well, unless you read the footnotes your children will starve. That was the message. You have to dig into the decision.

Mr. ANDREWS. Right.

Mr. KING. The D.C. Circuit relies upon Trident Foods, and I have read the decision, but also Jewish Hospital Cincinnati. Well, the Trident Sea Foods case was a successorship case; does not have anything to do with overwhelming community of interest. The community of interest test, traditional test, was in fact applied there.

Mr. ANDREWS. Well——

Mr. KING. And Jewish Hospital——

Mr. ANDREWS. The thing, if I may because my time is running short, I read you the language from Judge Ginsburg. Now, you may disagree with his statement in that case, but a disagreement among two experts is not the same thing as some radical decision where someone has run amuck.

So, the board adopted a standard that in 2008 Judge Ginsburg said was the definition of traditional community of interest test. I think they did what you asked them to. And if the board did what

you asked them to, how is that an example, an example of a pro-union bias at the NLRB?

Mr. KING. We disagree. The board did not do what we asked it to do, just the opposite. And to the extent that Blue Man Group is being cited, it is being cited incorrectly.

Mr. ANDREWS. Again, I just like saying Blue Man Group. But they did say traditional community of interest test is what they adopted. You may disagree with their interpretation, but it hardly sounds radical to me.

Chairman KLINE. The man's opportunity to keep saying it has expired. Thankfully.

Mr. Gowdy, you are recognized.

Mr. GOWDY. Thank you, Mr. Chairman.

The NLRB is allegedly a neutral arbiter dedicated to an even-handed administration of the NLRA. And Mr. Chairman, unfortunately I have to use the word allegedly because it appears at least recently they have become acolytes, shills, if you will, for organized labor. And Boeing may be the most public example, but it is by no means the only example.

You have a re-definition of bargaining units. You have bannering cases. And now you have posters. And the NLRB wants us to believe it is so people can understand the full panoply of their rights. In fact, they have the unmitigated temerity to suggest that it is only so people will understand their rights.

So, Mr. Martin, let me ask you this. Do you believe employees have a constitutional right to travel?

Mr. MARTIN. I think they do.

Mr. GOWDY. Where is that in the poster? How about the right to bear arms? How about the right to counsel if they are charged with a criminal offense?

Mr. MARTIN. Well, those matters——

Mr. GOWDY. How about the right to——

Mr. MARTIN. [Off mike.]

Mr. GOWDY [continuing]. To punish——

Mr. MARTIN [continuing]. Poster in this case that the board is addressing is directly related to how employees are to be treated in the workplace.

Mr. GOWDY. What is their statutory authority——

Mr. MARTIN. [Off mike.]

Mr. GOWDY [continuing]. For mandating posters?

Mr. MARTIN. It is consistent with the other posters that are posted in the——

Mr. GOWDY. I am going to ask you again.

Mr. MARTIN. [Off mike.]

Mr. GOWDY. What is the statutory authority for mandating those posters?

Mr. MARTIN. The——

Mr. GOWDY. Cite me with the statutory authority.

Mr. MARTIN. One of the things that the board is charged with is advising employees of their rights. This is one way to do it.

And I would also say to you, Congressman, we get calls——

Mr. GOWDY. I am listening for a cite, Mr. Martin. I am listening for a statutory cite to support the authority of the NLRB to mandate posters.

Mr. MARTIN. It is—the board is charged with responsibility for administering the act, and that is within their sound discretion.

Mr. KING. If I may, Mr. Congressman, there is no statutory——

Mr. GOWDY. Well, I—see you answered it in a couple seconds, and I knew that that was the answer.

Mr. King, it strikes me that this has nothing to do with an administration of rights. I want to read to you a quote by someone by the name of Stewart Acuff who is with the Utility Workers Union of America. "If we are not able to pass the Employee Free Choice Act, we will work with President Obama, Vice President Biden and their appointees to the National Labor Relations Board to change the rules governing forming of a union through administrative action."

And it just strikes most reasonable people that what they cannot do through the ballot box, and what they, heavens knows cannot get through Congress, even with a Democrat controlled House, Senate and White House, they are now seeking to do through administrative rule. That is just the way it looks. Am I looking at it wrong?

Mr. KING. That is the way it has looked for a period of time. The return on investment for the substantial contributions made to the other party did not result in legislative relief. So, the relief is now from organized labor's perspective through the regulatory community.

The United States Department of Labor is even perhaps more of an activist group than the National Relations Board. We are now being told that perhaps the so-called persuader area, we cannot even advise a client on attorney-client matter without having to disclose same. It is a full, regulatory full-court press.

Mr. MARTIN. Those are talking points. Those are not the board's decisions.

Mr. GOWDY. Mr. Martin, twice now you have attempted to assuage our fears of an activist NLRB by citing that we can always go to the federal courts of appeals to correct their errors. That analysis would not work very well with the issue of say prosecutorial misconduct, would it?

I mean you would not advocate—let us just excuse prosecutorial misconduct because we have a court of appeals that can fix it, or jury tampering because we have a court of appeals that can fix it. Or discovery abuse because we have a court of appeals that can fix it. Did I understand you wrong when you said——

Mr. MARTIN. No. I would suggest——

Mr. GOWDY [continuing]. We have a court of appeals——

Mr. MARTIN. I would suggest—what I would say was to the extent that there is a complaint, that you make this sweeping complaint that the board is acting as—is in the pocket of organized labor, you would have to test that. You could test that——

Mr. GOWDY. Can you name one reason——

Mr. MARTIN [continuing]. Court of appeals. And I think what you would find when you get there is you will get told the same thing I get told when I go up there and complain about something——

Mr. GOWDY. I have got just a little bit of time, Mr. Martin. Can you name me a reason not to join a union.

Mr. MARTIN. It will be up to you.

Mr. GOWDY. No. Can you name me a reason? I mean 94 percent of the American people choose not to. Can you name me a reason not to join a union?

Mr. MARTIN. I am not going to bother with that.

Mr. GOWDY. You cannot name a single reason not to join a union.

Mr. MARTIN. I would think in almost every case employees would be better off represented and working together regarding their wages, hours and working conditions.

Mr. GOWDY. So, the answer is no.

Mr. MARTIN. I think that that would be the best way to——

Mr. GOWDY. You cannot name a single reason——

Mr. MARTIN. Just like I—just like I would not want to represent myself in court. I think it would be—you know workers are better off represented by a union.

Chairman KLINE. The gentleman's time has expired.

Mr. Tierney? Mr. Holt?

Mr. HOLT. Thank you, Mr. Chairman.

Just to pursue this latest point a little bit more, Mr. Martin, you know the—let me read from, well it is Section 156 here of the annotated law here. "The board shall have authority from time-to-time to make, remand and rescind in a matter subscribed by subchapter 2 such rules and regulations as may be necessary to carry-out the provisions of the subchapter."

So, it is true that, for example, on wages and hours there is not statutory language that says you must post notices. But there are regulations going back many decades to say that your wages and hours, regulations—the regulation says that wages and hours notice must be posted. Is this different?

Mr. MARTIN. No, it is not. No, it is not. It is within the same agency authority.

Mr. HOLT. Okay.

Ms. Ivey, I certainly want you to have your rights. I mean, that is kind of what this whole thing is about, what are workers' rights? You state that the NLRB Gasket—Lamons Gasket decision took away your rights to a secret ballot. Do you not have a right to file a decertification petition at some point?

Ms. IVEY. I understand there may be an opportunity, maybe in a year. There may be up to 4 years if there cannot be a bargaining agreement. That could happen, but I do not see a real——

Mr. HOLT. Well, not could. It must. I mean, you have got that right as I understand it.

Mr. Martin, is not that correct?

Mr. MARTIN. Yes. And I would also say, you know one of the things Ms. Ivey has suggested is that there were misrepresentations made when the employees signed the cards. And frankly, if that is the case, if the SEIU, and I represent the SEIU, but if they made affirmative misrepresentations and tricked people into signing those cards, you can file an unfair labor practice charge and get the recognition set aside.

So, you know there is still a way to proceed. I mean, you have the ample counsel here who could probably, you know, help you out at the end of the hearing. But, as a practical matter if that were the case you would have a remedy in that case, which the board would——

Mr. HOLT. Thank you.

I am sure we could find people who could help you——

Ms. IVEY. Right——

Mr. HOLT [continuing]. File that unfair labor practices——

Ms. IVEY. And I appreciate all that, and I know there are—down the road——

Mr. HOLT [continuing]. If that is necessary.

Ms. IVEY [continuing]. There may be. But I tried to go farther than——

Mr. HOLT. Let me change the subject in my limited time here. Of course the whole issue is whether there is union favoritism. That is the title of today's thing. And several people have said that the specialty health care community of interest statement is radical and it needs to be addressed legislatively.

I would actually be quite concerned if we were asked to define you know whether physical therapists were in a community of interest with advanced practice nurses or something. I do not think that is the sort of thing that we should be legislating.

So, let me ask Mr. King, you were one of the people who mentioned this. I mean, what specifically would you ask us to do legislatively that we could do better than the NLRB could do in determining what is an acceptable community of interest?

I must say, I side with Mr. Andrews in saying that the board in this—in specialty health care did not do anything radical. They did something that Ginsburg and others had laid out as a pretty standard way of defining a community of interest.

Mr. KING. Mr. Holt, we certainly will agree to disagree, as I did with Mr. Andrews. But your specific question, I would ask that this committee, the Congress consider amending the Act to put in sufficiently distinct language in the statute to codify what the case law has been over the years, including Blue Man Group because the case is cited Blue Man Group do use sufficiently distinct. So, that is one suggestion.

