



**TESTIMONY OF G. ROGER KING**  
**JONES, DAY, REAVIS & POGUE**

**ON BEHALF OF**  
**THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT**

**BEFORE**  
**THE SUBCOMMITTEE ON EMPLOYER/EMPLOYEE RELATIONS**  
**OF**  
**THE COMMITTEE ON THE EDUCATION AND THE WORKFORCE**  
**UNITED STATES HOUSE OF REPRESENTATIVES**

**September 19, 2000**

Mr. Chairman:

The Society for Human Resource Management (“SHRM”) appreciates the opportunity to present testimony this morning before the United States House of Representatives' Subcommittee on Employer/Employee Relations of the Committee on the Education and the Workforce and strongly concurs with the Committee’s decision to hold this hearing regarding "The National Labor Relations Board: Recent Trends and Their Implications."

The Society for Human Resource Management is the leading voice of the human resource profession. Founded in 1948, SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than one hundred forty thousand (140,000) professional and student members throughout the world. The Society is the world's largest human resource management association.

Mr. Chairman, I have served on the SHRM’s National Employee Labor Relations Committee for a number of years, and I am a Partner in the Litigation and Labor and Employment Group of the law firm of Jones, Day, Reavis & Pogue.<sup>1</sup> My practice is devoted to representing employers in various labor and employment areas, including matters before the National Labor Relations Board and the state and federal courts. Prior to entering private practice, I served as Labor Counsel to Senator Robert Taft, Jr., and also as Staff Counsel to the Senate Labor Relations Committee and the Joint Committee on Congressional Operations. I presently serve as the Management Program Co-Chair of the American Bar Association Committee on Development and the Law Under the National Labor Relations Act. I also serve as an Associate Editor of the Bureau of National Affairs publication The Developing Labor Law. I have had the pleasure of working with the staff of this Committee in the past, and I have previously presented testimony on behalf of SHRM before committees of the Congress regarding issues involving the National Labor Relations Act ("NLRA" or "Act") and the National Labor Relations Board ("NLRB" or "Board").

SHRM has divided its analysis of "The National Labor Relations Board: Recent Trends and Their Implications" into the following categories: I. NLRB Substantive Decisionmaking; II. Federal Court Review of Board and General Counsel Decisions; III. NLRB Procedural, Systemic and Operational Issues; and IV. Comments Regarding the NLRB General Counsel's Recently Proposed Remedies.

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<sup>1</sup> Certain of the cases discussed in this testimony are cases that my firm or I have worked on as counsel of record or in an advisory capacity. The views that are presented herein, however, represent the position of SHRM and my personal professional views and do not necessarily represent the views or position of Jones, Day, Reavis & Pogue. I wish to acknowledge, however, the assistance of my associates Todd Sarver, Michael Rossman, Lori Clary, Jeff Winchester and my law clerk Brian Ray, in the preparation of this statement.

## **I. NLRB Substantive Decisionmaking**

At the outset of its remarks SHRM acknowledges the excellent job that NLRB Chairman John Truesdale has done in re-establishing positive relationships of the NLRB with Congress, bringing collegiality to Board decisionmaking and reaching out to the various constituencies of the Board. SHRM, along with a number of other entities and individuals, has in the past been highly critical of the Board due in part to the actions and decisionmaking of its former Chair, William B. Gould, IV.<sup>2</sup> Indeed, former Chairman Gould's partisan political pronouncements during his term, public statements regarding pending cases, "reformist" positions regarding the Act, and contentious approaches to members of Congress, practitioners and various entities certainly did not serve the Board as an institution in a positive manner. By contrast, Chairman Truesdale has re-established an appropriate budget structure for the Board by working in a positive manner with members of Congress and has been an excellent "listener" to various points of view regarding the Board as an institution. While SHRM, as noted elsewhere in this testimony, disagrees with a number of Chairman Truesdale's viewpoints in decided cases, it submits that he and his colleagues have displayed considerable professionalism and commitment to the Board as an institution.

Further, SHRM commends former Board Member, J. Robert Brame, for his recently concluded service on the Board and would note that it is extremely disappointed that President Clinton chose not to re-nominate Robert Brame to another term on the Board--Member Brame's term expired on August 31st of this year and a nominee for this position has yet to be named by the President.

Finally, SHRM would also note that General Counsel Leonard Page has brought considerable professionalism and private practice experience to his office. Again, while SHRM and its members will on a number of issues reach different conclusions than those reached by General Counsel Page, it submits he has under this Administration evidenced a sincere institutional commitment to the Board and his Office.

### **A. Failure to Follow Precedent**

The Supreme Court of the United States has consistently stressed the importance of the doctrine of stare decisis, or adhering to legal precedent, in our legal system. The Court has stated that "even handed, predictable and consistent development of legal principles. . .reliance on judicial decision, and. . .the actual and perceived integrity of the judicial process is extremely important."<sup>3</sup> The Court has also stated that stare decisis is "the means by which we insure that the law will not change

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<sup>2</sup> See generally, Flynn and Pierce, "Expertness for What?": The Gould Years at the NLRB in the Irrepressible Myth of the "Independent" Agency Distinguishing Legislative Rules from Interpretative Rules, 52 Admin. Law Review 465 (2000).

<sup>3</sup> Seminole Tribe of Florida v. Florida, 57 U.S. 44, 63 (1990).

erratically, but will develop in a principled and intelligible fashion."<sup>4</sup> The Court has instructed that departures from precedent should occur only for "articulable reasons" and that the proponent of overruling a precedent bears a "heavy burden of persuading the Court that changes in society or in the law dictate that the value served as stare decisis yield in favor of a greater objective."<sup>5</sup>

While the Supreme Court does, on occasion, overrule precedent,<sup>6</sup> such occasions are few, and as noted, strong legal and policy reasons must be present and articulated in a detailed and persuasive fashion. The NLRB, as an administrative agency certainly is required to follow United States Supreme Court precedent and the general principles of judicial decisionmaking. Although the Board may argue it is not technically bound by the doctrine of stare decisis, federal courts have consistently admonished the Board for not following the Board's own prior decisions and for failing to provide sufficient rationale for changing its own precedent.<sup>7</sup>

It is certainly important for the Board to be as consistent as possible in its decisionmaking and to follow precedent to permit employees, employers and labor organizations to act in a manner that is lawful in the workplace. SHRM submits that just, predictable and uniform policies and procedures that are enforced on a non-discriminatory basis certainly should be the goal for the Board and its General Counsel.

The current Clinton Board, starting with its decision in Boston Medical Center<sup>8</sup> in November of 1999, has unfortunately been inclined to overrule significant Board precedent at an alarming rate. The Board's rejection of precedent accelerated further in August of this year, as the Board, on a split decision basis, overruled Board precedent in a number of important areas. The timing of such decisionmaking in a Presidential election year and with the departure of one (1) of the two (2) Republican Members of the Board, certainly is a cause for concern.

Also disturbing to note is the split decisional basis on which virtually all of the cases in question have issued. Chairman Truesdale and Board Members Fox and Liebman have consistently made up the Board majority in overruling precedent. Board Member Hurtgen and former Member Brame, the Republican Members of the Board, have both been in the dissent in virtually all of these cases. As noted elsewhere in these remarks, the number of strong and lengthy dissents in such NLRB decisionmaking would appear to be at an all time high in the history of the Agency.

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<sup>4</sup> Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

<sup>5</sup> Id. at 265-66.

<sup>6</sup> See, e.g., Seminole Tribe of Florida, 57 U.S. at 63.

<sup>7</sup> See generally, Latrobe Steel Company v. NLRB, 630 F.2d 171, 177 (3rd Cir. 1980).

<sup>8</sup> 330 NLRB No. 30 (1999).

Outlined below is an illustrative summary of Board decisions which substantially depart from precedent beginning in November of 1999.

- # Boston Medical Center.<sup>9</sup> In November of 1999, in a 3-2 decision (Chairman Truesdale and Members Fox and Liebman in the majority and Members Hurtgen and Brame dissenting), the Board overturned more than twenty (20) years of precedent by holding that interns, residents, and fellows ("house staff") at the Boston Medical Center are "employees" for purposes of the NLRA. The Board majority failed to articulate compelling reasons to change Board precedent on this point and also failed to address the important and practical issues as to how the issue of academic training objectives and medical quality for house staff, who are, in fact, medical students, can be adequately addressed in collective bargaining and in the context of unfair labor practice charges.

The Board's majority in Boston Medical Center completely ignores the issue of why such an important change in the extension of coverage of the Act should not have been deferred to Congress. The Board's majority reasoning that Congress, in considering the 1974 Health Care Amendments to the Act, by "inaction" passively approved of coverage of interns, residents and house staff is particularly offensive. It is well-settled doctrine that the inaction of Congress is not the appropriate manner in which to discern Congressional intent. The Supreme Court has stated this doctrine repeatedly:

We have "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'"<sup>10</sup>

[I]naction, we have repeatedly stated, is a notoriously poor indication of congressional intent."<sup>11</sup>

[U]nsuccessful attempts at legislation are not the best of guides to legislative intent.<sup>12</sup>

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<sup>9</sup> 330 NLRB No. 30 (1999).

<sup>10</sup> United States v. Wells, 519 U.S. 482, 496 (1997) (quoting NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116, 129-130 (1971), quoting Girouard v. U.S., 328 U.S. 61, 69 (1946)).

<sup>11</sup> Schweiker v. Chilicky, 487 U.S. 412, 440 (1988) (citing Bob Jones Univ. v. U.S., 461 U.S. 574, 600 (1983) and Zuber v. Allen, 396 U.S. 168, 185-86 n. 21 (1969)).

<sup>12</sup> Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381-82 n. 11 (1969).

# Epilepsy Foundation of Northeast Ohio.<sup>13</sup> In August of this year, in a 3-2 split decision (Chairman Truesdale and Members Fox and Liebman in the majority and Members Hurtgen and Brame dissenting), the Board voted to overrule precedent dating back to the 1980s and held that non-unionized employees have the same right to representation in a disciplinary investigation that unionized employees have under NLRB v. J. Weingarten, Inc.<sup>14</sup> The *Wall Street Journal* described this decision as one of the most significant decisions of the Clinton Board. For fifteen (15) years prior to this case, the Board had consistently maintained that representational rights in the workplace in investigatory disciplinary meetings were only mandated in unionized employment settings.<sup>15</sup>

Numerous commentators have questioned the wisdom of the Board's decision.<sup>16</sup> For example, in a non-union setting a co-worker selected to accompany an employee subject to an interview will, in all likelihood, not have relevant experience to assist the interviewed employee and may, indeed, be more of a hindrance than an assistance. Further, there are numerous instances in which confidential interviews are necessary in the workplace, particularly in instances of alleged sexual harassment investigations. Additionally, is an employer required to pay or grant time off to a co-worker chosen to be present in such an investigatory interview? The Board provides no assistance answering these questions, leaving the unwary employers open to administrative and judicial second guessing.

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<sup>13</sup> 331 NLRB No. 92 (1999).

<sup>14</sup> 420 U.S. 251 (1975).

<sup>15</sup> See, Materials Research Corp., 262 NLRB 1010 (1982), where a previous split Board in a 3-2 decision held that Weingarten Rights extended to requests for co-worker representation in a non-union setting. Three (3) years later the NLRB reversed Materials Research Corporation in Sears Roebuck & Co., 274 NLRB 230 (1985), and held that Weingarten Rights were not applicable to a non-union setting. The Board's decision in Epilepsy Foundation reverses Sears.

<sup>16</sup> See, e.g., Management Attorney Comments, Daily Labor Report (BNA), Monday, August 7, 2000 "Attorneys Disagree About Wisdom of NLRB Extending Weingarten Rights."

