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BY A THOUSAND CUTS: THE AGENDA OF THE OBAMA NLRB

BALLARD SPAHR LLP BREAKFAST BRIEFING

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By a Thousand Cuts: The Agenda of the Obama NLRB

1. INTRODUCTION

Traditional labor law has experienced some radical changes in the last two years, occasioned not only by a change in administration, but also through developments in Congress, the courts and the federal agencies. This paper discusses those changes and the shift in direction brought on by President Obama and his administration, the Supreme Court decision in *New Process Steel v. N.L.R.B.*, the current National Labor Relations Board and potential legislation.

2. HISTORICAL BACKGROUND (OR HOW DID WE GET HERE?)

(a) The Bush Administration

(i) President Bush appointed ten members to the Board during his presidency. Eight members were Republicans (Peter J. Hurtgen, Michael J. Bartlett, William B. Cowen, R. Alexander Acosta, Robert J. Battista, Peter C. Schaumber, Ronald E. Meisburg, Peter N. Kirsanow). Two members were Democrats (Wilma B. Liebman and Dennis P. Walsh).

(ii) Between 2004 and 2007, the so-called "Bush Board," utilizing a 3-2 Republican majority established several precedents favorable to employers and reversed several Clinton-era Board decisions.

(b) The Obama Administration

(i) Executive Orders: Soon after taking office, President Obama demonstrated his commitment to "level[ing] the playing field for workers and the unions that represent their interests," signing four Executive Orders that reversed Bush-era directives deemed "anti-worker."

(1) Executive Order 13494, signed on January 30, 2009, "Economy in Government Contracting"

a. Prohibits federal contractors from seeking reimbursement for activities undertaken to encourage or discourage employees to organize, or concerning the manner of exercising the employees' rights to organize and bargain collectively.

(2) Executive Order 13495, signed on January 30, 2009, "Nondisplacement of Qualified Workers Under Service Contracts"

a. Requires any service contract with the federal government to include a provision guaranteeing the right of first refusal of employment to nonsupervisory incumbent employees "under a contract that succeeds a contract for performance of the

same or similar services at the same location" as the predecessor contract.

(3) Executive Order 13496, signed on January 30, 2009, entitled "Notification of Employee Rights Under Federal Labor Laws"

a. Requires federal contractors post a notice of employee rights under the National Labor Relations Act.

b. Expressly revoked Executive Order 13208 (February 17, 2001), President Bush's requirement that government contractors post notice informing employees of their right not to join a labor organization.

(4) Executive Order 13502, signed on February 6, 2009, entitled "Use of Project Labor Agreements for Federal Construction Projects"

a. Allows federal agencies to require the use of project labor agreements in connection with a large-scale construction project, defined as "a construction project where the total cost to the Federal Government is $25 million or more."

(ii) 2010 Presidential Medal of Freedom, the highest civilian honor in the United States, is awarded to John Sweeney, President-Emeritus of the AFL-CIO.

(c) Trends in Union Membership

(i) The Labor Department's Bureau of Labor Statistics released figures indicating that union membership declined to a new low in 2010. "Union Membership Dropped in 2010, As Key Industries Shed Jobs, BLS Says," Daily Lab. Rep. (BNA) No. 14, at AA-1 (Jan. 21, 2011).

3. THE EMPLOYEE FREE CHOICE ACT AND OTHER LEGISLATION

(a) The Employee Free Choice Act ("EFCA")

(i) H.R. 1409, S. 560, 111th Cong. (2009)

(ii) Purpose:

(1) "To amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes."

(iii) Substantive Provisions

(1) *Section 2. Streamlining Union Certification.* If a majority of employees sign authorization cards "designating the individual or labor organizations specified in the petition as their bargaining representative," the Board shall immediately certify the individual or labor organization as the representative without a secret ballot election.

(2) *Section 3. Facilitating Initial Collective Bargaining Agreements.* Requires that the parties meet within 10 days after a written request for collective bargaining, and if, within 90 days, no agreement is reached by the parties, either party may request arbitration through the Federal Mediation and Conciliation Service ("FMCS").

(3) *Section 4. Strengthening Enforcement.* Stiffens penalties for violations that occur during organizing campaigns and first contract negotiations *for employers only*. Unions are not subject to the increased penalties.

(iv) Likelihood of Passage: Virtually nil given Republican dominated House.