Mr. HOLT. Surely you do not want us to have a list of thousands of categories that we will define these are communities of interest?

Mr. KING. No, absolutely not, Mr. Holt. I think it is unfortunate in one regard that the committee has to spend the time to look at a federal agency like we are doing today. But unfortunately events have required that, at least from my perspective.

The second answer to your question is I would also have the Congress codify no proliferation. I was involved back in 1974 when I was working on the Senate side as a counsel in the health care amendments. We attempted to get into the statute at that time a no proliferation standard for health care.

Unfortunately, the votes were not there to do that. We came close. We got very good committee language from both the House and the Senate. And there was bipartisan support for that no proliferation committee language. But it did not get into the statute. And I would suggest, to be specific in response to your question, the no proliferation language also be put in the statute.

Finally, I absolutely agree with you that the Congress should not try to legislate whether cooks, whether housekeepers or others constituted an appropriate unit. That is for the expertise of whatever

agency will continue to adjudicate those matters. You are correct in that.

But, the statute does need to be reexamined.

Chairman KLINE. The gentleman's time——

Mr. HOLT. But this is a hearing on union favoritism. It seems to me you are proposing something that is quite the opposite of that.

Mr. KING. I was just responding to your question.

Chairman KLINE. The gentleman's time has expired.

Dr. Bucshon?

Mr. BUCSHON. Thank you, Mr. Chairman.

I just want to agree with some other comments that the administration could not push through card check and other anti-worker legislation through the 111th Congress. And now they are trying to institute these policies through the NLRB and other agencies.

And with that, I would like to yield the balance of my time to Mr. Wilson from South Carolina.

Mr. WILSON. Thank you very much. [Laughter.] [Off mike.]

Both parties, we work to improve this. In fact, I started as a—back in 1973. In 1975 I was moved into the State Development Board, in South Carolina as a member of the state Senate—the BMW.

We are very proud that every X5, X6, Z3, Z4 in the world is made in South Carolina. And there has been no downturn, even as the American automobile industry had crisis.

We have seen thousands of jobs created. And in Congress I work every day, and as I did in the state Senate to recruit industry. I worked with the Crane Corporation to double on jobs in a small, rural community in Williston, South Carolina, creating jobs for people.

But then in April we—I have worked on this, again, all my life. But it never occurred to me that the NLRB would come in and attack Boeing. It is—I was there for the groundbreaking. The building is built, 1.1 million square feet. Eleven hundred people are employed today.

There has been no loss thanks to the inquiry by Congressman Gowdy, been no loss of jobs in Washington State. But still, they are proceeding, the NLRB, to put at risk 1,100 families in our state, and in fact suppliers all over the state, including the district I represent.

Sadly, the message is really clear. Do not locate in a union state because if you locate in a union state, you cannot leave. In fact, you must locate in a right to work state. That is the unintended overreach of NLRB, and it is really the roach motel. If you locate in a union state, you cannot leave.

And so, with that in mind, Ms. Ivey, thank you for your courage to be here today. As someone who works every day to make a living, do you feel the NLRB is looking out for the best interest of America's workers?

Ms. IVEY. Not at this time from what I have observed.

Mr. WILSON. And you gave excellent testimony factually on how it affected you and the people that you work with.

Additionally, Ms. Ivey, do you have any concerns about your employer providing your phone number and email address to the union?

Ms. IVEY. I was not aware if that happened or did not happen. I know during the petition both sides did. So, I feel as long as if we are going to be offered an opportunity to the union I would imagine both sides would be able to do it. Either both sides or no sides.

Mr. KING. If I may congressman under the proposed election rules of the board it appears that personal email addresses, personal phone number information would be required. Now, the board has not been clear on that, but that has been suggested.

Mr. WILSON. And Mr. King, back again. In regard—has this occurred before, where a plant is built, people employed and the NLRB comes in and announces that it cannot operate?

Mr. KING. Not to my knowledge under these facts. You are absolutely correct. It is my understanding no jobs were lost in Puget Sound area. No jobs were transferred to South Carolina. The parties bargained. Boeing sat down and tried to bargain with the union here. There was no movement of equipment.

There was—it is not a runaway shop. I have seen that mentioned. That is not the situation at all; Boeing, for good, legitimate, non-discriminatory reasons, as I understand the facts, simply decided to have an alternative site to build aerospace equipment.

Mr. MARTIN. There are cases where the board has ordered factories to return where they were moved illegally.

Mr. WILSON. And I would like to point out that in the—as we were reaching efforts to recruit them, it is a second line to build 787s. That was always the understanding. Not a diversion. Thank you very much.

Chairman KLINE. The gentleman's time has expired.

Mr. Kildee, you are recognized.

Mr. KILDEE. Thank you, Mr. Chairman.

I was 7 years old when the Sit-Down Strike took place in Flint, Michigan, which is part of our history here. Foster Rhea Dulles, brother John Foster Dulles calls that strike in Flint, Michigan the Lexington of the organization of the CIO. And I can recall when the strike began, and I can recall when the strike ended in February 11, 1937.

And it is interesting. They reached a contract. And that is the contract, one-page contract. And they recognized all the members of the union, guaranteed they would not be in any way punished; gave a delineation of some of their rights to bargain. And it was a very historic thing.

But it was done on one sheet of paper, signed by some famous names in history, William Knudson who was the president of General Motors, who my dad knew very well; and John L. Lewis, the president of the CIO, who my dad knew very well.

As a matter of fact, I am grateful for two groups in Flint, Michigan for my life. I am grateful to General Motors for having supplied the capital to enable them to produce the millions of cars which they produced. And I am grateful to the UAW. I just talked to one of the president of the old Buick local this morning driving into work.

I am grateful because they re-secured justice for us. But it was a one-page. It was very, very important. And as they say, it is the Lexington of the organization of the CIO.

Unions really help build a middle class in this society. My dad could never have gotten to send me to college were it not for the UAW. No.

I am grateful also to General Motors for having the wisdom to build great cars and build those plants in Flint, Michigan. But, what I have seen recently, I have been in Congress now 36 years. And the power of unions in general have lessened in those years. And the purchasing power of the working people have lessened in that year.

How else some modest changes by the NLRB now want more workers to organize in an expeditious and efficient manner so we can give that rightful power to the unions to bargain and let them again increase their purchasing power and get this economy going. What changes by the NLRB would help expedite that?

Mr. MARTIN. Well, I think, I mean it is a tragedy that one of the efforts that has helped drive the middle class over the years is now being demonized, and that is organized labor and the labor board. But I will say that you know, a reasonable—the board's rules that they have proposed regarding elections streamlines that process. And it moves the litigation to the back of the process.

You know, one of the things that happens is, is under the board's current election procedures there is the opportunity to litigate before the election, which delays the election. And there is the opportunity to litigate after the election.

If the litigation takes place after the election, it simply moves the process along in a more orderly and less expensive fashion. And if the union loses, the whole thing is mute and there is no need to litigate it anyway. So, it has certain practical aspects. And so I think that that would be a positive.

Mr. KING. If I may, Congressman, I do want to make sure, at least from my perspective I am clear. I am not here to suggest, nor would any responsible employer I think be here to suggest that we ought to do away with collective bargaining. That is a fabric built into this nation, and how workers and employers come together. And where appropriate, collective bargaining has worked quite well.

There are problems with the current board, but certainly collective bargaining is something that we ought to hold near and dear to the hearts of all of us in this country. The question is, how do we regulate the workplace as we go forward?

Mr. MACK. And I agree with Mr. King on that.

Chairman KLINE. The gentleman's time has expired.

Mr. Hanna, you are recognized.

Mr. HANNA. Thank you, Chairman.

Mr. Martin, I personally have been in a union for many years; 25 actually. And I take exception, great exception to what your implications that there is anyone here on either side of the aisle that in any way denigrates or undervalues the value of unions over time, particularly as a union member. I have not heard that in any way.

Mr. MARTIN. Well, maybe I misunderstood some of the——

Mr. HANNA. Well, what I do think, though is that there is an effort on our part to create a fair and balanced approach to the regulations, and that unions in many ways over time are now begun to

try to do through legislation and regulation what on a marginal way they failed to be able to do through the power of their argument.

With that, I would like to yield the balance of my time to Mr. Gowdy.

Mr. MARTIN. Well, if I may, you know—but that is—you know what, I would argue that that is not actually reflected by the decisions. Again, the decisions are a return to traditional approaches that were used by both Republicans and Democrats.

Mr. HANNA. Well, I would suggest to you there is nothing more traditional than a secret ballot.

Mr. MARTIN. The voluntary recognition has always been an option to the parties. If the union has to demonstrate a majority, freely made, and it is an option available to the employer to agree. Then that is sanctioned by the Supreme Court.

Mr. GOWDY. I thank Mr. Hanna.

Mr. Mack?

Mr. MACK. Yes, sir?

Mr. GOWDY. The NLRB poster states that under the National Labor Relations Act it is illegal for your employer to prohibit you from wearing union hats, buttons, tee shirts and pins in the workplace, except under special circumstances. The posters I have seen do not define special circumstances. Can you help us understand what that very vague language might mean?

Mr. MACK. And that is one of the problems with the notice posting because there are circumstances, locations, the acute health care area, area on store floors where folks are selling goods employees cannot be soliciting, distributing literature for the union. This poster is so vague that employees have no idea what their rights and responsibilities are. And that is going to lead to an awful lot of disciplinary action and matters before the NLRB.