Former NLRB Member, Marshall B. Babson,<sup>17</sup> expressed concern about the Board overruling this precedent.<sup>18</sup> Babson noted that the Act has not been amended to support this change in precedent and noted that the Board in Epilepsy Foundation did not make specific findings to support changing in this area.

Another former Board Member and Chair, Edward B. Miller, stated that extending Weingarten rights to the non-union setting "doesn't make a lot of sense," particularly since a co-worker representative in such a setting has no bargaining power and "doesn't have much to contribute" other than psychological support.<sup>19</sup>

Finally, and perhaps most importantly, the Board's analysis in Epilepsy Foundation is statutorily suspect. Section 7 rights in the Act are only triggered, in virtually all situations, by group or concerted activity. A single employee requesting that a co-worker be present at an investigatory meeting represents a completely different situation than a group of workers engaging in a walkout to protest the imposition of discipline on a fellow employee. Even assuming *arguendo* that an employee has a Section 7 right to seek assistance of a co-worker at an investigatory interview, there is nothing in the Act that requires an employer to grant such request. At a minimum, the Board's decision in Epilepsy Foundation as stated by dissenting Member Hurtgen, presents unsuspecting employers the distinct possibility of activating "unknown trip-wires" in the workplace and therefore facing, as noted above, administrative and judicial second guessing. Certainly given the Board's difficulty in meeting its current case load, it is questionable as a policy matter whether the Board and General Counsel should further extend the Agency's resources in this area.

# Retroactive application of Epilepsy Foundation and related decisions is also a concern. In Retail, Wholesale and Department Store Union v. NLRB,<sup>20</sup> the District of Columbia Court of Appeals held that it was improper for the Board to give retroactive effect to a new rule. In its decision, the court stated it was not *per se* proper for agencies to apply

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<sup>17</sup> Babson is a former Democratic Board Member and now a management attorney with Jones, Day, Reavis & Pogue in Washington, D.C.

<sup>18</sup> See, e.g., Management Attorney Comments, Daily Labor Report (BNA), Monday, August 7, 2000 "Attorneys Disagree About Wisdom of NLRB Extending Weingarten Rights."

<sup>19</sup> Id.

<sup>20</sup> 466 F.2d 380, 390 (D.C. Cir. 1972).

new rules retroactively, but emphasized that the benefits of a new policy must be weighed against the ill-effects of applying the decision in a retroactive manner. The Court articulated five (5) factors to take into consideration when assessing this balance: (1) whether the case is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area; (3) the extent to which the party against whom the rule will be applied relied on the former rule; (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying a new rule.

Unfortunately, the Board in Epilepsy Foundation largely neglected applying the above principles and concluded that its decision should be applied in a retroactive manner. This approach by the Board in retroactively applying its reversals of precedent is evident on a reoccurring basis. Such a repeated course of action compounds the problems of overruling precedent in the first instance and only adds to uncertainty, unpredictability and lack of stability in the workplace for all participants.

# Atlantic Limousine, Inc.<sup>21</sup> In another August decision, the NLRB, in a 3-2 split decision (Chairman Truesdale and Members Fox and Liebman in the majority and Hurtgen and Brame dissenting), overruled substantial Board precedent dating back to 1969.<sup>22</sup> In this decision, the Board changed the rules by which parties can provide incentives for employees to participate in an NLRB representation election. The Board's ruling applies on a retroactive basis and again provides uncertainty as to pre-election conduct. Indeed, in the case in question, a third election will be held among the employees in question to determine whether they wish union representation. While it certainly is debatable as to the merits of inducements by employers and labor organizations for employees to participate in Board elections, this case is yet another illustration of the Board's constant vacillation and inconsistency.

# Family Service Agency.<sup>23</sup> In yet another August ruling, the Board in a 4-1 decision (Chairman Truesdale dissenting), overruled forty-three (43) years of Board precedent.<sup>24</sup> This case involved the issue of who is eligible to be an election observer for a union in a representation election. The merits of the Board decision in this case

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<sup>21</sup> 331 NLRB No. 134 (1999).

<sup>22</sup> Hollywood Plastics, Inc., 177 NLRB 678, 681,(1969) and Buzza-Cardozo, 177 NLRB 589 (1969).

<sup>23</sup> 331 NLRB No. 103 (2000).

<sup>24</sup> Plant City Welding and Tank Co., 119 NLRB 131 (1957).

may ultimately be supportable, but its explanation for changing precedent would again appear to be lacking.

- # M.B. Sturgis, Inc.<sup>25</sup> This decision, overruling and modifying substantial Board precedent, was issued in a 3-1 split decision on August 25, 2000 (Chairman Truesdale, Members Fox and Liebman in the majority and Member Brame dissenting). This decision is discussed further in SHRM's remarks, but it is important to note that the majority in reaching its position, modifies and overrules Board precedent dating back to 1973, and substantially changes the rules of the workplace regarding the eligibility of contingent work force employees to participate in NLRB elections. It also creates, on a retroactive basis, substantial questions and problems for both the supplying employer of such employees and the host employer who accepts such employees in its workplace. Substantial statutory and practical problems are not addressed by the Board's decision.
  
- # Office of Prof'l Employees Int'l Union Local 251 (Sandia Corp. d/b/a Sandia Nat'l Lab.<sup>26</sup> In a split decision issued earlier this month (Chairman Truesdale, Members Fox and Liebman in the majority, Member Hurtgen concurring in part and Member Brame dissenting), the Board voted to overrule Board precedent<sup>27</sup> and change the standard by which a union can discipline its members. Again, the ultimate result of the Board might be defensible in this case, but the Board majority offers little to justify its overruling of precedent.
  
- # Chelsea Industries, Inc.<sup>28</sup> In this August 31, 2000, 3-1 decision (Chairman Truesdale and Members Fox and Liebman in the majority, Member Hurtgen dissenting), the Board again overruled substantial precedent and held that an employer cannot withdraw recognition from an incumbent union based on any facts or circumstances that occur before the conclusion of the initial certification year. SHRM agrees with Member Hurtgen's dissent that the Board majority failed to properly apply Board precedent and ignored the fact that the employee petition signers in question--who were requesting to withdraw their support from the incumbent union--had not changed their minds in any manner from the date they signed their petition until after the initial certification year had been completed. This case is a continuing example of the Board and its General Counsel imposing unwarranted impediments on employees' voting rights and correspondingly, employees' exercise of free choice, as outlined in a further section of these remarks.

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<sup>25</sup> 331 NLRB No. 173 (2000).

<sup>26</sup> 331 NLRB No. 193 (2000).

<sup>27</sup> Carpenters Local 22 Graziano Construction, 190 NLRB 1 (1972).

<sup>28</sup> 331 NLRB No. 184 (2000) .

## **B. Employee Voting Right Issues**

Section 7 of the NLRA is the very core of the Act. This Section provides the basic right of an employee to decide whether to join, or refrain from joining, a labor organization. Indeed, conducting secret ballot elections "to assure employees the fullest freedom and exercising the rights guaranteed by the Act" is the fundamental tenet of the Board's existence.<sup>29</sup> The Board "jealously guards its election process as the keystone of the Act."<sup>30</sup> Certainly, a decision by an employee whether to join or refrain from joining a labor organization is an important one that an individual should carefully make, free from coercion, pressure or undue influence from any source. Correspondingly, a decision by an employee to seek to withdraw from recognition is also an important statutory right that should also only be exercised after careful thought and also be free from improper influence and pressure. In theory, the protections afforded as to whether an employee initially elects to be represented or refrains from being represented by a labor organization should also be equally protected and provided in the same manner in the decisional process for an employee to withdraw his or her decision for union representation. Unfortunately, it appears that latter employee rights to withdraw from union representation have become less of a concern to the Clinton Board and its General Counsel.

Concurrent with the inattention and statutory deviation by the Board and its General Counsel to employee voting rights is a trend of unions engaging in attempts to obtain "neutrality" in the organizing context. One of the new acronyms that has developed from these initiatives is "N/CC" which stands for the proposition of "Neutrality-Card Checks."<sup>31</sup> A further development of this phenomenon is the practice of unions "bargaining to organize." Undoubtedly, these developments have occurred given the union movement's well-documented difficulties in organizing new members, especially through secret ballot NLRB elections. What predictably occurs in such situations is that employers, at the union's insistence, agree to (1) give unions access to their employees; (2) not campaign against the union; (3) not utilize NLRB procedures; and (4) recognize the union without any type of secret ballot vote--representation is usually based on an authorization card check neutral basis. "Agreements" in this area also, on occasion, automatically accrete or add non-union employees to a pre-existing bargaining unit. My fellow panelist this morning, former NLRB Member, Charles Cohen, provides a thoughtful analysis of this area. SHRM echoes Mr. Cohen's concerns.

In the union "neutrality" recognition area, the Board is apparently sending signals to employers and labor organizations that virtually any type of recognition agreement will be sanctioned no matter how compromised employees' free choice Section 7 rights may be in such agreements.

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<sup>29</sup> 29 U.S.C. §159(b).

<sup>30</sup> Modern Hardchrome Serv. Co., 187 NLRB 82, 83 (1970); Sewell Mfg. Co., 138 NLRB 66, 69 (1962); Clearwater Transp., Inc., 133 F.3d 1004, 1008-09 (7th Cir. 1998).

<sup>31</sup> See generally, Adrienne E. Eaton and Jill Kriesky, Organizing Experiences Under Union-Management Neutrality and Card Check Agreements, as a Report to the Institute for the Study of Labor Organizations, George Meany Center for Labor Studies, April 1999.

Indeed, two (2) weeks ago, in Pall Biomedical Prods. Corp.,<sup>32</sup> the Board, in a split 3-1 decision (Chairman Truesdale and Members Fox and Liebman in the majority and Member Hurtgen dissenting), overturned the decision of the Administrative Law Judge and found that an employer violated the Act when it repudiated a voluntary letter of recognition agreement wherein a company stated it would extend recognition to the union at one of its facilities if one or more workers at such location was performing bargaining unit work. The Board majority concluded that the recognition agreement was a mandatory subject of bargaining and that the employer therefore violated Section 8(a)(5) of the Act in refusing to continue the agreement.

This is exactly the type of improper "signal" that SHRM is concerned about to both employers and unions alike. The Board appears to be giving considerable sanction and support to virtually any type of recognition agreement, notwithstanding the detrimental impact upon employee voting rights. SHRM agrees with Member Hurtgen's dissent in Pall Biomedical that this type of letter agreement is not a mandatory subject of bargaining since recognition of the union in question, without a showing of employee majority support, is violative of Section 7 of the Act, and therefore clearly unlawful.

Another example of infringement of employee free choice is the Board's recent approach in unit clarification matters. The Board, in John P. Scripps Newspaper Corp. dba the Sun,<sup>33</sup> has changed the law and the manner in which unrepresented employees can be accreted; that is, automatically added to an existing bargaining unit without such employees having an opportunity to vote.

Further, as mentioned above, the Board's August decision in Chelsea Industries also substantially removes the right of employees to a vote on whether they wish to discontinue their initial choice of representation. Along the same lines, the General Counsel of the Board has been urging the Board to overrule long-standing Board precedent established in Celanese Corp. of America,<sup>34</sup> and only permit employers to withdraw representation of a union based on a Board-conducted election. Current law in this area, including the Supreme Court's recent decision in Allentown Mack Sales & Service, Inc. v. NLRB,<sup>35</sup> permits an employer to withdraw recognition of a union based upon such objective considerations as signed employee petitions by a majority of bargaining unit employees stating that they no longer desire union representation.<sup>36</sup> It is ironic that the General Counsel is taking this position when

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<sup>32</sup> 331 NLRB No. 192 (2000).

<sup>33</sup> 329 NLRB No. 74 (1999).

<sup>34</sup> 95 NLRB 64 (1951).

<sup>35</sup> 118 S. Ct. 818 (1997).