(b) State Secret Ballot Laws:

(i) In November 2010, South Carolina, Utah, Arizona and South Dakota approved state constitutional amendments which require the use of secret ballots in union representation elections. In January 2011, the Board's General Counsel informed the attorneys general that Section 7 of the NLRA preempted the amendments and that he intended to initiate civil actions against the states seeking to invalidate the amendments. The attorneys general responded that they were prepared to defend the amendments in court. On March 4, 2011, the attorney generals declined to enter into a confidentiality agreement covering their discussions with the Board involving the dispute. The Board refuses to continue negotiations without such an agreement.

(ii) Five Republican senators from Utah, Arizona, South Carolina, and South Dakota, wrote to the NLRB to "express [their] concerns" with the agency's requesting that the Board explain how it reached its conclusions, asking what authorization the Board has to bring a lawsuit against a state or to challenge the constitutionality of a state constitutional amendment, and suggesting that the Board's decision to target some laws and ignore others demonstrated a pro-union bias.

4. THE OBAMA BOARD

(a) Chairman Wilma Liebman

(i) Appointments

(1) By President Clinton: 11/1997 – 12/2002

(2) By President Bush: two terms, last expiring 8/2011

(3) Designated as Chairman by President Obama on January 20, 2009

(ii) Background

(1) Deputy Director of the Federal Mediation and Conciliation Service

(2) Labor Counsel for the Bricklayers and Allied Craftsman International Union

(3) Counsel to the International Brotherhood of Teamsters

(4) Staff Attorney with NLRB.

(iii) What She's Said

(1) In November 2009, speaking before the U.S. Chamber of Commerce, Chairman Liebman stated that a number of "significant issues" were on the agenda to be addressed by the Obama Board, including:

a. revisiting cases on union bannering, pre-recognition bargaining, salts, the rights of workers hired by employers who knew of their illegal status, and others that were set aside during the two years in which the Board had only two Members; and

b. making greater use of the Board's rulemaking authority.

(2) In April 2010, speaking at the AGC's Annual Symposium, Chairman Liebman said that the Obama Board will take a more "dynamic" approach to decision-making than the Bush Board took, viewing the National Labor Relations Act as a "living document," and taking into account "real-world" considerations.

(3) On January 9, 2011, in a speech to the LERA annual meeting, Chairman Liebman said that "most people in the workplace don't have a clue" that the NLRA involves non-unionized workplaces. The NLRB intends to develop the message and deliver it to the public.

(b) Member Craig Becker

(i) Appointment

(1) Nominated by President Obama

(2) Fight on the Hill

a. Republicans blocked Becker's nomination from getting a filibuster-proof 60 votes in the Senate, due primarily to the belief that Becker would be an extremely pro-union partisan based on his service as Associate General Counsel to Service Employees International Union ("SEIU") and the AFL-CIO.

(3) President Obama seated Becker in a recess appointment that expires in December 2011, and on January 26, 2011, re-nominated Becker for a full term.

a. In response, on February 1, 2011, all 47 Republican Senators sent a letter to the White House, urging the withdrawal of the nomination, mentioning the NLRB's decidedly pro-union turn since Becker's appointment.

(ii) Background

(1) Associate General Counsel to SEIU and the AFL-CIO

(2) Professor of Law at UCLA, University of Chicago and Georgetown

(iii) What He's Said

(1) Becker wrote extensively on the NLRA prior to his appointment on the Board. Becker has expressed strong and, according to some, "radical," pro-labor sentiments, directly attacking decisions of the Bush Board.

(2) In a 1993 Minnesota Law Review article, Becker stated that traditional notions of democracy should not apply in union elections,

and that employers do not have the right to be heard in representation or unfair labor practice cases before the NLRB.

(3) In a 2005 Berkeley Journal of Employment and Labor Law article, Becker criticized decisions of the Bush Board, characterizing them as "limiting employees' section 7 rights, weakening penalties for employers who commit unfair labor practices, and otherwise expanding employer rights."

(4) Becker has also written on an employer's role in union organizing and representation elections, and advocated, prior to the Board's decisions in the *Kentucky River Three* (discussed below), for narrowing the definition of supervisors to allow for broader coverage of the Act.

(c) Member Mark Gaston Pearce

(i) Appointment

(1) Recess-appointed by President Obama in April 2010, and unanimously confirmed by the Senate on June 22, 2010. Pearce's term will expire in August 2013.