Mr. GOWDY. Or it may just lead to wallpaper. We may just have another poster that explains what the special circumstances are and then another poster after that. And pretty soon it is just union wallpaper.

Mr. KING. If I may, Congressman, and you certainly touched upon the language of the poster. But my answer to the question a few moments ago is, is this statutorily authorized? I think that is questionable. But the real issue is, if you do not put the poster up——

Mr. GOWDY. [Off mike.]

Mr. KING [continuing]. The employer—well, that is one issue. The employer is a, guilty of an unfair labor practice charge; b, the statute of limitations is tolled, or may be according to what the board says; and third, the employer is somehow deemed to be anti-union and have union animus. That is where I think we really get into some statutory issues.

I understand the broad baseline in the statute. We all do them, regulations issuing there under. But you have to really drill into this. So, not only do you have an issue of whether the poster language is balanced, and I think we could go back and forth on that for a long period of time. And by the way, this whole poster and these regulations come at a time when the president keeps saying we should have less regulation in workplace.

Mr. GOWDY. Right. It is——

Mr. MARTIN. I would say—it is ironic in that way.

Mr. GOWDY. Hang on, Mr. Martin. I will come to you. I want to ask Mr. King another question.

Cass Sunstein, who is the regulatory czar wrote a piece analyzing Justice Alito's dissents in an effort to determine whether Justice Alito had any bias or not before he went on the Supreme Court. Have you had an occasion to analyze NLRB member Hayes' dissents to see whether or not they have increased in frequency or what can be learned? Are these all unanimous decisions? Or have we had some notable dissents?

Mr. KING. First, Congressman, we have had no major decision issued from this NLRB with unanimity. I read Mr. Martin's paper. I think it is very well done. I commend him for putting the paper together as he did. But it glosses over what has actually happened at the board.

Not one major decision has issued with unanimity. In fact, I looked at this last night with the help of my associates. Mr. Hayes, Member Hayes has dissented in 59 cases. I have read every one—excuse me. I have not read every one of those dissents. I read most of the dissents, and they are quite well written, I believe. But they are quite, quite biting, and they are quite critical frankly to the majority.

We do not have any unanimity on this board, unfortunately, not close to it. And there has not been any type of bipartisan approach there like other boards, Democrats and Republican, unfortunately, to move forward.

Mr. GOWDY. There is a lot of five-person board——

Mr. MARTIN. Most decisions have been unanimous.

Mr. GOWDY How many vacancies are there, Mr. King? That will be my last question. Is a five-person board?

Mr. KING. Yes, sir.

Mr. GOWDY. How many vacancies are there?

Mr. KING. There are now one, two; two vacancies.

Mr. GOWDY. And how many recess appointees?

Mr. KING. One.

Mr. GOWDY. Thank you.

Chairman KLINE. The gentleman's time is expired.

Ms. Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman.

I am really getting antsy sitting here talking about a poster and hearing from three over one witnesses that clearly, clearly do not agree that organized labor and unions deserve any kind of protection when we have a 9 percent unemployment rate in the United States of America. And we should be talking about jobs that our ranking member sent a letter, I know, to the committee asking that we have hearings on jobs.

Right here, this is what this panel should be doing; not talking about—regurgitating every reason why people do not want labor unions to be strong. And when are we going to have this jobs hearing? That is my question. So, let us do it. Let us not just pretend like this committee does not have—the Education and Labor Committee—Workforce—Labor, no Workforce; you took Labor out of

there—Committee does not have jurisdiction over part of the jobs bill. We need to have that hearing sooner rather than later.

So, my question now is to Mr. Martin. First of all, if we had a poster that listed everything that is not covered through the NLRB it would probably be wallpaper, right?

Mr. MARTIN. I agree with Mr. Gowdy on that.

Ms. WOOLSEY. Yes. We do not do that. We do not list everything that is not, we list what is protected.

Mr. MARTIN. And I would also point out, if I may, Congresswoman, the board has said if people overlook, you know if they just overlook the fact that they should have posted and do not post it. The board is basically going to give them a Mulligan on that and say put it up and it is good to go. So, anyway.

Ms. WOOLSEY. Yes. Well, so how many—let us go to the reality of the whole thing. Since somebody pointed out that over 90 percent of employers are not covered by labor unions, how many of those 90 percent of those employers actually have new employee orientations and employee handbooks that say you have a right to unionize?

Mr. MARTIN. I have not seen one.

Ms. WOOLSEY. I have not seen one. No.

Mr. MARTIN. I have not seen one.

Ms. WOOLSEY. I mean, that is where that would be to make it balanced. Hello, employees. We are a non-union facility, but you have every right to unionize.

So, now if an employee goes to the shop floor, if there are any shops anymore in this country, and wears a tee shirt that says, I am pro-union or if—or a button or a hat, is that protectable?

Mr. MARTIN. That is protected. If the employer is not aware that that is protected they might discipline them for it.

Ms. WOOLSEY. Well, I mean can they legally discipline for it?

Mr. MARTIN. No.

Ms. WOOLSEY. No. All right. But just what is the risk, that you know of, for——

Mr. MARTIN. I will tell you, as a practical matter we routinely get calls from employees in non-union workplaces who complain to their employer about—you know, about overtime, about not being allowed to share in profit sharing and get disciplined for that. The file a charge, the HR person is duly embarrassed. They get a lawyer. They fix it.

It is—you know the—most employers do not discriminate, but we still put posters up notifying people not to discriminate. Most employers have good, safe workplaces. They still have to notify people about.

Ms. WOOLSEY. Yes. So, since employers have unfettered access to their employees at all times during the workday, and they can express their views because they are the employer, how much do these rules change that?

Mr. MARTIN. I think it just simply—I do not think it changes the balance at all. The employer is still the dominant operator in the workplace. The employees serve at their will and—and can be compelled to listen to their viewpoints.

Ms. WOOLSEY. So, these proposed election rules do or do not take away the employer's voice.

Mr. MARTIN. Of course they do not.

Ms. WOOLSEY. And where does the employee's voice come in?

Mr. MARTIN. Well, the employee's voice is limited. They—the employees may talk amongst themselves on break time——

Ms. WOOLSEY. Whispering.

Mr. MARTIN. Whisper. And the union can try and contact them at home. But they certainly—you know when the employer calls a captive audience meeting where everybody is required to appear under penalty of discipline, the union does not have a voice in that. And the employees, frankly, in most cases know better than to make a noise in that that is not acceptable to the employer.

Ms. WOOLSEY. Not very American.

Chairman KLINE. The gentlelady's time has expired.

Dr. Roe?

Mr. ROE. Thank you, Chairman, for yielding. And I will agree with people on both sides of the aisle. With 14 million people out of work, jobs are the most important issue that we have in this country today, hands down. No doubt about it.

I have sat here and listened now for going on 2 hours, and I do not think that any of this encourages me as an employer to hire anybody. When I sit and listen to all of this, this does not encourage me to go out. And what will encourage me to create a job is a demand for the goods or services that I produce.

As a physician, if I am going to work on Monday and I have got an empty schedule on Friday, I am not going to hire anybody. It is that simple. If I am booked up for 4 months and I—then I am going to hire a new doctor to help me get that backload of patients taken care of. It is no more complicated than that.

All of this discussion right here would discourage me as an employer from hiring anybody. It is complicated enough. And Mr. Martin clearly pointed out that our bulletin board at home, you cannot even read it there are so many thumbtacks in there with I think irrelevant things there.

I want to ask Mr. King, why do you think that private union membership is dropping in this country? Why is that?

Mr. KING. Foreign competition; jobs going overseas. We look at the Boeing situation, that is one of the few employers in this country that exports goods. But that is not the case in many other industries.

We have over-regulation. Per your point, these new election rules, Dr. Roe, I just looked at the stats here. These new proposed expedited election rules, they modify over 100 sections and subsections of the current board regulations, include changes that span over 35, three-column pages of the federal register.

What small employer is going to be able to figure that out? And there are many other issues why the union membership in this country has dropped. We do not have time to go into them. But it is unfortunate for the whole economy that we have to have this absolute back and forth sparring. We need to have a federal agency that is fair and unbiased so businesses can do what they do best, create jobs and move this country forward.

Mr. ROE. Well in that day National Labor Relations Act 1935 and it was passed, and it was passed for a good reason. I grew up

in a union household. My father lost his job overseas in 1974 when I was in the military.

And I think, Mr. Mack, I want to ask, you have a tremendous amount of expertise in the NLRB. And with your experience there, what is your opinion of the board's Boeing decision? I mean, I have looked at that, and I have driven to Charleston, South Carolina for a reason. I do not live—6-hour drive from there. I wanted to see that building.

They have built a huge building there with 1,100 people with good jobs. And the NLRB is saying, drop that capital investment, take it back to Washington where no one has lost their job. What kind of a ruling?

Nobody with any common sense can understand that at all. I mean, I try to explain it to people and I cannot. I would just like to hear your opinion.

Mr. MACK. Thanks, Congressman.

Being a lawyer, I have not studied the Boeing case. We do not represent Boeing in this particular case. But I can share with you, it is going to be a—NLRB has before it a lot of remedies and a lot of approaches. It can deal with this issue without requiring Boeing to move its operation back to Seattle.

It would seem to me that asking a company to shutdown a multimillion or billion dollar facility and taking 1,100, 1,200 employees out of employment, that would be something that the board would come at with great reservation, and should not go after that lightly. There are a lot of other ways that the NLRB, assuming—and I do not know that there has been a violation. But assuming for the moment that there has been a violation, there are a lot of other remedies or weapons at the disposal of the NLRB rather than close shop and go back to Boeing. That is an awful decision.