<sup>36</sup> See Levitz Furniture Company, Case No. 20-CA-26596, presently pending before the Board.

it so expeditiously endorses initial employee representation through neutrality card checks and other non-election procedures.<sup>37</sup>

In a related matter, the Board has made it increasingly difficult for employers to obtain a secret ballot election when they are being pressured under various "corporate campaign" approaches by labor organizations and when they are requested by labor organizations to agree to numerous types of neutrality agreements. For example, in New Otani Hotel,<sup>38</sup> the Board, in a 2-1 split decision (Members Fox and Liebman in the majority and Member Hurtgen dissenting), held that a union's picketing and boycott of a hotel, combined with its request that the employer sign a neutrality/card check agreement, did not constitute a "present" demand for recognition sufficient to permit the employer to obtain a secret ballot NLRB election.

The Board majority noted its policy preference in favor of permitting a labor organization to request an election only once it has reached a point in its organizing activities where it believes it has a chance of success. SHRM submits such a biased policy approach in this area not only is clearly discriminatory toward employers, but unjustly prohibits employees from deciding whether they wish representation. Member Hurtgen, in his dissent, notes that the majority ignores the union's request for card check recognition and the continuing picketing and related recognitional initiatives by the union. Member Hurtgen concludes by stating:

My colleagues also cite the need "to prevent an employer from precipitating a premature vote before a union has an opportunity to organize," thereby interrupting employees' efforts to organize....They also express concern that an employer may seek an election "early in

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<sup>37</sup> See also, MGM Grand Hotel, Inc., 329 NLRB No. 50 (1999) where the Board, in a 3-2 split decision (Chairman Truesdale, Members Fox and Liebman in the majority and Members Brame and Hurtgen dissenting), held that an employer's voluntary recognition of a union barred three consecutive decertification petitions because a reasonable time period to bargain had not elapsed at the time the petitions were filed. Members Brame and Hurtgen contended in their dissent that the majority's decision violated the rights of employees in an election. Similarly, in Supershuttle of Orange County, Inc., 330 NLRB No. 138 (2000), the Board, in a split 2-1 decision (Chairman Truesdale and Member Liebman in the majority and Member Hurtgen dissenting), found that a Teamster petition for a decertification election to oust another union should be dismissed because an unfair labor practice charge against the employer had been resolved in the collective bargaining agreement between the employer and the incumbent union. Member Hurtgen dissented submitting that a settled charge should not taint a petition for an election because it deprives employees the right to choose, reject or change a bargaining representative. SHRM believes that Member Hurtgen correctly pointed out that the majority's decision could lead to collusion between an employer and an incumbent union to freeze out a rival union.

<sup>38</sup> 331 NLRB No. 159 (1999).

organizational campaigns in an effort to obtain a vote rejecting the union before the union had a reasonable opportunity to organize." Those statements have no relevance to the instant case. The Employer contends, and the Union does not dispute, that the Union's efforts to organize have continued for over 4 years. Thus, this is not a case about a "premature" vote to be held "early" in an organizational campaign.<sup>39</sup>

Finally, in the employee voting area, SHRM is quite concerned about the Board's uneven application of its "blocking charge" procedure. Such procedure is purely an administrative creation of the Board and has no statutory basis in the Act. The theory behind such procedure is that the election atmosphere may have been tainted by alleged illegal actions of either an employer or a union, and therefore the election in question must be postponed.<sup>40</sup> In certain instances, the petition in question seeking an election also may be dismissed after a blocking charge has been filed if the alleged conduct is proven to have tainted the petition in the first instance, e.g., employer unlawful assistance in decertification petitions. Virtually unlimited discretion is given to Regional Directors of the Board in determining when the Board's blocking procedure is to be implemented, how long it is to be implemented and when, if at all, it is to be withdrawn. Indeed, a decision in one regional office may bind other regional offices where elections are involved in various geographic regions of the country.

The practical reality of this procedure is that a labor organization can continually use blocking charges to delay an election petition it has filed so as to time the ultimate date of the election so that is most advantageous to the labor organization. Labor organizations and their counsel are fully aware that in many regions the Board will automatically apply the blocking procedure to certain unfair labor practice charges and that it will take a certain amount of administrative time to investigate even the weakest charges.

SHRM submits an even more egregious application of the Board's blocking procedure, however, is in the decertification area where a union can literally foreclose the meaningful opportunity for employees to exercise their Section 7 rights with respect to whether they desire to retain representation. Savvy union representatives can manipulate such blocking charge procedure in a manner that the initiators of a decertification petition quickly can become discouraged and ultimately perhaps lose interest in whether an election is ever held.

Unfortunately, federal circuit courts of appeal do not have the ability to provide relief in this area. As noted by the Seventh Circuit some time ago, the Board's blocking charge procedure is subject to considerable abuse by labor organizations, but since such practice is of the Board's administrative making, the court "lacked the power to do anything about it."<sup>41</sup>

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<sup>39</sup> Id.

<sup>40</sup> NLRB Casehandling Manual ("NLRB CHM"), ¶ 11730.

<sup>41</sup> Pacemaker, Inc. v. NLRB, 260 F.2d 880, 883 (7th Cir. 1958).

On this point, it is particularly interesting to note that the Board prides itself on obtaining expeditious elections when petitions are filed by labor organizations. The median time from the date of the filing of a union-sponsored petition for election to the date of an election presently is forty-one (41) days.<sup>42</sup> In such situations, an employer is frequently served with a copy of the petition by fax and is required, in most instances, to prepare for a hearing in less than two (2) weeks before the Board's regional office.<sup>43</sup> An employer's ability to obtain a continuance of such hearing date is virtually impossible. SHRM submits that the Board should strive for the same expeditious election petition processing for decertification elections<sup>44</sup>.

SHRM submits that Congress should fully explore the Board's blocking charge procedure and require the same expeditious investigation and processing of decertification petitions as is the case with union-sponsored election petitions. While the theory and concept behind the blocking charge procedure has certain merit, steps must be taken to prohibit its serious misuse and abuse.

**C. Retaliatory Lawsuit Issues--B E & K Construction Company, 329 NLRB No. 68 (1999)**

For some time, the Board has recognized and applied what has become to be known as the Bill Johnson's doctrine.<sup>45</sup> This Doctrine comes from the United States Supreme Court decision of the same name.<sup>46</sup> The holding in the case stands for the proposition that employers cannot file a retaliatory lawsuit against labor organizations if the labor organization in question is engaged in protected activities. The Board (Chairman Truesdale, Members Fox & Liebman) in B E & K held that an unsuccessful law suit by an employer against several unions under Section 303 of the Labor Management Relations Act and the Sherman Antitrust Act constituted a retaliatory Section 8(a)(1) unfair labor practice charge. Accordingly, the Board accordingly ordered the employer to pay the unions' legal fees in defending against the lawsuit. The employer in question was a non-union contractor who had been awarded a contract to modernize a steel mill. The union conducted a corporate campaign to force the owner of the mill to remove the employer from the job. The campaign included environmental lobbying, secondary picketing, a lawsuit alleging health and safety violations, and contractual grievances against the employer's joint venture partner.

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<sup>42</sup> Report of NLRB General Counsel, Feinstein, on Operational Developments in Reoccurring Legal Themes, November 19, 1999, reprinted in the Daily Labor Report (BNA) November 23, 1999 ("Feinstein Report").

<sup>43</sup> NLRB Casehandling Manual, ¶11082.3 (the region should provide at least five (5) days notice of the hearing).

<sup>44</sup> Data could not be located to determine median time frames for decertification elections after blocking charges had been filed by a labor organization.

<sup>45</sup> Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983).

<sup>46</sup> Id.

In Petrochem Ins.,<sup>47</sup> the Board reached a similar conclusion to its B E & K holding. The employer in Petrochem was a non-union construction company that performed work for power plants and similar facilities. Several unions conducted a corporate campaign against various plant owners by filing environmental objections and delaying the issue of construction permits. The employer responded by filing an action against the unions for treble damages under RICO and the Sherman Act. After the conclusion of the litigation, which was unsuccessful, the Board (Chairman Truesdale and Members Fox and Liebman), found that the employer-initiated litigation was retaliatory and therefore a violation of Section 8(a)(1). The Board panel held that the employer's attempt to recover treble damages was evidence of retaliatory offense since the employer could have sought a "less drastic" remedy by filing a Section 303 action under the Labor Management Relations Act for damages under Section 8(b)(4) of the Act.

Finally, in another recent decision, Roundout Electric, Inc.,<sup>48</sup> a Board panel (Chairman Truesdale and Members Hurtgen and Brame) held that an employer did not violate Section 8(a)(1) of the Act when it filed criminal trespass charges against union organizers who entered its office trailer at a job site. Although the trespass charges were dismissed by the state court on a pleading technically, the Board panel nevertheless concluded that they lacked merit under the Bill Johnson's analysis. The Board panel further concluded, however, that the charges were not "retaliatory" under the Act since they were filed as a result of intrusion by organizers.

The above cases, and similar cases, have taken on added importance given the increasing use by labor organizations of corporate campaigns, *i.e.*, actions of varying types designed to pressure and coerce an employer into certain actions including often the voluntary recognition of a union as a bargaining agent for its employees without the benefit of an election. An employer is often placed in a very precarious situation as a result of the Board's "second guessing" litigation initiated by employers in its various federal and state courts to respond to such corporate campaigns. Causes of action filed by employers can be found to have merit in part, and be dismissed in part, but still be subject to labor union Section 8(a)(1) retaliation unfair labor practice charges. Further, legitimate employer litigation responses to union corporate campaigns can be dismissed on the basis of procedural technicalities, and therefore also expose the initiating employer to Section 8(a)(1) retaliation charges. Such potential legal exposure to an employer that is faced by multi-faceted union corporate campaigns, coupled with potential to have to pay the union's attorneys fees, significantly chills employer rights and provides an unfair advantage to unions in the corporate campaign area. The issue of making employers pay a union's attorneys' fees is especially troubling. This type of Board "remedy" clearly would appear to be violative of the "American Rule" which generally precludes the award of attorneys' fees in legal

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<sup>47</sup> 330 NLRB No. 10 (1999).

<sup>48</sup> 329 NLRB No. 87 (1999).

proceedings.<sup>49</sup> SHRM submits the Board needs to revisit this area of the law and establish a "leveler playing field" for employers.

#### **D. Merit Pay Issues--McClatchy Newspapers and Detroit News**

Numerous members of SHRM have established merit pay practices wherein employees are rewarded for individual excellence in the performance of their job duties. Unions, however, regularly oppose merit pay plans arguing that wages should be applied in a uniform manner to all members of a bargaining unit or for categories of employees in a unit. Unfortunately, unionized employers that have in place merit pay plans, or who wish to establish such plans, are on a very "slippery slope" as a result of recent Board decisions. The Board in McClatchy Newspapers<sup>50</sup> found the employer guilty of a Section 8(a)(5) violation for failure to bargain in good faith the employer's merit pay plan. The Board, however, provided little guidance for employers that wish to establish such plans. Indeed, as a result of McClatchy, and its progeny, it would appear that unionized employers that wish to maintain or establish merit pay plans proceed at their legal peril as unions may argue such plans are unlawful and not a mandatory subject of bargaining. Alternatively, unions may argue that such plans provide too much discretion to the employer, and therefore are violative of a union's representation of the bargaining unit.

This issue was revisited recently in the "Detroit Newspapers" litigation. As the Committee is undoubtedly aware, there have been a series of labor disputes involving the Detroit, Michigan newspapers and the unions representing various employees of these publications. One of the central issues of such litigation has been the validity of a merit pay plan bargaining proposal made by the agency that jointly operates the Detroit newspapers. The Board reasoned in its findings that the employer violated the Act by submitting a bargaining proposal for a merit pay plan that was "standardless." The Board, therefore, concluded that the employer could not implement its plan even at impasse because it would be destructive of employees' collective bargaining rights.