(ii) Background

(1) Partner of Creighton, Pearce, Johnsen & Girouz, Buffalo, NY

(2) Member, the New York State Industrial Board of Appeals

(3) Attorney and District Trial Specialist for NLRB Region 3 in Buffalo, NY

(iii) What He's Said

(1) In October 2010, Member Pearce said that the Board must seek to limit the time between the filing of a petition and holding an election in order to reduce the number of unfair labor practice charges. Pearce described as "intriguing" the Canadian process of holding elections within five to ten days and postponing eligibility issues until after the vote. "NLRB Member Pearce Urges Reduction In Time for Holding Representation Elections," Daily Lab. Rep. (BNA) No. 204, at B-1 (Oct. 22, 2010).

(d) Member Brian Hayes

(i) Appointment

(1) Unanimously confirmed by the Senate on June 22, 2010. Hayes's term will expire in December 2012.

(ii) Background

(1) Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions

(2) Private Practice

(3) Counsel to the Chairman of the NLRB and Clerk for the Chief ALJ of the NLRB

(e) Nominee Terrence F. Flynn

(i) Nominated by President Obama on January 27, 2010.

(ii) Currently Chief Counsel to Board Member Hayes.

(iii) Formerly in private practice at Crowell & Moring.

(f) Acting General Counsel Lafe Solomon

(i) Appointment

(1) By President Obama on June 21, 2010

(2) Nominated to serve a 4-year term as General Counsel by the President on January 27, 2011.

(ii) Background

(1) Field Examiner in the NLRB's Seattle Region

(2) Attorney in the NLRB's Office of Appeals and the Appellate Court Branch

(3) Staff Attorney to various former Board Members

(iii) Memorandum GC 10-07, "Effective 10(j) Remedies for Unlawful Discharge in Organizing Campaigns"

(1) Solomon calls for "priority action" and a speedy remedy in unfair labor practice cases involving discharged employees in the context of organizing efforts.

(2) Noting that "the Agency has developed a variety of very effective strategies for minimizing these consequences," Solomon announced best practices and timelines designed to further those strategies and expedite "nip-in-the-bud cases."

(3) In an October 13, 2010 speech at Cornell University, Solomon suggested that GC 10-07 could be expanded to other areas of Section 10(j) injunctive relief beyond retaliation.

(iv) Memorandum GC 11-01, "Effective Remedies in Organizing Campaigns"

(1) In addition to seeking Section 10(j) reinstatement in all cases involving discharges during an organizing campaign, Solomon directs the Regions to consider the following remedies:

a. Notice Reading: A responsible management official must read the notice to assembled employees, or a Board Agent will read the notice in the presence of a responsible management official;

b. Access Remedies: Allowing union access to the employer's bulletin boards and providing the union with the names and addresses of employees.

(v) Memorandum GC 11-05, "Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases"

(1) Solomon urged the Board to adopt a new approach for determining whether to defer to arbitration decisions and grievance settlements.

(2) The Memo includes proposed deferral requirements. For example, Solomon recommended that, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have adequately been considered by the arbitrator. Additionally, Solomon recommended that Board members place the burden of proof on a party seeking deferral to an arbitration award to show that "(1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue."

(vi) On March 16, 2011, the Board's General Counsel issued "A Report of on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section," (Memorandum GC 11-09) responding to questions submitted to him during a recent American Bar Association meeting.

Solomon's memorandum covered practitioners' questions and the acting General Counsel's answers on a number of topics, including:

(1) His initiative to make more effective use of injunctive relief to remedy unlawful discharges during union organizing campaigns;

(2) Issuance of investigative subpoenas in unfair labor practice cases;

(3) Use of default language in unfair labor practice case settlement agreements;

(4) Deferral of unfair labor practice cases to grievance and arbitration procedures;

(5) Electronic posting of NLRB remedial notices;

(6) Appropriate remedial requests in first contract bargaining cases;

(7) Procedures in representation case hearings and elections; and

(8) Statistical information concerning case-handling activities of the acting general counsel and the board.

(g) Who placed this Ad?

(i) Concluding that an NLRB's advertisement, which read, "Labor Organizations Info, Find Info on How to Start a Union. Get the Process and More on Our Site!" was "unquestionably biased," the Chairman of the House Education and the Workforce Committee, Rep. John Kline (R-Minn.), requested that the NLRB provide documentation related to the NLRB's "advertising strategy and goals," including disbursement records he said were needed to "better evaluate" the possible use of taxpayer funds for advertising.

(ii) Kline reiterated that "the NLRB must maintain a neutral position between unions, employees, and employers," and requested the Board provide:

(1) All documents and communications relating to Google advertisements.

(2) All documents and communications relating to the NLRB's advertising strategy and goals.

(3) Itemized list of all advertising disbursements.