Mr. ROE. I agree with you 100 percent. Let me make this——

Mr. MARTIN. Can I comment on the Boeing——

Mr. ROE. No. I want to make one statement because my time is almost up.

I left this country in 1973, put on a uniform and served in a foreign country in U.S.—Second United States Infantry Division, as many people have done here. That is done so that we will have a secret ballot and a right to a secret ballot.

I was elected by a secret ballot. The president of the United States was elected by a secret ballot. The union leadership is elected by a secret ballot. Every employee—we have 200 years of history in this country.

I think it is the most important thing we have so that you cannot intimidate anybody, either the employer or the employee, which is what I thought the NLRB was supposed to be, an impartial arbiter so as to allow people to make those choices freely. And a secret ballot does that.

And I am going to have to face a secret ballot next year. And that is the way it should be. I do not know how my wife voted. She said she voted for me, but I do not know that for sure. And that is the way it ought to be.

Chairman KLINE. The gentleman's time has expired.

Mr. ROE. I yield back.

Chairman KLINE. Mr. Kucinich?

Mr. KUCINICH. Thank you very much, Mr. Chairman.

I have been involved in several hearings dealing with the NLRB. And what occurs to me is that in being very familiar with the case of the workers at Boeing, the question really is going to be whether or not the workers at Boeing are going to have any right to recourse under the National Labor Relations Act.

Now, whether you are from Washington State, South Carolina or Ohio, where I am from, the question is going to arise, will the workers in South Carolina have less protection than workers in Washington State? And will workers all over America have less protection as a result of the National Labor Relations Act effectively being vitiated by our friends in the majority. This is a serious question about workers' rights.

Now, one of the witnesses talked about—did his analysis about why union membership dropped. Let me offer mine. Passage of NAFTA; passage of the General Agreement on Tariffs and Trade; emergence of the World Trade Organization; the passage of China trade; we lost millions of manufacturing jobs in trade agreements that were aimed at a race to the bottom.

We saw the best trained workforce. But frankly, a lot of our corporations, they are not committed to the red, white and blue. Their only color is green. You know, we take a pledge of allegiance at the beginning of our congress. Corporations do not take that pledge. They do not have any allegiance to the United States of America; their allegiance to their bottom line. Fine, but do not come here and give us lectures about the imperative of protecting workers' rights.

So, our workers here do not have—are not put on the same level as workers in China, let us say, which is a Communist country. Last I checked, we are still a democracy.

According to the statistics from the Organization for Economic Cooperation and Development, American workers today are more vulnerable to being fired without cause, more vulnerable to not getting severance, more vulnerable to being part of a mass layoff with little notice than any worker in one of the 14 other member countries of the OECD. The other 14 member countries are Western democracies comparable to the United States, nations we consider to be our peers; countries like the U.K., Australia, Ireland, Canada, France, Germany. What a situation for America to be in.

You know this whole idea about the National Labor Relations Board too powerful, it favors unions. Human Rights Watch report from 2000 warned that American companies have little incentive to respect workers' rights in the face of weak remedies called for by the National Labor Relations Act. According to the Human Rights Watch, the remedies, which this Congress voted to weaken last week are so meager that American workers are treated by employers as a minor cost of doing business. This is over 10 years ago.

I believe that given the fact that we have so many Americans who are unemployed or underemployed will corporations sit on record amounts of cash. Things are even worse today for workers in America.

Now, in the time that I have left, I have a question for Mr. Mack regarding the notice posting rule. The U.S. Chamber of Commerce and others have sued to block the NLRB's rule that requires em-

ployers to post a notice of workers' rights under the NLRA. One of their contentions is that requiring a posting of this notice of employee rights violates employers' first amendment rights.

So, does the requirement that employers post a notice advising employers—employees of the current minimum wage or the employee's right to file a complaint under employment discrimination laws or a report of violation to OSIA also violate employers' first amendment rights. Mr. Mack?

Mr. MACK. Your question—here is the question you are asking. Does it violate the employer's first amendment right to post a notice? There are two questions to that.

First, does the NLRB have the authority to do that? And I think that answer is no. We have operated under the NLRB for 75 years without such obligation. When you look at your statue, there is nothing in the NLRA which gives the board that authority.

You look at some of these other statutes, the ADEA and some others, this Congress included a provision that the agency can require the employer to post notice. NLRB has no such——

Mr. KUCINICH. Can you explain what is different about posting a notice regarding the National Labor Relations Act when compared with OSIA or the Fair Labor Standards Act?

Mr. MACK. Two things, sir. One, the agency does not have the authority to do it. Congress gave them the authority to do it in some of the others.

And number two, the language in the notice that the board is requiring to post goes beyond the board authority. The Congress says in the National Labor Relations Act, you must file an unfair labor practice, charge them 180 days after the event. The NLRB says if you do not post a notice, your time—statute of limitations does not run. There is nothing that gives the board that authority.

The NLRA is entirely different from the——

Chairman KLINE. The gentleman's time has expired.

Mr. MACK. Thank you.

Chairman KLINE. Mrs. Roby?

Mrs. ROBY. Thank you, Mr. Chairman.

Thank you to all of you for your testimony this morning.

Mr. King, in your experience, what kind of information does the union—excuse me—provide to the employee?

Mr. KING. There is—Mrs. Roby, it can be anything from very scant information regarding dues, regarding constitution and bylaws, which are all very important legal governing documents; too often very strident campaign material. And employees, frankly—and I know we can debate back and forth whether the employer said something wrong or the union said something wrong.

But employees frankly have a difficult time discerning what really is fact and what is fiction. And what is really a problem with these new proposed election rules, they diminish time significantly for employees. Put aside unions and employers' interests. The new rules would diminish significantly the time for employees to figure it out for themselves. And that is what we really ought to be here about, I think; making sure employees have rights.

Mr. MARTIN. I——

Mrs. ROBY. Right. So—and excuse me. So, in determining the accuracy of the information provided to employee—the employer—ex-

cuse me. The employee by the union, what recourse do the employees have if they are provided with inaccurate information?

Mr. KING. Very little. Frankly, the NLRB standards are such that the union, and to a certain extent the employer can engage in considerable puffery during the campaign process. And once that election is concluded, there is very little that can be done.

Mrs. ROBY. No recourse.

Mr. KING. Now, I understand, and pardon me for just a moment. I understand Mr. Martin's point. You can always decertify. Well, yes, that is true in the statute, but that is exceptionally difficult. That requires employees to obtain legal counsel, expert advice, go through a process of getting at least 30 percent of the bargaining unit to agree. It is exceedingly difficult to do.

Mrs. ROBY. Well, that goes to a point made by my colleague, Mr. Gowdy earlier. What are the restrictions on union and employer speech during the representation election drive? What are the restrictions?

Mr. KING. Not a great—not a great deal, frankly. The board in recent decisions, we probably would agree, Mr. Martin, on some of these decisions. The board has permitted considerable leaway for the parties to engage in court election campaigning. Again, it is back to employees. How do they figure it out? How do they really determine what is in their best interest? And that is very difficult.

Mrs. ROBY. Right. And my first question had to do with the employee determining about accurate or inaccurate and what recourse they have. Let us just state for the record, what recourse does the employer have once they find out, again going through that legal process?

Mr. KING. Not a great deal. There is a very recent decision by this board wherein a union had posted in campaign material pictures of voters, prospective voters, people in the voter unit giving the impression that each one of those employees whose picture had appeared on that union campaign piece was in fact supporting the union. Some employees came forward and said that is not what I said you could use or how you could use my picture. But yet the board said that was Okay.

So, the employer is limited to a great extent what it can do to try to overturn an election. Pursuing election objections are difficult. Under the new proposed election rules it is going to be even more difficult.

Mrs. ROBY. Right.

Mr. MARTIN. This board has sanctioned——

Mrs. ROBY. Excuse me, Mr. Martin. I have a very limited time.

And I want to talk to Ms. Ivey because we have not had a lot of time with you. And I appreciated your courage to be here and your willingness to be very frank with this body about your experience. And I really just want to give you an opportunity.

I understand your frustration in being denied the opportunity to participate in the election because the employer voluntarily recognized the union. And so now your opportunity under the Lamons Gasket ruling, you do not have that right to vote.

I want you to tell all of us in here why it is so important for you to have the opportunity to participate in that election.

Ms. IVEY. Well, because we live in the United States, and I have always, as I stated earlier, believed that a vote is truly an election, a card check. And I am not saying, as Mr. Martin said, that there is a lot of misinformation, whether intentional, not intentional. But a vote at the end of the day says, yes, I want to be a member of the union; no, I do not.

I work with other people in other departments that are in a union. I do not have anything per se against the union. I just choose—I want a choice to say no, I do not want to be in a union, as did 45 percent of the people when I just asked them, did you really feel you had a—this was a vote? Did you have a voice, because even if I had a card, if I do not turn it in I do not have a voice.

But if I turn it in, my voice is yes. I want an opportunity for everybody to say yes or no when you vote for an elected official. You do not say—or a ballot. You know, you have a choice, yes or no.

Mrs. ROBY. Thank you so much. I really appreciate it, again, for your courage to be here.

Thank you, Mr. Chairman. My time is expired.

Chairman KLINE. I thank the gentlelady.

Mr. Altmire?

Mr. ALTMIRE. Thank you, Mr. Chairman.