The D.C. Circuit Court of Appeals in July of this year unanimously reversed the Board on this point. The Circuit Court found that the Board acted arbitrarily and capriciously in determining that the employer could not unilaterally implement its merit pay proposal. The Circuit Court chastised the Board for attempting to apply McClatchy II in such a manner that could "simply brandish McClatchy, without any real explanation, to prevent an employer from ever implementing a merit pay proposal after impasse."<sup>51</sup> The Circuit Court went on to hold as follows:

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<sup>49</sup> Summit Valley Industries v. Local 112, United Brotherhood of Carpenters & Joiners of America, 456 U.S. 717 (1982).

<sup>50</sup> 321 NLRB 1386 (1996), en'd 131 F.3d 1026 (D.C. Cir. 1997) (McClatchy II).

<sup>51</sup> Detroit Typographical Union v. NLRB, 216 F.3d 109, 117 (D.C. Cir. 2000).

We conclude. . .that the Board's finding cannot stand because it is infected with. . .legal error. . .and it is otherwise not supported by substantial evidence on the record as a whole.<sup>52</sup>

Greater clarity is necessary in this area for all parties, particularly unionized employers who desire to continue or to implement merit pay plans. Although labor organizations, and perhaps certain members of the Board, may have philosophical or policy reasons to oppose merit pay, such opposition cannot and should not interfere with the establishment of proper legal guidance on this important compensation issue in the nation's workplace.

**E. Access to Private Property Issues--Sandusky Mall Co., 329 NLRB No. 62 (1999)**

In Sandusky Mall Co.,<sup>53</sup> the Board, in a 3-2 decision (Members Truesdale, Fox and Liebman, in the majority and Members Hurtgen and Brame dissenting), held that the Sandusky Mall Company ("Mall") discriminated against the United Brotherhood of Carpenters and Joiners ("Union") because the Mall refused access to its premises by the Union so that it could handbill a tenant of the Mall. The Mall had permitted several charitable events on its property such as an Easter Seals cake auction and an American Red Cross Bloodmobile. The rationale for permitting such activities was to enhance the Mall's public image, bring more patrons into its mall, and to provide valuable public services. In keeping with this goal, the Mall exercised its business judgment in choosing the organizations allowed to solicit on its property. The Mall's policy prohibited access, however, to disruptive groups, as well as to groups that conflicted with the business of any mall tenant.

The Union sought access to the Mall as part of an attempt to organize a boycott against a mall tenant, Attivo. Attivo had hired a non-union construction firm to remodel its store. Without first seeking permission from the mall, the Union handbilled in front of Attivo. The Union refused to leave when asked, and the handbillers were arrested for trespass.

In rendering its decision finding illegal activity on the part of the Mall, the Board chose to completely ignore precedent of the United States Court of Appeals for the Sixth Circuit, the appellate court in the jurisdiction of the case. Indeed, the Board expressly stated that its decision conflicted with the Sixth Circuit's, but that it is the Board's duty to "apply uniform policies the Act, and . . . as a practical matter, [it is] impossible for us to acquiesce in every contrary decision by the Federal courts of appeals."<sup>54</sup> The Board proceeded to hold, as it has in other cases, that an employer commits a violation of the Act "by denying union access to its property while permitting other individuals, groups,

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<sup>52</sup> Id. at 121.

<sup>53</sup> 329 NLRB No. 62, 1999 WL 812243 (September 30, 1999).

<sup>54</sup> Id.

and organizations to use its premises for various activities” regardless of the charitable and/or civic nature of the permitted activities.<sup>55</sup>

The United States Supreme Court has addressed non-employee access to private property in two (2) particularly important cases: Lechmere, Inc. v. NLRB,<sup>56</sup> and NLRB v. Babcock & Wilcox Co.<sup>57</sup> Pursuant to such precedent, a property owner need not provide non-employee union activists access to its property except in two limited situations: (1) if there are no reasonable means for the union to communicate its message elsewhere, and (2) if it has "discriminate[d] against the union by allowing other distribution.”

Interpreting the United States Supreme Court's discussions in Lechmere and Babcock & Wilcox, in Cleveland Real Estate Partners v. NLRB,<sup>58</sup> the Sixth Circuit concluded that "discrimination. . . [meant] favoring one union over another, or allowing employer-related information while barring similar union-related information." The Sixth Circuit observed that:

Babcock and [other Supreme Court union access cases], which weigh heavily in favor of private property rights indicate that the [Supreme] Court could not have meant to give the word "discrimination" the import that the Board has chosen to give it. To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so.<sup>59</sup>

Other Circuits have reached conclusions similar to that of the Sixth Circuit in interpreting Lechmere and Babcock & Wilcox. In NLRB v. Pay Less Drug Stores Northwest, Inc.,<sup>60</sup> the Ninth Circuit, held that “[a] business should be free to allow local charitable and community organizations to use its premises, whether for purely altruistic reasons or as a means of cultivating good will, without thereby being compelled to allow the use of those same premises by an organization that seeks to harm that business.” The Ninth Circuit refused to enforce a Board order directing a property owner to allow union picketers on its sidewalk because it had in the past allowed a Bloodmobile and a Girl Scout cookie sale on its property.

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<sup>55</sup> Id.

<sup>56</sup> 502 U.S. 507 (1992).

<sup>57</sup> 351 U.S. 103 (1956).

<sup>58</sup> 95 F.3d 457, 465 (6th Cir. 1996).

<sup>59</sup> Id. at 465.

<sup>60</sup> 1995 WL 323832 (9th Cir. 1995).

In Riesbeck Food Markets, Inc. v. NLRB,<sup>61</sup> the Fourth Circuit likewise concluded that any discrimination claim required a finding that the employer treated similar conduct differently. The Fourth Circuit found a “legally significant difference between the charitable solicitation that Riesbeck allowed and the union’s ‘do not patronize’ solicitation which Riesbeck prohibited.” The Fourth Circuit reiterated its interpretation of federal labor law in Be-Lo Stores v. NLRB.<sup>62</sup> Citing the Sixth Circuit’s decision in Cleveland Real Estate Partners with approval, the Fourth Circuit stated that it doubted that “an employer’s approval of limited charitable or civic distribution while excluding union distribution constitutes discrimination.” Similarly, the Tenth Circuit held in Four B Corp. v. NLRB,<sup>63</sup> that “[c]ourts have recognized that employers may make neutral . . . distinctions between different kinds of solicitations.”

Despite the overwhelming consistency in interpretation of Supreme Court precedent by the various Federal courts of appeals, the Board imposes its own interpretation, apparently concluding that it need not abide by the decisions of the Courts of Appeals and the Supreme Court. In doing so, the Board compromises its integrity and its function in fashioning Federal labor policy. The Board is not an administrative agency granted carte blanche authority by Congress to choose what law or interpretation of the law it will apply in fulfilling its administrative role. Yet, that is what is happening in this area of the law.

**F. Employee Handbook Issues--Flamingo Hilton, 330 NLRB No. 34 (1999)**

The Board and its General Counsel also apparently continue to scour employee handbooks for potential violations of Section 8(a)(1) of the Act even when there is no evidence that the employer at issue has used the terms of the employee handbook to chill Section 7 rights under the NLRA.

For example, in Super K-Mart<sup>64</sup> the employer was called upon to defend a provision of its employee handbook that stated: "Company business and documents are confidential. Disclosure of such information is prohibited." The employer did not use the confidentiality provision to prohibit employees from discussing the terms and conditions of their employment with others. Nonetheless, when a union attempting to organize the company's employees filed a charge alleging that the handbook violated Section 8(a)(1) of the Act, the Regional Director issued a complaint and notice of hearing, and the administrative law judge ruled against the employer. In so doing, the judge concluded that, since the employer did not tell its employees that the provision should not be interpreted to preclude concerted activity, that provision was per se unlawful since it could reasonably be read by employees to encompass matters pertaining to their wages, hours, and conditions of employment. On appeal,

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<sup>61</sup> 1996 WL 405224 (4th Cir. 1996).

<sup>62</sup> 126 F.3d 268 (4th Cir. 1997).

<sup>63</sup> 163 F.3d 1177 (10th Cir. 1998).

<sup>64</sup> 330 NLRB No. 29 (1999).

Members Hurtgen and Brame, over the strong dissent of Member Liebman, reversed the administrative law judge's decision and order, finding instead that "employees reasonably would understand from the language of the . . . confidentiality provision that it is designed to protect the [employer's] legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions."<sup>65</sup>

While the handbook provision at issue in Super K-Mart passed the Board's muster, other employers have not been as fortunate. For example, in Flamingo Hilton<sup>66</sup> the Board found unlawful, among other things, the employer's rule prohibiting "disorderly conduct. . . including fighting, horseplay, threatening, insulting, abusing, intimidating, coercing or interfering with any guests, patrons, or employees." The Board ordered the employer to cease and desist from "[m]aintaining rules prohibiting abusive or insulting language without making clear that such rules are not intended to bar lawful union organizing propaganda." Id. The Board did so notwithstanding the fact that the rules at issue were not initiated in response to concerted activity and had not been used to discipline employees for engaging in concerted activity. As Member Brame candidly noted, "prosecution of trivial violations such as these is not a wise use of the Board's resources."<sup>67</sup>

The Board's attack on facially-neutral, lawfully-applied handbook policies presents serious obstacles to employers who legitimately wish to regulate workplace conduct. Further, the Board and its General Counsel's focus on the completely hypothetical impact such policies may have on concerted activity, is not only arguably beyond the reach of the NLRA, but a very poor use of scarce agency resources.

### **G. Temporary Workforce Employees**

As noted previously, in M.B. Sturgis, Inc.,<sup>68</sup> the Board overturned and modified seventeen (17) years of precedent and held that an employer that utilizes a contingent work force, can be forced into a bargaining relationship with the supplier of such contract employees. Such a controversial decision, over the dissent of Members Hurtgen and Brame, fails to address in any meaningful manner the practical problems of forcing two employers to bargain together with a union

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<sup>65</sup> Id.

<sup>66</sup> 330 NLRB No. 34 (1999).

<sup>67</sup> Id.; see also Aroostook Cty. v. NLRB, 81 F.3d 209 ( D.C. Cir. 1996) (reversing Board's finding that confidentiality provisions in policy manual were unlawful and noting that "[i]f and when . . . employees find that the rule is being unreasonably enforced so as to infringe on protected activities, they may seek appropriate redress"); Lafayette Park Hotel, 326 NLRB No. 69 (1998) (challenging employer's standards of conduct, which had been in force for years, were not instituted in response to union activity, and had not been used against any employee engaging in protected activity).

<sup>68</sup> 331 NLRB No. 173 (1999).

regarding terms and conditions of employment of their two (2) distinctly different groups or types of employees. Beyond the practical problems that should be self-evident in such three-party bargaining, is the substantial probability that a greater number of representation hearings will now have to be held in this area to determine if a joint employer situation exists, and if that answer is in the affirmative, whether there is a “community of interest” between the host employer employees and the supplier contract employees. The practical reality will be that such contract employees in Board voting unit decisions will become “pawns” of the parties and be utilized in a manner that best suits the voting strengths of the respective parties. Further, the Board’s decision in M.B. Sturgis has the strong potential of having employers reduce their use of a contingent work force altogether to avoid three-party bargaining scenarios, or in the alternative, further eliminate their existing regular and part-time employee workforce and replace such employees with all contract workforce employees.