Mr. King, I am trying to get a handle on exactly what the issue is that we are discussing here. Are we talking about the legal ability of the NLRB to carryout actions which you and many members of the business community clearly disagree with, but they are within the scope of the current law? Or are you making the case, and Mr. Mack and others also that they are outside of the law in some of the decisions that they have made? Did they have the legal ability to carryout these decisions, even though you disagree with them?

Mr. KING. We would have concerns, Congressman, on both levels. Where arguably the board may be permitted under existing case law, it is gone so far in one direction due to its totality of cases that it has not presented the type of climate for fair, unbiased adjudication.

But these little minds can argue about certain areas of the law, concede that. But we are most concerned about specialty health care where we believe the board has not followed the law. And the election proposed rules we believe are outside the scope of the law on a number of points: due process issues, not having a hearing before an election. So, on both levels we have concerns.

Mr. ALTMIRE. And do you feel like your concerns will be heard in a way that is within the scope of the law, and that there will be a decision made by a court based upon the claims that you are making?

Mr. KING. I agree with Mr. Martin that there is always—I should not say always. Strike that; that there is a court of appeal option in many circumstances. That what we really are facing at the end of this year is an NLRB with only two city members. And as you may know, under the decision of the U.S. Supreme Court, a new process still, the board will not be able to adjudicate or function, which I think is a tragedy for everybody, labor and management and employees.

So, we may not be able, unless the Senate confirms one of the nominees or both. Or we have another recess appointment from the president, and that is controversial. We will have a LRB that cannot function, and who not be able to even appeal under the courts of appeal.

So, that is why we have another concern about specialty health care. We may not be able to even pass that. Yes, court of appeal remedies available in adjudication.

The last point I would make is that in rulemaking, it is exceedingly difficult to take a challenge to a rule into federal courts. It can be done. It has been done, but very difficult.

Mr. ALTMIRE. Well, Senate confirmation clearly is an issue that needs to be discussed outside of——

Mr. KING. Right.

Mr. ALTMIRE [continuing]. The parameters.

But, with regard to favoritism, and I do not know the numbers. Perhaps you do. In recent decisions from the NLRB, do you have a rough estimate of the percentage of times or the number of times where they have sided with the employer versus the union.

Mr. KING. No. Excellent question. We intend to amend the record on that point.

I agree with Mr. Martin that on the run-of-the-mill discharge case, and cases where employers and unions are out of line, this board has addressed those issues. We would agree on that. What we do not agree on are the very important policy cases.

And as I mentioned earlier, Member Hayes, the Republican has dissented in 59 cases in a very short period of time. That is not healthy. That is not healthy for the agencies. It is not healthy for unions. It is not healthy for employers.

And I will tell you what employers tell me. They cannot figure out what the law is. And you talk about red tape, legal costs, et cetera. That is not good for this economy irrespective of your labor or management viewpoint.

So, it is a problem that needs remedy. We need to get to a point where an employer, a union, an employee can bring a case to an unbiased agency and get a fair hearing on an expedited basis. The current direction the board, at least from the employer perspective, says that is not available.

Mr. ALTMIRE. I guess you are hitting exactly on the point that I am trying to get at. And I am asking the question without a preconceived answer. But, are you suggesting that in those very big cases that you are talking about that the NLRB is operating outside the scope of what is legally available to them to decide?

Or are you just saying they are outside the mainstream, they are hurting employers, there is an unintended consequence? We can argue the policy of that, but are they, in making those decisions, violating the law?

Mr. KING. Yes. In specialty health care I think they have gone beyond the law. Yes on proposed election rules. Yes on the poster as it relates to the independent unfair labor practice charge, the totaling of the statute of limitations and the union animus that would be thrust upon the employer.

It is debatable on whether a piece of paper can be required to be posted. It is unfortunate we have to spend so much time on that. That I agree with. That is debatable.

But certainly in those areas and certain other areas, clearly the board does not follow the law. Other areas I would concede they are within their right to adjudicate as they have. It is a policy question. And it gets back—and your question is an excellent one. It gets back to this oscillation or back and forth when we have a Democrat administration or a Republican administration. It is not good.

We have to adders this on a broader base. And I know that is an issue, Mr. Chairman, for another hearing, another day. But the current system, notwithstanding all the fine public servants we have, does not seem to be working.

Chairman KLINE. The gentleman's time has expired.

Mr. Platts?

Mr. PLATTS. Thank you, Mr. Chairman. I want to thank you for hosting this hearing. I appreciate all the witnesses being here.

And I guess first, a comment that I know in the title of the hearing it is—and I think—and I agree, when you look at all the issues the NLRB has actively taken a pro-union. But how I would, I think even more importantly describe what they have done is anti-worker, union or non-union. And I will highlight two. And Ms. Ivey, your testimony hits right on a point on both of them, the timeframe that the NLRB is looking at shortening to not allow a full and informed decision to be made by workers, whether or not to be union.

I am a former union member, teamster, Local 430. And I am withdrawn in good standing from about 24 years ago; still keep it in my desk drawer. I am not anti-union. I am pro worker fairness.

So, the timeframe and the suggestion that just a few days or even 14 days, and in your case you are given 2 days of a hearing. Twelve days after that conference or that meeting, boom, you are represented. I mean, no one would think that is a fair approach if given an opportunity to honestly comment on it.

And your analogy to—if we had a presidential election and said hey, we are going to elect a president or governor or mayor, and by the way, the election is going to be 2 weeks from now, and by the way, we may do it by open card check and not by secret ballot, that would be an outrage across this country, understandably. And whether or not to unionize, I would contend is one of the most important decision that a citizen makes because it is about their livelihood, about their job, their pay, their benefits, their working conditions.

And to rush into this decision—so, first the shortening the timeframe is outrageous and not about worker—protecting workers, again, union or not. The possibility of disclosure of personal information, your email, your phone number; if you want to have a private phone number, that is your right and we should not be saying no, it has to be given to potential representative, a union for their use.

The card check system, and Ms. Ivey, you said it well in your testimony. You say "every time I was reassured by the NAJA my vote was confidential." And you go on to say the card check process un-

dermines the privacy and voices of the very workers they seek to represent." I think it captures it.

You know when I have talked to unions about this issue and expressed my absolute opposition to card check, I always ask a question. With rare exception, how do most unions vote on whether to accept or not a proposed labor contract that their union management team has negotiated with the management negotiators. They rarely do it by open show of hands. They do it by secret ballot so the members of the union can vote in private on whether—why do they do that?

Mr. MARTIN. Because they do not have to vote.

Mr. PLATTS. So that they do not have to publicly say I am with my union leaders or I am opposed to what they agree to. I think they agree to a terrible contract. They do it by, you know, secret ballot. And if it is a good idea for whether to agree to a union contract is an even better idea of whether to have a union represent you or not. And so both of those issues I think are dead wrong and anti-worker, anti-fairness, which is what our nation is long stood for when it comes to elections.

Ms.—or, I am sorry. Mr. Mack, in trying to better understand, as my understanding in the denial of the petition for a secret ballot because of the Lamaze decision that when the NLRB did that they basically said you are going to have to wait at least 6 months, and depending if it is a recognition board or a contract board, maybe as long as 4 years before you can then have an actual secret ballot.

Mr. MACK. Absolutely.

Mr. PLATTS. So, am I understanding that correctly?

Mr. MACK. You are right on the point, sir.

Mr. PLATTS. So, we have an NLRB who does not think it is any problem to shorten it to a couple days, you know, or I will say 2 weeks to whether to unionize or not. But if you want to have a secret ballot and not unionize you got to wait 6 months or years. I mean, it captures the pro-union approach of the NLRB, and it is not pro-worker; it is pro-union.

Can you expand on that? And especially maybe on the Giffords Stream, the contract bar and the recognition bar.

Mr. MACK. On the contract bar, the employer and the union have negotiated a contract. The employees ratify the contract in some terms, in some fashion. So, they know that they are going to be stuck by the contract for a time. That is important.

When the recognition part that we are dealing with here is so many times employees and their cases, a zillion cases out there where someone says to an employee, sign here, it is just to get an election. Sign here, we just want to keep contact with you. Do this and do that. Never telling the employees you are going to be stuck with it.

And then the employer and the union enter into this recognition deal the employees are stuck with the union——

Mr. PLATTS. Ms. Ivey's case captures it exactly.

Chairman KLINE. And I am sorry, the gentleman's time has expired.

Mr. Tierney, you are recognized.

Mr. TIERNEY. Thank you.

Mr. Martin, help me out and put some perspective on this. If I am an individual working on a company and somebody misleads me into signing a card for union representation, is not there recourse against that?

Mr. MARTIN. Sure there is. Sure, it is an unfair labor practice. And if it is the basis for the voluntary recognition it can be set aside.

Mr. TIERNEY. So, if you have got a beef, bring the brief. This is sort of nonsense to bring it up here, right?

Mr. MARTIN. Right.

Mr. TIERNEY. So, look. I am hearing things about how far this board has gone off in one direction and how I think one witness said, oh, we are going back and forth. The fact of the matter is that recent decisions have restored decades long law. Is that correct?

Mr. MARTIN. Absolutely.

Mr. TIERNEY. And——

Mr. MARTIN. And all this conversation about specialty health care, again, what the board says in specialty health care that the board finds that employees in the group that share a community of interest after considering the traditional criteria, that means the criteria that goes back and is traditional.

Mr. TIERNEY. So, some people that have a beef, they do not like the traditional criteria. Apparently the Bush board did not like it because they, for instance in the Lamons Gasket case, have been off 1966 to 2007, 41 years. So there is Republicans and Democrats in the White House, right?

Mr. MARTIN. Exactly.

Mr. TIERNEY. And no member, no member raised an objection to it during that period of time on the board.

Mr. MARTIN. Correct.

Mr. TIERNEY. So, you got to the Bush era and they decide they do not like it. And so they toss it. And then when it gets restored, people argue about, well gee, you know we are upsetting precedent here and we are going back and forth. Just because we have an outlier in that one board, one period of time that upset historic law. Is that correct?

Mr. MARTIN. Well, and actually in this case it was the Park Hills case that applied specifically to nursing homes. And what the board says is we are just going to treat every——

Mr. TIERNEY. Case by case.

Mr. MARTIN. Case by case.

Mr. TIERNEY. And that is what the board went back to doing, treating it case by case.

Mr. KING. If I may——

Mr. TIERNEY. Sorry. I am having a conversation with Mr. Martin here. You have had more than ample opportunity to, I think——

Mr. KING. I apologize.

Mr. TIERNEY [continuing]. Back and get some direction on this.

So, tell me your perspective of this, Mr. Martin? Am I right in saying that rather than show a bias, this board is basically restoring what had been traditional law?

Mr. MARTIN. Absolutely. We complained quite a bit during the Bush board. And we took our medicine and moved on. And it is—

this is the same—you know this is simply you know the way the board traditionally manages its policy.

Mr. TIERNEY. Well, actually there was a period of time from 1966 to 2007 where at least the Lamons Gasket case where whatever the administration, whatever party and members of the board, they all consistently went along until we got to the Bush group.

Mr. MARTIN. In fact, the only thing that has changed with Lamons Gasket is that in the nursing home industry it is now going to be subject to the same traditional community of interest test that every bargaining unit has. These guys—you know, frankly if they could sell their interpretation, I would buy it. But it just does not.

Mr. TIERNEY. Right.

Mr. MARTIN. What it says is we are going to go back to the traditional criteria, and that means an appropriate unit will be right. And even though a larger unit might be okay, but we are not going to force people into a larger unit unless there is an overwhelming community of interest. And that goes back to that narrow exception where you know nurses are trying to exclude some nurses because they are on the wrong shift.

Mr. TIERNEY. So, there is a right, I take it, for an employer to voluntarily accept the union when they want to. Is that right?

Mr. MARTIN. Yes.

Mr. TIERNEY. Okay. And this is apparently what Ms. Mack bumped up against?

Mr. MARTIN. Yes.

Mr. TIERNEY. So, first of all if Ms. Mack contends that people were forced to sign those cards, whatever, by misleading statements or whatever, we should look for Ms. Mack to have filed a complaint somewhere, is that right? Then have it adjudicated in her favor.

Mr. MARTIN. Yes, Ms. Ivey.

Mr. TIERNEY. See any evidence of that?

Mr. MARTIN. In this case?

Mr. TIERNEY. Yes.

Mr. MARTIN. Well, I mean, it is—you know we often hear people complain about what happened. But you got to prove it. So, I mean if—you know, certainly if it can be proven you know she would be entitled to a remedy.

Mr. TIERNEY. So, she has a remedy on that basis.

Ms. IVEY. Can I ask a question?

Mr. TIERNEY. Well, actually the way we usually do it around here is we ask the questions because you are the people with the direct relevant information. That is why we are asking on that basis or whatever.

So, no, I appreciate your testimony and all of your comments. I just, I guess, do not quite see what it is other than that things were restored to their traditional value and people liked it when they were out of sync.

I yield back.

Chairman KLINE. I thank the gentleman.

Mr. Walberg, you are recognized.

Mr. WALBERG. Thank you—thank you, Mr. Chairman.

And thanks to each of the witnesses for being here. And especially the Michigan State—the University of Michigan representative here today, Mr. Mack.

Mr. MACK. Blue go green and white.

Mr. WALBERG. [Off mike.]

Mr. MACK [continuing]. Mr. Congressman.

Mr. WALBERG. If you want to answer my next question——

Mr. MACK. Yes, sir?

Mr. WALBERG. That is not a winning statement around here.

Mr. MACK. I understand.

Mr. WALBERG. But having a twin brother that is a Buckeye, hey, what can you say for family?

Mr. King, I do want to ask you this question. I am a representative from Michigan, a non-right-to-work state. I hate to say that, but it is a non-right-to-work state. We are challenged with the task of luring employers into the state.

If you could give me a brief description how the specialty health care decision—in fact, I think of the specialty health care decision as far more important than even Boeing. Not as high profile, but it has greater impact, I think than even Boeing. How the specialty health care decision would affect a company operating in my hometown of Jackson, Michigan, let us say, in acquiring employees.

Mr. KING. Congressman, specialty health care from my perspective, unless Mr. Martin can prevail somehow on the NLRB to reverse what it just did, is the most significant reversal in the recent history of board law. Per the question-and-answer that just went on, I was going to hope to say was that specialty health care reversed 20 years of precedent of Park Manor under both Democrat and Republican boards.

If we are correct that the overwhelming community of interest test has now been implemented, that is another reversal of 30 plus years of precedent. It is not correct to say we are just going back to our law. That is just flat incorrect.

Per your question, it is specialty holds in your state, the small business restaurant, let us say, that has cooks. That is perhaps a separate appropriate unit; the servers perhaps a separate appropriate unit.

Mr. WALBERG. Micro units.

Mr. KING. Right. Micro units. The cashier, I could go on and on, the people that wash the dishes. Where do we draw the line? And that is not a job creator.

I spent a lot of time in Michigan also, Mr. Congressman, in Michigan, Ohio, the other states from this part of the country. We cannot take many more hits. We need to create jobs.

Mr. WALBERG. Now, going back to the decision that was made earlier, did not members of the board under Chairwoman Liebman hold an opposite opinion just about a year ago in a separate case, Wheeling Island Gaming?

Mr. KING. Absolutely. That is what is really ironic. The former chair of the board, Wilma Liebman, an excellent jurist, very bright woman, agreed on just the opposite approach in the Wheeling Gaming case.

Mr. WALBERG. What was that approach?

Mr. KING. There the union was attempting to have a separate unit of poker dealers, separate unit of others within a casino. And the board, with Chair Liebman, a Democrat on the board, sided with then Member Schaumburg and Member Becker dissented.

We do not understand this. That was the law just a year ago, and now it seems to be turned upside down.

Mr. MARTIN. I can explain——

Mr. WALBERG. They wanted a larger unit instead of the smaller unit. Let me ask you, in basis of that issue, if this decision is so far out of line, can this go right to the federal court for decision?

Mr. KING. Unfortunately not.

Mr. WALBERG. We are stuck with it.

Mr. KING. What we have to do as the employer is refuse to bargain. The election ballots are just open in specialty health care, by the way. And a small, micro unit was approved for representation, which the workers have a right to do. But then, if the employer wants to contest that unit, it has to refuse to bargain.

An unfair labor practice complaint then issues, or charge, excuse me, is filed. The general counsel issues a complaint, and then the employer appeals into the federal courts of appeal. We are off into years of litigation and expense.

Mr. WALBERG. Let me turn to Mr. Mack then, and say, what happens? If this is a lengthy period of time that is going to take place, how do all companies live under this decision in the meantime?

Mr. MACK. Ask your question one more time, please, sir.

Mr. WALBERG. Hearing that this is a lengthy process to get through it, in the meantime what happens to all the companies now living under the decision?

Mr. MACK. Most of them are trying to bargain with the union to get an agreement. And more importantly, Congressman, we are talking about going to federal courts. There are many times you are talking about small to medium-sized employers. And they do not have the money to run off to federal court like some of the bigger ones did.

So, these are just bad decisions here. They are just—when employers are trying to operate under these near decisions, moving employees from one position to another, from one department to another, getting product on the assembly line, they are just impossible to do. It Balkanizes the operation. There is too much conflict and confusion going on. They are not good.

Mr. KING. Congressman, just very briefly——

Chairman KLINE. I am sorry. I hate to do this, but the gentleman's time has expired. We are drawing to the close of the hearing.

I want to recognize Mr. Miller for his closing remarks.

Mr. MILLER. Thank you very much, Mr. Chairman. I think this hearing has pointed out a number of the redundancies in the four hearings that we have had, but I guess we will continue to plow this ground. I would like to use my time to ask a couple of questions.

Ms. Ivey, when did you find out about the card procedure?

Ms. IVEY. The email was sent July 20th.

Mr. MILLER. July 20th of——

Ms. IVEY. This year.

Mr. MILLER [continuing]. 2011?

Ms. IVEY. Yes, this year.

Mr. MILLER. And did you know about the card provisions for that—for recognizing the union, the process before?

Ms. IVEY. I know of it. I have heard of it because there are other unions in our workplace, or the same union, but other departments.

Mr. MILLER. So, what was the surprise that you experienced when you got the card?

Ms. IVEY. I never received a card.

Mr. MILLER. So, you did not sign a card?

Ms. IVEY. No. I was never given that opportunity. I guess I would have had to call the union to get one if I wanted to.

Mr. MILLER. No. I think you have a right under the agreement that you may revoke your card or—either by request of the union or through a neutral umpire at any time after the day of the card count. And the cards have to be made available to the employees. Are you aware of that?

Ms. IVEY. Well, they were never made. I live in Salem, and there are four of us in Salem. We never even received a card, never saw anything——

Mr. MILLER. Did you know that your employer can provide information to the union about you as an employee?

Ms. IVEY. I do not know that.

Mr. MILLER. Did you know—did the other employees ask for cards?