In his dissent, Member Brame perhaps best characterized the defect in the majority's holding by stating the following:

In the interest of facilitating union organizing in the modern workplace. . . today's [majority] decision sacrifices [the] fundamental statutory principle of commonality of interest by forcing employers of different employee groups to bargain together despite their differing and often conflicting interests with respect to the bargaining unit employees.<sup>69</sup>

Criticism has indeed been considerable of the Board's decision in M.B. Sturgis. For example, former NLRB Member, John M. Raudabaugh, stated that the Board provided no guidance on how bargaining would work in a situation where temporaries would be accreted or added to an existing unit. Daniel Yager, General Counsel for the Labor Policy Association, an association of human resource executives and employers, stated that the Board majority ruling will "create chaos" because temporaries or contingent workers will be subject to two (2) different sets of work rules--those of the supplier employer and the user employer. Mr. Yager questioned how seniority would be determined in such a situation and how employees in such a hybrid bargaining unit would be rewarded or disciplined. John S. Irving, a former NLRB General Counsel, observed that there are also numerous and practical legal problems with the Board's ruling and questioned whether a union in such a situation could lawfully go on strike against a supplier employer or whether such conduct would constitute a secondary boycott.<sup>70</sup>

SHRM concurs with the Comments of Messrs. Irving, Raudabaugh and Yager. Sturgis is not good law. The Board majority's reasoning that the increased use of contingent workers as a justification for its holding is particularly questionable given the Board's return to previous positions taken by former Boards in the 1970s to address this area. Apparently, the Board majority feels a "70s"

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<sup>69</sup> 330 NLRB No. 34.

<sup>70</sup> See generally, "Contingent Workers--Will NLRB's Recent Sturgis Ruling Help or Hurt Organizing, Bargaining?" Daily Labor Report (BNA) Wednesday, September 6, 2000.

approach is the proper manner to respond to a phenomenon the Board identifies as substantial change in the workplace in the year 2000. Such "reasoning" simply does not make sense.

### **I. Statutory Supervisors Definition**

Section 2(11) of the National Labor Relations Act defines the term supervisor as follows:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.<sup>71</sup>

The Clinton Board, however, has continued to struggle with how this definition is supplied in the workplace, particularly for health care employers.<sup>72</sup> Notwithstanding the Supreme Court's Decision in NLRB v. Healthcare and Retirement Corp. ("HCR")<sup>73</sup> wherein the Court's majority rejected the Board's holding that a nurse's supervisory authority is not exercised in the interest of the employer " if it is incidental to the treatment of patients."<sup>74</sup> Following the HCR decision the Board has issued numerous decisions finding that nursing personnel at various healthcare institutions are not statutory supervisors. Such decisions apparently rest on findings either that the employees in question do not exercise sufficient independent judgment in the workplace or that authority they do have is of a routine nor clerical nature. This issue unfortunately is an issue that employers have had to suffer through for a substantial period of time.<sup>75</sup> Time and space in these remarks does not permit a full treatment of the many cases that could be reviewed with the Committee. Suffice it to say that employers and certain circuit courts of appeal have lost their collective patience with the Board on this subject. As the Sixth Circuit Court of Appeals recently stated in rejecting the Board's position on this issue:

[I]t is up to Congress to carve out an exception for the health care field, including nurses, should Congress not wish for such nurses to be

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<sup>71</sup> 29 U.S.C. §152(11).

<sup>72</sup> See Office of General Counsel, Division of Operations-Management Memorandum OM99-44, August 24, 1999--NLRB Guideline Memorandum on Charge Nurse Supervisory Issues.

<sup>73</sup> 511 U.S. 571 (1994).

<sup>74</sup> Id. at 576-580.

<sup>75</sup> See generally, G. Roger King, Where Have All the Supervisors Gone--The Board's Misdiagnosis of Health Care & Retirement Corp., 13 Lab. Law. 343 (1997).

considered supervisors. It is the responsibility of this court to interpret the law as written by Congress and promulgated through case decisions. Although the Board has maintained it will not yield this point, when the facts so warrant, as in the case at bar, this court must reverse the decision of the Board.<sup>76</sup>

The Third and Fourth Circuit Court of Appeals also have similarly disagreed with the Board's logic in this area.<sup>77</sup>

Although there is certain support for the Board's position among other circuit courts,<sup>78</sup> this is an area of law that again needs substantial clarification for all constituencies of the Board. It is important that employers and unions alike know who is and who is not a supervisor in the workplace. Such a definition is not only important in the voting eligibility and organizing context, but also quite important in the discipline area. Constant change in position and direction on this point simply is not good policy for anyone.

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<sup>76</sup> Integrated Health Services of Michigan, at Riverbend, Inc., v. NLRB, 191 F.3d 703 (6th Cir. 1999).

<sup>77</sup> See Passavant Retirement and Health Center v. NLRB, 149 F.3d 243 (3rd Cir. 1998); Beverly Enterprises, Virginia v. NLRB, 165 F.3d 290 (4th Cir. 1998); and Caremore, Inc. v. NLRB, 129 F.3d 365 (6th Cir. 1997).

<sup>78</sup> See e.g., NLRB v. Hilliard Development Corp., d/b/a Provident Nursing Home, 187 F.3d 133 (1st Cir. 1999); NLRB v. Autobon Healthcare Center, 170 F.3d 662 (7th Cir. 1999) (en banc); Linwood Health Center, Minnesota, Inc. v. NLRB, 148 F.3d 1042 (8th Cir. 1998) and Grandview Healthcare Center v. NLRB, 129 F.3d 1269 (D.C. Cir. 1997).

## II. Federal Court Review of Board and General Counsel Decisions

Not only has the Board been split in its own decisionmaking, it also has faced difficult times of late in reviews by the United States Courts of Appeal. Indeed, many circuit courts have been particularly critical of the Board in its decisionmaking, including chastising the Board for failing to explain the rationale of its decisionmaking, particularly when the Board disregards its own precedent. Indeed, all twelve (12) of the Federal Circuit Courts of Appeal have reversed, in whole or in part, Board orders over the last two (2) years.<sup>79</sup>

In excess of sixty (60) cases are involved in such reversals. Outlined below by subject area is an illustrative listing of such cases.<sup>80</sup>

### ELECTIONS & BARGAINING UNITS

Pacific Micronesia Corp. v. NLRB, 219 F.3d 661 (D.C. Cir. 2000) **Concluding that the Board's overturning of an initial, employer-won, union election was based upon "evidence that simply is not relevant" and "obvious" gaps in reasoning, the court denied the Board's petition for enforcement.** The court concluded that the evidence in the case simply did not support a conclusion that the media-reported statements of third parties – legislators opposed to union organization in general – tainted the results of the election.

North of Market Senior Servs., Inc. v. NLRB, 204 F.3d 1163 (D.C. Cir. 2000) Finding that the employer had made a prima facie showing that objectionable conduct occurred during the course of a union-won election, the court determined that the Board erred by failing to either (1) overturn the election, or (2) conduct a hearing on the matter.

MacMillan Pub. Co. v. NLRB, 194 F.3d 165 (D.C. Cir. 1999) The Regional Director, with Board approval, overturned a representation election on the basis of a company leaflet. The decision concluded that the leaflet violated the principle that the employer should act as "if a union were not in the picture." **The court held, however, that under the Act no such principle governs employer**

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<sup>79</sup> Representatives of the Board and its Office of General Counsel may respond by stating that on a consistent basis over sixty percent (60%) of its orders are enforced, in whole or in part, by the federal courts. Such a statement is correct. This statement ignores the fact, however, that a substantial number of such affirmances are of routine cases or involve cases of relatively uncontroverted facts or where the law in question is quite clear. In a substantial number of cases involving novel issues of law, important policy questions or disputed facts, the Board's success rate, however, over the last two (2) years is subject to question.

<sup>80</sup> Certain of the case descriptions in this testimony were derived from those found at <http://www.nlrbwatch.com/subscribers/cases/Federal>, a service provided by the Labor Policy Association. SHRM and Jones Day wish to acknowledge the helpful assistance that this database provided in the preparation of this testimony.

**communications during election campaigns, expressing doubt that such a principle could possibly exist in light of the First Amendment.**

Associated Milk Producers, Inc. v. NLRB, 193 F.3d 539 (D.C. Cir. 1999) Faced with a dispute over a stipulated bargaining unit, the court stated that the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. **The court found, contrary to the Board, that only when the stipulation is a nullity from which no intent can be discerned should the Board ignore the agreement and determine the bargaining unit on the basis of its community of interest test.**

Sundor Brands, Inc. v. NLRB, 168 F.3d 515 (D.C. Cir. 1999) The court determined, for several reasons, that the Board erred in certifying a unit, as the evidence demonstrated that the employees lacked a community of interest. **The court stated, for example, that "[h]ow the Board could conclude from this evidence that the employees in the unit interact frequently with each other eludes us."**

Freund Baking Co. v. NLRB, 165 F.3d 928 (D.C. Cir. 1999) The court refused to enforce a Board bargaining order, finding that the union's sponsorship, one week before the election, of employees' lawsuit seeking overtime pay from the employer violated the rule against providing gratuities prior to an election.

Time Warner Cable v. NLRB, 160 F.3d 1 (D.C. Cir. 1998) The court overturned a Board determination that an employee was ineligible to vote in an election. The employee had worked forty hours in the unit prior to the election and unit work accounted for at least thirty percent of his time in two of the three weeks between the eligibility date and the election. The court held, contrary to the Board, that this established "a sufficient interest in the bargaining unit's conditions of employment."

Avondale Indus. Inc. v. NLRB, 180 F.3d 633 (5th Cir. 1999) **The court refused to enforce a Board bargaining order, finding that the voter identification procedures in the election, used to ensure that only eligible employees voted, were "utterly insufficient."**

NLRB v. St. Francis Healthcare Case Ctr., 212 F.3d 945 (6th Cir. 2000) Concluding that an employer had presented evidence to create a material issue of fact as to whether a fair election had been conducted in the case, the **court held that the Board had abused its discretion by failing to conduct a hearing on the issue.**

NLRB v. Gormac Custom Mfg., Inc., 190 F.3d 742 (6th Cir. 1999) The court determined that, contrary to the Board's determination, the **employer was entitled to an evidentiary hearing on its election objections** concerning, among other things, a union leaflet that was made public two to three hours before the election and that allegedly misrepresented that certain employees were in favor of the union.

Wells Aluminum Corp. v. NLRB, 162 L.R.R.M. 2832 (6th Cir. 1999) Noting at the outset that **"[t]his case unfortunately demonstrates a lengthy administrative delay on the part of the**

**NLRB in disposing of issues important to the resolution of a hotly contested election which occurred some eight years ago,"** the court reversed the Board's certification of the union's election victory, finding that the union had tainted the election by making threats to the workers that the union would "wreak economic havoc upon the employer" if the employees did not vote for the union.

### **EMPLOYER DISCRIMINATION**

Eastern Omni Constructors, Inc. v. NLRB, 170 F.3d 418 (4th Cir. 1999) The court refused to enforce a Board determination that an employer violated the Act by threatening to discharge employees who distributed literature and by terminating two employees.

NLRB v. Stark Electric, 159 L.R.R.M. 2960 (4th Cir. 1998) The court held that the Board improperly found that the employer's discharge of three employees was illegal, as **"the Board failed to establish § 8(a)(3)'s 'most basic element,' namely, that the employer was aware of the employees' protected activities."**

NLRB v. Elyria Foundry Co., No. 97-5445, 2000 WL 263356 (6th Cir. March 2, 2000) In a case in which a "significant body of evidence" indicated that the employee in question was guilty of shoddy workmanship and neglect of duty – if not outright sabotage – the court denied enforcement to a Board determination that the employer discharged the employee for union activity. "Having scrutinized the entire record," the court determined that **"the Board's decision ignores significant evidence contrary to its conclusion** and is not supported by substantial evidence on the record as a whole."

NLRB v. Zimmerman Plumbing and Heating Co., Inc., 162 L.R.R.M. 2447 (6th Cir. 1999) The court did "not agree that the record, considered as a whole, contains substantial evidence to support the Board's conclusion that Zimmerman, by locking its on-site trailers, violated § 8(a)(1) of the National Labor Relations Act." The court found that there was no evidence to contradict the testimony of one of the owners of the company that such action was necessary to secure company records.

NLRB v. General Sec. Servs. Corp., 162 F.3d 437 (6th Cir. 1998) The court found legitimate, nondiscriminatory factors motivating the employer's decision in the case and concluded that there was "no evidence that either these factors or the degree of their influence would have differed in the absence of protected conduct."

Clock Elec., Inc. v. NLRB, 162 F.3d 907 (6th Cir. 1998) The court held that, in determining that the employer discriminated by hiring one applicant over others, the **Board and ALJ erred in "substituting their own preferences" as to critical hiring factors such as the hired applicant's better test scores, stable employment history, earning history and compensation expectations.**

NLRB v. Fluor Daniel, Inc., 161 F.3d 953 (6th Cir. 1998) The court remanded the case to the Board on the issue of the employer's refusal to hire union organizer applicants for a determination of whether the job openings that were available could be matched with applicants' qualifications consonant with the elements of a prima facie case as articulated by the court.

Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB, 219 F.3d 677 (7th Cir. 2000) The court rejected the Board's determination that an employer's termination of two "foul-mouthed, insubordinate, and sometimes even violent" employees violated the Act. Rejecting the Board's conclusion on the facts case that a supervisor's knowledge of the employees' union activity should be imputed to the employer, the court determined that there was no evidence that the employer was even aware of the employees' union activity. Furthermore, assuming for the sake of argument that the employer was aware of the employees' union activity, the **court found incredible the Board's determination that the employer would not have terminated the employees based on their conduct if they were not union supporters.**

NLRB v. Louis A. Weiss Mem'l Hosp., 172 F.3d 432 (7th Cir. 1999) The court held, contrary to the Board, that the **General Counsel failed to meet its burden of proof in showing that anti-union animus** was a motivating factor in discharging a pro-union employee in a reduction-in-force case in which the employee fared poorly under objective selection criteria.

NLRB v. MDI Commercial Servs., Inc., 175 F.3d 621 (8th Cir. 1999) The court refused to enforce the Board's findings that the employer violated the Act by terminating two employees and delaying the recall of two others.

Jim Walter Resources, Inc. v. NLRB, 161 L.R.R.M. 2702 (11th Cir. 1999) The **court found improper "at several levels" a Board decision** that an employer's refusal to hire an employee was discriminatory, where the evidence demonstrated that employer's decision was based on reports that the employee had a "bad attitude" in previous jobs and there was no evidence that the reports were related in any way to union activity.

### **INTERROGATION OF EMPLOYEES & SOLICITATION OF GRIEVANCES**

Pioneer Hotel, Inc. v. NLRB, 182 F.3d 939 (D.C. Cir. 1999) The court determined that substantial evidence did not support the Board's findings: (1) that a supervisor was terminated because he refused to commit unfair labor practice, and (2) that the same supervisor committed unfair labor practice by interrogating an employee.

Mathews Readymix, Inc. v. NLRB, 165 F.3d 74 (D.C. Cir. 1999) The court determined that in asking strike replacements to indicate on employment applications whether they belonged to a union, the employer engaged in illegal interrogation. The court also determined, however, the **Board incorrectly concluded that this illegality tainted the employees' petition** to the employer disavowing the union since there were no other facts to indicate that the illegal interrogation had influenced that action. Therefore, the court concluded that the employer's withdrawal of recognition from the union was not unlawful.

Health Management, Inc v. NLRB, No. 98-6363, 2000 WL 377111 (6th Cir. April 7, 2000) The court concluded that the Board's determination that the employer had unlawfully solicited employee grievances was without substantial support. Specifically, the court determined that there was no

evidence that the employer suggested that employer would remedy employee problems only if the employees abandoned their efforts to organize.

ITT Automotive v. NLRB, 188 F.3d 375 (6th Cir. 1999) The court found that **substantial evidence did not support the NLRB's determination** that an interview of an employee by the employer's counsel in preparation for unfair labor practice hearing was coercive.

### **MANAGEMENT RIGHTS & UNILATERAL IMPLEMENTATION**

BP Amoco Corp. v. NLRB, 217 F.3d 869 (D.C. Cir. 2000) The **court concluded that the Board was mistaken in its finding** that an employer had unlawfully altered its employee medical benefit plan without bargaining with the union. Finding the matter a question of contract interpretation, the court held that the plan, incorporated into the parties' agreements, provided the employer the authority to unilaterally modify it.

Detroit Typographical Union No. 18 v. NLRB, 216 F.3d 109 (D.C. Cir. 2000) The court determined that the Board erred as a matter of law in its determination that an employer had unlawfully implemented a merit pay proposal upon impasse. The court further determined that the Board's determination that the employer had bargained in bad faith regarding merit pay could not stand because the determination was "infected with the legal error we have just discussed, and it is otherwise not supported by substantial evidence on the record as a whole." Finally, the court determined that "**[t]he Board's decision that the [employer] committed an unfair labor practice by failing to respond to the [union's] overtime exemption information request rested on pure conjecture, and is therefore not supported by any – let alone substantial – evidence.**"

NLRB v. Wehr Constructors, Inc., 159 F.3d 946 (6th Cir. 1998) The court determined that there "**is no evidence to support the Board's conclusion** that Wehr unilaterally changed its subcontracting practices upon or after Union certification" and that the Board erred in finding that Wehr violated the Act by subcontracting without bargaining.

### **PROCEDURE**

Thomas-Davis Medical Ctrs. v. NLRB, 157 F.3d 909 (D.C. Cir. 1998) The court remanded a case in which the Board attempted to expand its no-relitigation rule to apply in a situation in which an employer could have raised an issue in a case that was "by no means" clearly related to the present one. The court stated that "**[t]he Board must provide a reasoned explanation, either consistent with precedent or explaining its departure therefrom, if it chooses to so expand the rule's scope and it has offered none.**"

Sam's Club v. NLRB, 173 F.3d 233 (4th Cir. 1999) The court reversed the Board on three issues. The court determined: (1) that the **Board erred in relying on an affidavit never properly entered into evidence**; (2) that the **Board's finding of pretext** with regard to the employer's explanation for the discharge of a union supporter **was not supported by substantial evidence**; and (3) that the **amendment of the unfair labor practice charge was improper**.

Schaub v. Detroit Newspaper Agency, 154 F.3d 276 (6th Cir. 1998) In this case the court affirmed a lower court's denial of a request by Regional Director, William C. Schaub, for 10(j) injunctive relief in connection with unfair labor practice charges that resulted from the Detroit newspaper strike. The court indicated that the requested 10(j) relief would cause "clearly. . .significant" hardships on the newspapers and on current employees. **The court also found that the Board's eighteen (18) month delay in seeking the injunction cast serious doubt on whether it should issue.**

NLRB v. Dynatron/Bondo Corp., 176 F.3d 1310 (11th Cir. 1999) The court held that Board erroneously determined the timeliness of an unfair labor practice charge, which challenged a new work rule as a unilateral change in working conditions. The **court determined that "[a]ny reasonable application of the Board's own construction of [29 U.S.C. § 160(b)] would yield the conclusion that" the charge was untimely.**

### **PROTECTED ACTIVITY**

Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012 (7th Cir. 1998) Refusing to enforce a Board order reinstating nearly an entire shift of restaurant workers who walked off the job at the start of a Friday evening shift to protest the termination of their supervisor, the court held that the **Board had erred by not considering the reasonableness of the means of protest in determining whether the employees' activity was protected.** The court found that "[t]here is substantial evidence to suggest that their unduly disruptive walkout bore no reasonable relation to their grievance and necessarily lost them the protection of the Act."

NLRB v. Federal Sec., Inc., 154 F.3d 751 (7th Cir. 1998) The court held, contrary to the Board's determination, that a walkout by security guards in a public housing project was unprotected activity because the walkout was "abnormally destructive and threaten[ed] the health or safety of others." Though no one was actually harmed as a result, the court concluded that issue was "whether the activity endangered anyone to the point that harm was foreseeable."

NLRB v. Portland Airport Limousine Co., 163 F.3d 662 (1st Cir. 1998) The court found, contrary to the Board, that a driver's refusal to drive his assigned tractor for safety concerns and his conversation with another driver on the issue did not constitute protected concerted activity. **The court found "it disturbing that the Board made no attempt to analyze the facts within its own [previously constructed] framework."**

## REMEDIES

Vincent Indus. Plastics, Inc. v. NLRB, 209 F.3d 727 (D.C. Cir. 2000) Noting that the court "repeatedly has reminded the Board that an affirmative bargaining order is an extreme remedy that must be justified by a reasoned analysis," the court refused to enforce the Board's bargaining order due to the lack of such analysis on the part of the Board. Although clearly concerned by the fact that the **"court's institutional integrity is undermined by the Board's refusal to modify its behavior in response to operant conditioning,"** the court expressed concern for employees "who, in this case, sought protection from the Board." The **court indicated that the Board's refusal to justify its affirmative bargaining order would, in the end, only serve to delay relief to the employees in the case.**

NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc., 191 F.3d 316 (2nd Cir. 1999) The court determined that the Board erred in determining an appropriate remedy for the employer's conduct by including contributions to the pension fund on behalf of an employee who was discharged.

Coronet Foods, Inc. v. NLRB, 158 F.3d 782 (4th Cir. 1998) In a case in which the employer had subcontracted its in-house transportation department in retaliation for union activities, the court refused to enforce the Board's order that the employer restore the abolished department. The court found too narrow the Board's exclusive focus on costs and benefits. The court further found that the **Board should not have discounted testimony demonstrating that restoration would be a "bad business decision" that would impose an "outmoded and inefficient structure" on the company, jeopardizing its ability to remain competitive.** The court thus concluded that the remedy would be punitive and impose an undue burden.

Starcon, Inc. v. NLRB, 176 F.3d 948 (7th Cir. 1999) The **court refused to enforce the Board's "indisputably overbroad" order** of reinstatement with back pay for to 80 union-organizer applicants who were discriminated against. The evidence did not demonstrate that the employer would have offered jobs to all 80 applicants.

NLRB v. Waymouth Farms, Inc., 172 F.3d 598 (8th Cir. 1999) Although the court found that substantial evidence supported the Board's determination that the employer violated its obligation to bargain over a plant closing, the court held that the Board erred in determining that back pay was owed to those employees who transferred to the employer's new facility. Furthermore, the court refused to enforce the Board's order requiring the employer to bargain with the union for a collective bargaining agreement at the new facility, holding that the union was bound by a geographic limitation clause in its contract at the previous facility that it accepted in exchange for a union security clause.

NLRB v. Advanced Stretchforming Int'l, Inc., 208 F.3d 801 (9th Cir. 2000) Although affirming the Board's determination that a successor employer failed to bargain with the union, the court remanded the case because the Board, in determining its remedy, failed to consider whether the successor employer had presented evidence that it would have bargained to impasse and imposed terms less favorable than those under the predecessor employer's contract with the union.

Nabors Alaska Drilling, Inc. v. NLRB, 190 F.3d 1008 (9th Cir. 1999) The court held that although substantial evidence supported the Board's findings of union animus, the employees discharged in the case would have been released in any event due to their failed drug tests. Therefore, the Board erred as a matter of law in determining the remedy in the case.

### **SECTION 8(F)**

American Automatic Sprinkler Sys., Inc. v. NLRB, 163 F.3d 209 (4th Cir. 1998) cert. denied 120 S. Ct. 65 (1999) The court determined that construction-industry unions recognized under the Act's perhire provisions can attain full majority representative status only through the traditional means available to unions in nonconstruction industries. Because the construction-industry union in this case did not do so, the court refused to enforce the Board's finding that the employer violated the Act by refusing to bargain with the union upon the expiration of collective bargaining agreements.