Ms. IVEY. My understanding is that there were employees that went to the union to ask for cards so that they could distribute them to employees.

Mr. MILLER. Were you aware that the union had access to your workplace at different times during the card process?

Ms. IVEY. They probably did, but I live in Salem and most of the activity was in Portland.

Mr. MILLER. In the question of violations, are you aware that you can—you could have brought those to the attention of the partnership committee?

Ms. IVEY. My understanding, and again part of this is I do live 60 miles south——

Mr. MILLER. No, I understand. Did you——

Ms. IVEY. Okay.

Mr. MILLER. Did you bring what you thought was a violation to the attention of the partnership committee?

Ms. IVEY. I did not know it was a violation not to be offered a card, to be honest.

Mr. MILLER. You know what I think? I think if they had posted this in your workplace, because this has been in existence since August of 1999, maybe employees would know their rights under the agreements that Kaiser entered into with the union.

It is not required to be posted, apparently, but it would have been nice to be posted and people could have—you could have consulted this during the election process. You could have found out your rights. You could have found out your obligation.

You could have found out where you go to file your grievances, and what impact they might have, and what the rules for the elec-

tion are because they are all spelled out here. It seems to me the posting has some value because this is what Kaiser and the union agreed to how this process would go forward.

I live in an area where I think one out of five people who have health insurance have Kaiser. Kaiser is a very big operation in my area, and these agreements have existed for a long time. So, I think there is probably some merit to posting.

Ms. IVEY. I will agree that I know that there is a job—or a posting involving new notices of other things. I think my whole case stems on the fact that I believe that we followed all the rules to do a petition because there were many of us that felt that a card count was——

Mr. MILLER. I understand that. I understand that. But the suggestion was that somehow this card, and it explicitly says that the card has to tell you that this is for the purposes of recognition of the union. There is no other purpose that can be done. You suggested you thought the card was for something else.

Apparently nobody went to the partnership committee and complained about that. That is to be addressed if that would be the case.

I am just trying to point out, you know, there is great upset here because somebody posted the rights of workers under the law of the United States of America in the workplace, very similar to what is done under the FSLA.

And yet at the same time, I would assume the workers would have liked to have this posted so as you rotate through, because as whole balance process about when you are hired and when the unit is closed and when it is open and all the rest of that. But we act like posting is un-American.

I mean, that is your presentation of posting here is that somehow it is un-American. The type face is the same and you have the right to belong to a union and your right not to belong to a union. Type face is the same in engagement activities and not to engage in activities. But somehow that is all un-American.

Thank you, Mr. Chairman.

Chairman KLINE. I thank the gentleman.

This hearing has revealed, I think we heard from all of you. We on this committee talk back and forth about how the NLRB does move back and forth. And it is a pendulum. When there is a Republican in the White House, it is weighted with Republicans on the board. When it is a Democrat in the White House, it is weighted with Democrats on the board. And so accusations of being active have gone back and forth.

I remember when I was the minority here, we did complain sometimes. When they are in the minority, they complain.

But, I do also believe in hearing testimony today that this board is especially active. That is Mr. King's testimony. And so, I do believe it is incumbent upon us to provide some checks to what that board is doing. So, despite the complaints from my colleagues, we probably will continue to provide oversight to this board and move legislation as necessary to put it back in as close a balance as you can get when a system that is fundamentally broken.

It has been suggested by Mr. King and others that the Act, the NLRA ought to be changed. I agree. I think that is going to be very

hard to do, and there is a reason why it has not really been changed in all these years. It is very, very hard to do it because—in large part because of the swings back and forth and the partisan nature of the board.

I want to thank the witnesses for their testimony, and for the lively engagement of discussion; and my colleagues for their participation. There being no further business, the committee stands adjourned.

[An additional submission of Chairman Kline follows:]

Prepared Statement of the HR Policy Association

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE: Thank you for this opportunity for HR Policy Association to express strong concern over the activities of the National Labor Relations Board, which, in recent months, has proposed a regulation undermining the longstanding election process and issued a series of decisions that will cause significant disruption in the workplace and limit employee choice in determining union representation.

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. The Association consists of more than 330 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, these companies employ more than 10 million people in the United States, and their chief human resource officer are generally responsible for employee and labor relations for their respective companies.

The Board's recent action against Boeing, the proposed regulation dramatically shortening the time for union elections, and the Specialty Healthcare decision which encourages micro-units in the workplace, all serve to disrupt the workplace and undermine and hinder job growth and economic recovery. We applaud your Committee for holding a hearing on these critical issues. We strongly encourage Congress to take action, either through changes in the statute or in the funding of the Board, to limit or curtail these activities. While there are several issues of significant importance, what follows are the Association's concerns regarding the proposed election regulations and concerns related to the recently issued Specialty Healthcare decision.

I. The NLRB's Expedited Election Rules Would Curtail Employees' Ability to Make a Fully Informed Decision on Union Representation

On June 22, 2011, the National Labor Relations Board (NLRB) issued a Notice of Proposed Rulemaking with respect to Representation-Case Procedures (76 Fed. Reg. 36812) which contains a number of controversial changes to the highly complex rules and procedures governing union representation elections conducted by the NLRB. While most of these changes have generated controversy in and of themselves, it is the broader goal of the proposed changes—a substantial shortening of the election period from the current median of 38 days to as little as 10 days—that prompts the strongest objections from the employer community. Such a brief period will deprive employees of the ability to hear and discuss among themselves the views of both their employer and their co-workers, which was one of the most offensive aspects of the card check provisions under the Employee Free Choice Act.

Election Data Indicates Proposal is a Solution in Search of a Problem. In a statement issued in conjunction with publication of the rules, NLRB Chairman Wilma Liebman states that, despite some improvements over the years, "the current [election] rules still seem to build in unnecessary delays, to encourage wasteful litigation, to reflect old-fashioned communication technologies, and to allow haphazard case-processing." Yet, the case is not made in the proposal for this apparent breakdown. Indeed, in his dissent, NLRB Member Brian Hayes cites NLRB data to show that the vast majority of elections proceed in a very expeditious manner. Currently, the NLRB's internal objective in representation cases is to complete elections within 42 days of the filing of the petition. However, in 2010, the regional offices exceeded this objective, completing initial elections in representation cases in a median of 38

days from the filing of the petition.[1] Citing BNA data,[2] Member Hayes further adds: "Inasmuch as unions prevailed in 67.6 percent of elections held in calendar year 2010 and in 68.7 percent of elections held in calendar year 2009, the percentage of union victories contemplated by the majority in the revised rules must be remarkably high."

Failure to Seek Stakeholder Views. In addition to its failure to justify the need for the proposed changes, the credibility of the proposed rules is further undermined by the decision of the Board not to solicit any views from the stakeholder community before issuing the proposal. In our Blueprint for Jobs in the 21st Century, HR Policy recommends "involvement of essential stakeholders in the formulation of new employment policies" (i.e., through a process of negotiated rulemaking) as a solution to the problem of existing rules failing to reflect the realities of the workplace. Instead of being formulated through a collaborative process, employment regulations often simply implement the wish list of a powerful interest group. Moreover, President Obama's Executive Order 13563 specifically states that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." While independent agencies like the NLRB are not required to comply with the Executive Order, they should operate within its spirit, particularly in a highly sensitive matter like union representation elections, where a number of interests are affected. As Member Hayes notes in his dissent, there were a number of ways of involving the affected stakeholders in this process, including negotiated rulemaking or, at the very least, receiving comment by the Board's standing Rules Revision Committee and by the Practice and Procedures Committee of the American Bar Association. Indeed, some of the proposed changes, such as allowing the electronic filing of key documents with the Board, have not generated significant opposition and, as part of an overall collaborative process, could be part of a package of welcome improvements to the Board's election procedures.

Curtailing Employee Access to Essential Information Before Voting. Under the Board's proposed "hurry up and vote" procedures, employees will be denied critical information in making an informed decision regarding whether to be represented by a union—a decision that in the vast majority of situations is, as a practical matter, a permanent one that will bind not only the voting employees but later hires as well. There are two critical areas where key information will be limited or curtailed:

• Shorter Campaign Periods While the proposed rules do not identify a specific time target, a key provision in the changes requires the NLRB regional director to set the election at "the earliest date practicable." Member Hayes estimates that the changes will result in elections between 10 and 21 days. This is far shorter than the current 38 day median (within which, as BNA data indicates, unions win 2 of every 3 elections already), which is itself a considerably shorter period already than voters have in deciding whether a candidate will represent them for 2, 4 or 6 years in Washington. In most cases, this gives employees ample opportunity to hear not only from their employer but to discuss the issues among themselves. Both the Board and the U.S. Supreme Court have recognized that Federal labor policy favors "uninhibited, robust, and wide-open debate in labor disputes" and that the enactment of Section 8(c) "manifested a congressional intent to encourage free debate on issues dividing labor and management."[3]

• Not Knowing Who Else the Union Would Represent In seeking to expedite the election process, the proposed rules would eliminate pre-election proceedings in certain situations where the employer disputes the union's claim of which employees will vote upon and potentially be represented by the union. Currently, the Board will make a "unit determination" in those situations before the employees vote. The dispute may be based on different job classifications or, as discussed below, whether certain employees are exempt supervisors and therefore excluded from the voting and the representation. The proposed N.L.R.B. 927, 932 (1988). Section 8(c) of the

[1] NLRB General Counsel, Summary of Operations (Fiscal Year 2010), GC. Mem. 11-03, at 5 (January 10, 2011).

[2] "Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year," Daily Lab. Rep. (BNA), No. 85, at B-1 (May 3, 2011).