NLRB v. Oklahoma Installation Co., 219 F.3d 1160 (10th Cir. 2000) The court refused to enforce a Board order that found that a construction industry employer had entered into a Sec. 9(a) relationship with a union and thus had a continuing obligation to both recognize the union and adhere to the terms of the parties' expired contract. The court found no evidence that the parties' agreement in the case unequivocally and unambiguously evidenced an intent to be governed by Sec. 9(a) rather than Sec. 8(f), which presumptively governed the case.

### **SUPERVISORY STATUS**

Micro Pacific Dev. Inc. v. NLRB, 178 F.3d 1325 (D.C. Cir. 1999) The court determined that the Board erred in its conclusion that a "housekeeping supervisor" was not a supervisor under the Act.

Schnurmacher Nursing Home v. NLRB, 214 F.3d 260 (2nd Cir. 2000) The court determined that the Board's finding that charge nurses in the case were not statutory supervisors was without evidentiary support. To the contrary, the court noted the "overwhelming evidence" that the charge nurses in question performed supervisory functions as defined by the Act.

NLRB v. Prime Energy Ltd. Partnership, \_\_\_\_ F.3d \_\_\_\_, 2000 WL 1123503 (3rd Cir. 2000) The court determined that the Board erred in its conclusion that seven workers at a power co-generation plant were not supervisors. Noting "the **Board's failure to arrive at a reasonably consistent view of the statutory definition of supervisor,**" the Court held that each of the employees in question exercised supervisory authority within the meaning of the Act and that their exercise of this authority was neither routine nor clerical in nature.

NLRB v. Attleboro Assocs., Inc., 176 F.3d 154 (3rd Cir. 1999) The court refused to enforce the Board's holding that the licensed practical nurses in the case were not supervisors. The court concluded that the evidence demonstrates that the nurses "exercis[e] independent judgment" in recommending discipline, adjusting grievances, and assigning and responsibly directing certified nursing assistants.

Beverly Enters. Virginia, Inc. v. NLRB, 165 F.3d 290 (4th Cir. 1999); see also Beverly Enters. West Virginia, Inc., 165 F.3d 307 (4th Cir. 1999) The court ruled that licensed practical nurses functioning as charge nurses were exempt supervisors. The court stated that the **Board's conflicting rulings on this issue over the years "manifested an irrational inconsistency," prompting "widespread speculation" that its decisions are based on a "policy bias."**

Integrated Health Servs. of Michigan, at Riverbend, Inc. v. NLRB, 191 F.3d 703 (6th Cir. 1999) The **court** ruled the Board erred that in determining that the nurses in the case were not supervisors and **"again . . . admonish[ed] the Board for its unremitting refusal to follow the law as we have declared it."**

Kentucky River Community Care, Inc. v. NLRB, 162 L.R.R.M. 2449 (6th Cir. 1999) (petition for cert. filed 5/12/00, 68 U.S.L.W. 3726) The court held that Board erred, on the facts of the case, in its conclusion that the employer's registered nurses are not supervisors.

Beverly Health & Rehabilitation Servs. v. NLRB, 161 L.R.R.M. 2704 (6th Cir. 1999) Noting that it was the Sixth Circuit's eighth decision reaching the same result, the court held that the licensed practical nurses in the case were exempt supervisors because they provide directions to and file disciplinary reports on certified nursing assistants.

Empress Casino Joliet Corp. v. NLRB, 204 F.3d 719 (7th Cir. 2000) The court denied enforcement to a Board decision "which holds rather surprisingly that none of the captains, first mates, or chief engineers of riverboat gambling casinos is a supervisor within the meaning of the National Labor Relations Act." The court found the evidence of the supervisory status of captains and first mates to be "conclusive." In addition, the court found **no "rational connection between the facts** bearing on the responsibilities of the chief engineers and the conclusion that they are not supervisors."

NRLB v. GranCare, Inc., 158 F.3d 407 (7th Cir. 1998) Observing that "[i]n determining supervisory status, the **Board's 'well-attested manipulativenness' has earned it little deference,**" the court determined that substantial evidence did not support the Board's finding that the licensed practical nurses at an employer's facility were not supervisors.

### MISCELLANEOUS

United Food & Commercial Workers Int'l Union v. NLRB, \_\_\_\_ F.3d \_\_\_\_, 2000 WL 1141102 (D.C. Cir. Aug. 22, 2000) (Solicitation and Distribution) The court held that the Board's determination that an employer lawfully expelled union organizers from a snack bar pursuant to a no-solicitation policy was not supported by substantial evidence. Indeed, the **court could "find no evidence at all" to support the Board's determination.** The court also concluded that the Board erred as a matter of law in its determination that the employer lawfully excluded union organizers from sidewalks in front of its stores.

Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000) (Beck Rights); see also Thomas v. NLRB, 213 F.3d 651 (D.C. Cir. 2000) Relying on Supreme Court and previous D.C. Circuit case law, the

court found that the union violated its duty of fair representation by: (1) providing Beck objectors with only general categories of expenditures; (2) failing to disclose payments to affiliates and how those affiliates used those funds; and (3) not informing employees who had not yet exercised their Beck rights what percentage of dues is spent on nonrepresentational activities.

Warshawsky & Co. v. NLRB, 182 F.3d 948 (D.C. Cir. 1999) cert. denied 120 S.Ct. 1267 (2000) (Secondary Activity) Finding that the Board's holding that a union did not unlawfully induce a secondary boycott was "defective," the court held that (1) the evidence demonstrated the union's handbilling in fact was indented to induce neutral employees to walk off the job, and (2) that the First Amendment was not implicated by the case.

Viking Indus. Security, Inc. v. NLRB, No. 98-4395, 2000 WL 1218799 (2nd Cir. Aug. 28, 2000) (Joint Employer Doctrine) The court held that the Board's imposition of joint-employer liability on Viking New Jersey **deprived the company of due process of law**. Viking New Jersey was not named as a respondent in the Union's complaint, and there was no indication in the record that the affiliation between Viking New Jersey and the named respondent continued to the date the complaint was filed. Because the court concluded that "[o]nly where there is an identity between the charged party and a later added party can it be said that the newly added party has had notice and an opportunity to contest the charge," it granted Viking New Jersey's petition for review.

Americare Pine Lodge Nursing and Rehabilitation Center v. NLRB, 164 F.3d 867 (4th Cir. 1999) (Direct Dealing) In all but one instance, the court rejected the Board's ruling that the employer engaged in illegal direct dealing with the employees. The court, holding that the **Board had "misinterpreted the mandate of § 8(a)(1) and 8(a)(5)" and had "failed to give effect to § 8(c)," found "no support" for the Board's rule that an employer is required to delay informing employees of its proposal until the union has had some period of time to consider it.**

NLRB v. Anchor Concepts, Inc., 166 F.3d 55 (6th Cir. 1999) (Lockouts) The court found that the **Board had no "substantial basis for its decision"** that a lockout was unlawful and that an employer violated the act by failing to reinstate strikers who made unconditional offers to return to work. The court went on to chastise the Board for its **delay in handling the case. "[T]he Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing."**

Rehabilitation & Healthcare Ctr. v. NLRB, 161 L.R.R.M. 2128 (6th Cir. 1999) (Employer Free Speech) The court refused to enforce the Board's finding that an employer was not engaged in protected "free speech" under Section 9(c) when it posted a letter it had written to the union stating that the employer had been advised by the State of Florida that the union had violated state law by failing to register as required by Florida law. The court found no substantial evidence that the posting constituted a threat or reprisal or promise of benefit.

### III. NLRB Procedural, Systemic and Operational Issues.

#### A. Delay in Decisionmaking

The recent edition of The Labor Lawyer, a publication supported and underwritten by the Labor and Employment Law Section of the American Bar Association, contains six (6) stimulating articles regarding the current status of the NLRB and its case handling management. These articles were written by NLRB Chairman John Truesdale, NLRB Members Peter Hurtgen and Wilma Liebman, former NLRB General Counsel Fred Feinstein, Attorney Andrew Kramer of Jones, Day, Reavis & Pogue, Jonathan P. Hiatt and Craig Becker, General Counsel and Associate General Counsel, respectively, of the AFL-CIO and Professor Charles Carver of the George Washington University Law School.<sup>81</sup>

As outlined in the above noted articles and by other commentators,<sup>82</sup> significant delay has occurred in the Board decisionmaking process. In many cases, parties have had to wait years at a time before a Board decision has issued, with some cases pending up to approximately ten (10) to nineteen (19) years before being decided.<sup>83</sup> The well worn but wise aphorism that "justice delayed is justice denied"<sup>84</sup> is certainly applicable in many respects to the Board's case handling. Certain federal courts of appeal have noted this concern criticizing the Board for the "dilatory virus"<sup>85</sup> and the "snail-

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<sup>81</sup> "Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response" by John C. Truesdale; "The Clinton Board(s)--A Partial Look from Within" by Wilma B. Liebman and Peter J. Hurtgen; "The Challenge of Being General Counsel" by Fred Feinstein; "The Clinton Labor Board: Difficult Times for a Management Representative" by Andrew M. Kramer; "Drift and Division on the Clinton NLRB" by Jonathan P. Hiatt and Craig Becker; and "The Clinton Labor Board: Continuing a Tradition of Moderation and Excellence" by Charles B. Craver. 16 Lab. Law. 1, *et seq.* (2000).

<sup>82</sup> See, e.g., Former NLRB Edward B. Miller, "An Administrative Appraisal of the NLRB" 69-92 (4th Ed. Labor Relations and Public Series No. 16, 1999).

<sup>83</sup> Liebman and Hurtgen, 16 Lab. Law at 46.

<sup>84</sup> "The adage 'justice delayed is justice denied' is appropriately used to criticize unnecessarily protracted court proceedings." Hinkle v. Henderson 135 F.3d 521, 523 (7th Cir. 1998); "[It is a] well worn but nevertheless truthful aphorism that 'justice delayed is justice denied.'" Bhatnagar v. Surrendra Overseas, Ltd. 52 F.3d 1220, 1227 (3d Cir. 1995; "[T]he court is mindful of the aphoristic wisdom that 'justice delayed is justice denied'...." Florida State Conf. of NAACP Branches v. City of Daytona Beach, 54 F.Supp.2d 1283, 1284 (S.D.N.Y. 1999); See also Cobell v. Babbitt 37 F.Supp.2d 6, 38 (D.D.C. 1999).

<sup>85</sup> NLRB v. Anchor Concepts, Inc., 323 NLRB 742 (1997), *enf. denied*, 166 F.3d 55, 59 (2d (continued...))

like pace"<sup>86</sup> in which it proceeds with its decisionmaking. Indeed, in a recent case, a federal court of appeals concluded:

The Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardship it is causing.<sup>87</sup>

Further, in NLRB v. Thrill, Inc.<sup>88</sup>, the Seventh Circuit concluded that the Board's failure to explain, or even mention its seven (7) year case processing delay, qualified it as the "Rip Van Winkle of administrative agencies."

As noted by Chairman Truesdale and NLRB Members Hurtgen and Liebman in their articles in The Labor Lawyer, in one case at least ten (10) different Board Members participated at various points in the matter before a decision finally issued.<sup>89</sup> Today the Board's case backlog is approximately 883 cases.<sup>90</sup> Under the leadership of Chairman Truesdale, certainly a degree of progress has been made in addressing this issue. Greater improvement, however, needs to occur. SHRM agrees with Chairman Truesdale's goal that "(i)deally all cases should be decided within a year or less and most within a few months."<sup>91</sup> If such a goal or similar goals cannot be achieved, the harmful consequences are clear: representation elections and labor disputes will be left unresolved; unfair labor practices will be left without remedy; increased back pay liability will occur for respondents; ineffective or unenforceable orders will issue and public confidence in the Board will be undermined.<sup>92</sup>

While SHRM, as noted infra, questions the long-range viability of the Board's institutional structure, it does agree with Chairman Truesdale's recommendations to achieve more

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<sup>85</sup> (...continued)  
Cir. 1999).

<sup>86</sup> Cecil v. NLRB, 194 F.3d 1311 (6th Cir. 1999) (table). See also Wells Aluminum Corp. v. NLRB, 187 F.3d 639 (6th Cir. 1999) (table).

<sup>87</sup> NLRB v. Anchor Concepts, Inc., 166 F.3d 55, 59 (6th Cir. 1999).

<sup>88</sup> 980 F.2d 1137, 1142 (7th Cir. 1992).

<sup>89</sup> Mississippi Power & Light Co., 328 NLRB No. 146 (1999); see also, 16 Lab. Law at 9, 46.

<sup>90</sup> Truesdale, 16 Lab. Law at 2 n. 4.

<sup>91</sup> 16 Lab. Law at 3.

<sup>92</sup> Truesdale, 16 Lab. Law at 2.

expeditious Board decisionmaking including changes in internal case handling procedures, establishment of priorities and setting time targets, and avoiding non-case related distractions.<sup>93</sup>

SHRM would also suggest, however, that the Board needs to review its "one member only" list procedure. Under this procedure, one Board Member assigned to a three-member or five-member panel can delay voting on a case even though all other Board Members on the panel have concluded their analysis and have voted, or are ready to vote. Although SHRM is not privy to the number of Board cases on hold due to such practice--the Chair of the Board is the custodian of such information--it believes that there may be a significant number of cases on the list.

SHRM also submits that the Board, as an institution, should not be shielded entirely from criticism in the discussions regarding casehandling due to Board Member and General Counsel turnover. For example, during the Bush Board years, there was also significant Board turnover and the productivity of the Board was as great, if not greater, than that for the Clinton Board's years.

Finally, SHRM urges the Board to keep proceeding, with all due deliberate speed, in technology advances. For example, the Board's computer system needs attention, as has been documented elsewhere. The taking of witness statements needs to move to a better procedure from the age-old hand written affidavits. Administrative Law Judge and Regional Director decisions and rulings should be available on-line. The Board's recent advances in its website, <http://www.nlr.gov>, are excellent and should be replicated and expanded throughout the Agency.

#### **B. Board Member and General Counsel Staff Experience and Training**

A particularly troubling trend to many employers and labor organizations is the lack of training and experience of Board and General Counsel staff and Administrative Law Judges. Perhaps a certain amount of this can be traced to the budgetary problems faced by the Board during Chairman Gould's tenure. The problem, however, is much deeper. Continually, parties before the Board and their respective counsel are faced with circumstances where Board staff involved in investigating and making recommendations for disposition of cases not only have little or no experience in practicing labor law, but very little training in the Act and the subject matters they are regulating. This is most evident in matters relating to collective bargaining.

To address the issue of lack of training for Board members and other staff, the Board's Office of General Counsel and its employees, and Administrative Law Judges, SHRM recommends that a portion of the Board's annual budget approved by Congress be specifically earmarked for training and education in labor relations matters and issues subject to the jurisdiction of the NLRA. Such training should come not only from academic sources, but also from management and labor organization representatives and private practitioners who represent both labor and management. The Labor Law Section of the American Bar Association, which consists of lawyers that represent management and labor, may be one source the Board may wish to consider to provide training in this area.

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<sup>93</sup> Truesdale, 16 Lab. Law at 12-18.

**C. NLRB and General Counsel Constantly Changing Composition**

As also documented in the Labor Lawyer articles noted above, there has been significant turnover in the composition of the Board and in the office of NLRB General Counsel. Indeed, as we discuss this Agency this morning, the Board has one vacant seat in that Member Robert Brame's term expired on August 31 of this year, and a replacement to date has not been nominated and confirmed. Further, NLRB Member Sarah Fox is serving in a recess appointment capacity and, unless confirmed before the Congress adjourns *sine die*, will not be permitted to continue to serve. Additionally, NLRB General Counsel Leonard Page, who is with us this morning, also is serving in a recess capacity, and will not continue to hold his position unless confirmed by the Senate by the end of the current Congress. The present composition situation of the Board and the Office of General Counsel is illustrative of the numerous vacancies and recess appointments that have occurred during the Clinton Administration and during other Administrations. For example, as outlined in NLRB Members Hurtgen and Liebman's Labor Lawyer article, there have been numerous configurations, vacancies and recess appointments in this Agency over the last eight (8) years:

1. March 1994 --Chairman William B. Gould IV, James M. Stephens, Dennis M. Devaney, Margaret A. Browning, Charles I. Cohen<sup>2</sup>
2. December 1994 --Gould, Stephens, Browning, Cohen, John C. Truesdale (recess)
3. February 1996 --Gould, Browning, Cohen, Sarah M. Fox (recess)
4. November 1996 --Gould, Browning, Fox, John Higgins (recess)
5. March 1997 --Gould, Fox, Higgins
6. November 1997 --Gould, Fox (confirmed), Wilma B. Liebman, Peter J. Hurtgen, J. Robert Brame III
7. August 1998 --Fox, Liebman, Hurtgen, Brame<sup>3</sup>
8. December 1998 --Chairman Truesdale (recess),<sup>4</sup> Fox, Liebman, Hurtgen, Brame

<sup>2</sup>Chairman Gould and Members Browning and Cohen were appointed by President Clinton and began their terms in March 1994. Members Stephens and Devaney were initially appointed by President Reagan.

<sup>3</sup>Between August 1998 and December 1998, the Board operated without a chairman.

<sup>4</sup>Chairman Truesdale was confirmed by the Senate in November 1999.<sup>94</sup>

The constantly changing composition of the Board and the numerous recess appointments with respect to Board Members and its General Counsel not only contribute to case handling delays, but also seriously undermine the credibility and independence of the Agency. Further, the constantly changing political climate imposed upon the Board certainly may discourage qualified individuals in the future from seeking Board and General Counsel nominations. Additionally, as noted previously in this testimony, federal courts of appeal are increasingly questioning the wisdom of Board

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<sup>94</sup> Liebman and Hurtgen, 16 Lab. Law, at 43-44.

decisionmaking. Finally, constantly changing Board precedent undermines the stability of the workplace and fails to provide stability and predictability to federal labor law.

The conclusion that SHRM draws from the above observations is that serious rethinking needs to occur in Congress about the statutory structure of the NLRB. Perhaps longer terms for Board Members (present Member term length is 5 years and General Counsel term length is 4 years), higher pay (present pay is \$125,900.00 for the NLRB Board Chairman and \$118,400.00 for Board Members and the Board's General Counsel), increased ability to select staff--presently Board Members can only select 1 staff member--should be considered.<sup>95</sup>

In conclusion, SHRM submits that Congress should give serious attention to restructuring or reforming the Board. The law of the workplace simply should not be written and changed on the basis of the last Presidential election or which party controls the Congress.

#### **IV. Comments Regarding the NLRB General Counsel's Recently Proposed Remedies.**

General Counsel, Leonard R. Page, has recently proposed that the National Labor Relations Board consider adopting additional remedies to address unfair labor practice findings of the Board. Such proposals have included an award of front pay in lieu of reinstatement, an award of consequential and tort-like damages and greater notice and access remedies delineated in the Circuit Court's decision in Fieldcrest Cannon.<sup>96</sup> General Counsel Page, in making such proposals, indicated that "economic and technical changes are sweeping the workplace, and some of these changes have impacted the effectiveness of the Board's traditional remedial strategies."<sup>97</sup>

Section 10(c) of the NLRA unquestionably provides the Board with certain options in devising remedies to effectuate the policies of the Act.<sup>98</sup> The discretion, however, provided to the Board is not without limit and must not only be tied to the facts of the case in question, but also must be clearly within the confines of the Act itself. For example, Section 10(c) of the Act reads in part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any. . .unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair

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<sup>95</sup> 29 U.S.C. § 153.

<sup>96</sup> 318 NLRB 470 (1995), enf'd in pertinent part, 97 F.3d 65 (4th Cir. 1996).

<sup>97</sup> See April 10, 2000 Speech by General Counsel Page presented at the University of Richmond Law School entitled "NLRB Remedies: Where are they going?" reported in Daily Labor Report (BNA), April 11, 2000.

<sup>98</sup> See NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346-47 (1953).

labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay as will effectuate the policies of this Act. . .<sup>99</sup>

Nowhere in Section 10(c) or anywhere else in the Act, is the Board authorized to issue front pay remedies or provide for consequential or tort-related damages. Indeed, the Supreme Court has clearly stated that the Board's "authority to order affirmative action does not. . .confer a punitive jurisdiction enabling the Board to inflict. . .any penalty it may choose. . .even though the Board is of the opinion that the policies of the Act may be effectuated by such an order."<sup>100</sup> Further, the Board may not justify a remedy solely on the ground that it may deter future violations of the Act.<sup>101</sup> SHRM certainly acknowledges the right of the General Counsel to pursue potential changes in the Act. SHRM suggests, however, such changes like those being suggested by General Counsel Page, should be submitted to Congress for consideration. If the Board proceeds in adopting such proposed new remedies in a decisional or rule making framework, certainly protracted litigation will follow and the important tenets of predictability and stability in the workplace will once again suffer.

With respect to the General Counsel's suggestion that Fieldcrest Cannon remedies be generally available to remedy unfair labor practice charges, SHRM questions the need and scope of such remedies on a broad basis. If an employer has committed egregious and continuing unfair labor practices, certain access and notice remedies should be considered. Further, SHRM agrees with the comments of Richard Cleary in his recently published paper at the American Bar Association Annual Meeting, however, that the access rights General Counsel Page is proposing may in fact be violative of the Supreme Court's recent decision in Lechmere v. NLRB.<sup>102</sup> In Lechmere the Board reversed substantial NLRB precedent and held that labor representatives' access to private property is restricted to instances when it is impossible, or unreasonably difficult, for such representatives to communicate with the target employees of an employer or employer access policies have been discriminatorily enforced. Accordingly, SHRM urges the General Counsel to proceed with sensitivity to the Supreme Court's holding in Lechmere as it relates to potential Fieldcrest Cannon access remedies.

Further, as a practical matter, SHRM submits that excessive resort to Fieldcrest Cannon remedies will unnecessarily increase litigation with respect to remedies and devote otherwise

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<sup>99</sup> 29 U.S.C §160(c).

<sup>100</sup> Consolidated Edison v. NLRB, 305 U.S. 197, 229-30 (1938).

<sup>101</sup> Bell & Howell Co. v. NLRB, 598 F.2d 136, 147 n. 36 (D.C. Cir.), cert denied, 442 U.S. 942 (1979).

<sup>102</sup> 502 U.S. 527 (1992); See Richard S. Cleary paper to the American Bar Association Annual Meeting, entitled, "Response to the General Counsel's Position on Expanding Board Remedies," July 10, 2000, referenced in Daily Labor Report (BNA), June 9, 2000. Mr. Cleary is a management attorney and partner in the firm of Greenebaum, Doll & McDonald, PLLC, Louisville, Kentucky.

scarce resources of the Board and its General Counsel to protracted litigation. Simply stated, the Board's present backlog and other issues are better objectives to be pursued.

In summary, SHRM concurs with Attorney Cleary's conclusion in his June 9, 2000 paper when he stated:

After examining the types of remedies proposed by the General Counsel, in light of the case law and principles developed over the past 65 years, one is at a loss in identifying what "economic and technical" changes have occurred that would mandate an expansion of appropriate remedies. Instead, one is left with a conviction that the General Counsel is recommending punitive measures to punish employers for their unlawful conduct and to deter future violations of the Act, tenets that have been conclusively rejected by the United States Supreme Court.<sup>103</sup>

Chairman Boehner, and Members of the Subcommittee, this concludes our testimony. I would be pleased to respond to any questions you may have.

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<sup>103</sup>

Id.