[3] See Chamber of Commerce of the United States v. Brown, 554 U.S. 60, 60-68 (2008); Franzia Bros. Winery, 290 rules provide that, where the disputed group of employees involves fewer than 20 percent of the total number, all employees are to vote anyway, with the votes to be counted after the unit determination is made. Thus, in a casino setting, the blackjack and poker dealers may have to vote without knowing whether their terms and conditions of employment will be covered by a collective bargaining agreement that also covers waiters and waitresses, bartenders and others that may or may not have a sufficient "community of interest" with them.

National Labor Relations Act protects an employer's right to communicate with employees regarding unions and representation issues.

Uncertain Status of Supervisors. One critical group that will be affected by the "20 percent" rule just described are supervisors, whose exempt status as such determines not only whether they will vote and be represented by the union, but also whether their conduct is regulated by the same rules that apply to the employer. Thus, if they participate as employees in the campaign and it is later determined that they were in fact supervisors, statements they made for or against the union could be deemed coercive. This could result in the election being overturned, as occurred in Harborside Healthcare, Inc., 343 N.L.R.B. 906 (2004) where an employee who helped the union solicit supporters was later deemed a supervisor.

Denial of Employer Due Process Rights. A number of the changes, purportedly in the interests of expediting election procedures, would curtail the ability of employers—especially small businesses—to effectively present their position to the Board on critical issues like which employees should or should not be in the unit. Many of these highly technical but significant changes would violate the requirement of "an appropriate hearing" under the National Labor Relations Act,[4] including:

- Limiting access to the NLRB for review of both pre-election and post-election determinations made by regional bureaucrats who often are not lawyers;
- Requiring employers to articulate and substantiate their positions on key election issues prior to any hearing or risk waiving those arguments; nor could they offer evidence or cross-examine witnesses with respect to virtually any issues not raised by them at the outset, even if those issues have a critical impact on the employees;
- Requiring an employer who contests the union's description of the "appropriate unit" to identify "the most similar unit" that the employer would deem appropriate, and provide the names, work locations, shifts and job classifications of those employees, which would then become available to the union.

Expanding Union Access to Employees' Personal Information. Under current procedures, once an election is ordered, employers are required to provide the union with a list of the names and addresses of the employees who will be voting. The proposed rules would expand the information required under so-called "Excelsior lists"[5] to include telephone numbers and email addresses, though it is not clear whether this information would be personal, business or both. Either is problematic. If personal email addresses and telephone numbers are required, this would be a significant incursion on employees' privacy. If the requirement involves business telephone numbers and email addresses, this would be an unprecedented expansion of union access to employers' workplaces.

II. Decision in Specialty Healthcare Furthers Long-term Goal of Labor to Undermine Fundamental American Labor Law Principle of "Majority Rules"

While a number of National Labor Relations Board (NLRB) actions in recent months have generated strong public controversy, a recent decision that will be enormously disruptive to U.S. employers' ability to compete globally has remained well below the public's radar screen. Decided on August 26, 2011 by a vote of 3 to 1, with NLRB Member Brian Hayes dissenting, the decision in Specialty Healthcare,[6] enables unions to secure organizing victories by carving out very small "micro-units" within a workplace, such as cashiers in a retail setting or poker dealers in a casino setting. What makes the situation even more alarming is the inability of employers to obtain a prompt review in the courts, which will likely take two or three years at best.

Determining Who Votes in a Union Representation Election. When a union seeks to organize employees in a workplace, the first issue to be addressed is usually which group of employees will vote and ultimately be represented by the union if it is successful—i.e., the "appropriate unit." The general touchstone in making this determination, which is very fact-sensitive, is whether there is a "community of interest" among the employees. When a union has authorization cards signed by at least 30% of the employees in the unit, it files a petition with the NLRB regional office. If the employer believes the union's target is not an appropriate unit, it can challenge the petition, prompting a hearing and determination by the Board as to what the appropriate unit is, i.e., a "unit determination." In making this determination, there is a presumption in favor of the union's petition. However, if the employer believes that other employees have been inappropriately excluded, it will argue that there is a broader community of interest and, prior to Specialty

[4] 29 U.S.C. § 159(a)(1).
[5] Named after Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).
[6] 357 NLRB No. 83 (August 26, 2011).

Healthcare, the employer generally could prevail if it could show that the union's unit does not have interests that are "sufficiently distinct" from the larger group.[7]

Union's Victory Strategy Often Premised on Smallest Possible Group. The smaller the group of employees voting in an election, the fewer the union needs to gain a majority. Thus, unless there is strong sentiment favoring the union in the larger workplace, the union will target a discrete group where pro-union sentiment is strongest and hope to hold the support of a majority of them in the election. If successful, the union can then try to secure better wages, benefits and other advantages for this small group, creating a case it can then make to the larger workforce. Thus, in Specialty Healthcare, rather than seeking to organize the entire non-acute healthcare facility—or even all nurses—the the union targeted certified nursing assistants (CNAs), and excluded registered nurses (RNs) and licensed professional nurses (LPNs), not to mention cooks, dietary aides, business clericals, residential activity assistants and others covered by the employers human resource policies.

The Goal of Organizing "Minority Unions." As organized labor's ability to organize new members has declined, it has begun supporting the concept of "minority unions," i.e., enabling any subset of a workforce's employees to form a union that the employer must bargain with, even if a majority of the employees do not support it. Although a petition has been filed with the NLRB by a broad coalition of unions to achieve this through rulemaking,[8] the National Labor Relations Act is clearly based on a "majority rule" principle. Moreover, such a policy, which mirrors the laws in several European countries, would be viewed by employers and, likely the overwhelming majority of policymakers as well, as being highly disruptive and divisive in American workplaces at a time when U.S. employers are struggling to compete globally. Nevertheless, absent a change in the statute, labor is interested in any approach that enables it to subdivide a workforce to obtain smaller "majorities" in elections.

The Specialty Healthcare Decision. In Specialty Healthcare, the Board adopted a new standard for determining appropriate units, raising the bar substantially—impossibly, in the view of many labor lawyers—for an employer to challenge the union's unit as excluding other employees with a shared community of interest. Abandoning the "sufficiently distinct" standard, the Board will now require employers to show that there is an "overwhelming community of interest" with the larger group by pointing to "factors that overlap almost completely." Effectively, any time a union files a petition involving a group of employees with the same job title and description, it will likely prevail. Although in deciding the case the Board sought in one part of the decision to claim that the new rule would only apply in non-acute health care facilities, the otherwise broad statements made in the decision prompted dissenting Member Brian Hayes to point out what management attorneys are generally concluding as well:

[T]his test obviously encourages unions to engage in incremental organizing in the smallest units possible * * * [It will] make it virtually impossible for a party opposing this unit to prove that any excluded employees should be included * * * [T]he Board's Regional Offices * * * will have little option but to find almost any petitioned-for unit appropriate * * *[9]

The Disruptive Impact of the Decision. The successful operation of a business often depends on the ability to maintain uniform human resource policies that provide wage scales, benefits, scheduling, promotions, and so forth to a broad range of employees within the workplace. To have these policies fragmented, requiring bargaining with a union representing a small group of employees every time changes are made, can make or break the employer's ability to maintain the flexibility needed to respond to the demands of the marketplace. This becomes even more difficult if there are multiple unions, each representing one small part of the workforce. Thus, in a retail setting, in order to change major store policies, such as hours of operation, management of work flows during peak seasons, etc., the store owner may first have to bargain with the unions separately representing the cashiers, the salespersons in each department, the loading dock, the delivery truck drivers, etc. To underscore the absurdity of the ruling in Specialty, an earlier ruling in a case involving a casino rejected a union's petition to organize the poker dealers as a distinct unit from the blackjack, roulette, craps dealers and so forth.10 Under Specialty

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[7] Cf. Wheeling Island Gaming, 355 NLRB No. 127, Slip. Op. at 1 n.2 (August 27, 2010); Newton-Wellesley Hospital, 250 NLRB 409, 411-12 (1980).

[8] Petition in the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining (Aug. 14, 2007).

[9] Specialty Healthcare, 357 NLRB No. 83, Slip. Op. at 19-20. 10 Wheeling Island Gaming, Inc., 355 NLRB No. 127, Slip. Op. at 1. 6

Healthcare, the union would likely have prevailed, as signaled by Member Craig Becker's dissent in the case.

Inability of Employers to Bring a Legal Challenge Necessitates Legislative Solution. What is perhaps most disturbing about the Specialty Healthcare decision is the inability of employers to obtain a challenge in the courts, due to the complicated procedures of the NLRB. With extremely rare exceptions, the NLRB does most its rulemaking with decisions in cases rather than regulations. There are two kinds of decisions—those such as Specialty Healthcare involving election procedures (called "R cases") and those involving unfair labor practices ("C cases"). Only decisions in C cases can be appealed directly to the federal courts, nor generally is there any realistic ability to obtain declaratory relief by a court that a Board decision is wrong. If an employer wishes to challenge an R case decision where the union "won" the election, it must refuse to bargain with the union, thus committing an unfair labor practice, which then invokes the Board's procedures in those cases. Thus, the time frame from the filing of a union petition to a review by the courts typically involves at least a year or two if not longer. Meanwhile, as employers wait for the right case to move through these procedures, every NLRB regional office in the United States will be required to rule on union petitions in accordance with Specialty Healthcare. Absent legislation overturning the decision, the disruptive effects will be felt immediately and for a very long time.

[Whereupon, at 12:19 p.m., the committee was adjourned.]