The Board claims that Google provided the advertisements in question at no charge beginning in 2008. The Board has decided to discontinue these ads.

(iii) Memorandum GC 11-07, "Guideline Memorandum Regarding Backpay Mitigation"

(1) On March 11, 2011, the Board's General Counsel distributed Memorandum GC 11-07 to regional office employees explaining that he will ask the Board to overrule two 2007 decisions he believes have inappropriately heightened the burden on employees and the general counsel to show that workers who lost their jobs due to unfair labor practices made reasonable efforts to reduce or mitigate their damages. In 2007 the Board established a two-week deadline for discriminatees to begin a search for new employment without incurring a reduction of back pay. He asked regional office staffs to identify cases that may be "proper vehicles" for asking the Board to overrule the decisions.

(iv) Memorandum GC H-08

(1) The Board's 2010 decision adopting daily compounding of interest on make-whole awards requires changes in the computation of interest amounts. Under the new policy, interest on back pay awards is to be compounded on a daily basis, rather than annually or quarterly, but Solomon said a review of the new policy had indicated that it would be appropriate to revise the treatment of several elements in a back pay calculation.

5. AUTHORITY OF THE NATIONAL LABOR RELATIONS BOARD

(a) History

(i) Statutory Authority of the NLRB. National Labor Relations Act, 29 U.S.C. §153, as amended by the Labor Management Relations Act, 29 U.S.C. §141 (1947).

(1) 5 members; Section 153(b) authorizes the Board to delegate its powers to any group of three or more members.

a. "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof."

(ii) Interpretation of NLRB Quorum Requirement by Office of Legal Counsel

(1) The OLC has opined that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained." 27 Op. Off. Legal Counsel 1 (2003).

(iii) Delegation to Three-Member Group

(1) Following the departure of Chairman Battista on December 16, 2007 and anticipating the departure of Members Kirsanow and Walsh, the Board delegated all of its powers to a three-member group on December 28, 2007.

(2) Effective January 1, 2008, the two remaining members, Liebman and Schaumber, continued to exercise the powers of the Board.

(iv) Challenges and Circuit Courts Split

(1) Overview: The United States Courts of Appeals for the First, Fourth, and Seventh Circuits held that a plain reading of the statutory text permitted the Board to exercise its authority as a two-member group where the third member was no longer present. The Second and Tenth Circuits held that the intent of Congress was not clear but under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Board's interpretation of the statute was reasonable. The District of Columbia Circuit alone held that §153(b) did not authorize the two-member quorum.

(b) Supreme Court Decides: *New Process Steel, L.P. v. N.L.R.B.*, 130 S. Ct. 2635 (June 17, 2010).

(i) 5-4 decision

(ii) Question Presented: Whether, following a delegation of the Board's powers to a three-member group, two members may continue to exercise that delegated authority once the Board's membership falls to two?

(iii) Held: No.

(iv) The Majority Holding.

(1) "[T]he delegation clause [of Section 153(b)] requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board." 130 S. Ct. at 2643.

(2) Rationale:

a. "Reading the delegation clause to require that the Board's delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions in [§153(b)]." *Id.* at 2640.

b. To allow "two members to act as the Board *ad infinitum*" undercuts the quorum requirements in the statute "by allowing its permanent circumvention." *Id.*

c. If Congress had intended to authorize two members to act for the Board, it would have said so in plain language.

d. The longstanding history of the Board militates against allowing a two-member quorum of a defunct three-member group.

(c) The Response to *New Process Steel.*

(i) The NLRB issued a series of press releases expressing its disappointment with the decision and asking that all two-member decisions pending an appeal in the federal courts be remanded to the Board.

(1) In cases remanded based upon *New Process Steel*, the Board delegated a three-member panel consisting of Chairman Liebman, Member Schaumber, and another member chosen randomly, to rehear the matter—a decision that received considerable criticism.

6. DECISIONS OF THE OBAMA BOARD: WHAT HAS HAPPENED ALREADY AND WHAT IS ON THE HORIZON

(a) SEIU Decisions Involving Member Becker

(i) Becker's Ethical Pledge: When sworn in as a member of the Board, Becker pledged: "I will not for a period of two years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or clients, including regulations and contracts."

(ii) *SEIU, Nurses Alliance, Local 121RN*, 355 NLRB No. 40, 188 LRRM 1089 (2010).

(1) Two months later, Becker, former General Counsel for SEIU and the AFL-CIO, refused to recuse himself from *SEIU, Nurses Alliance, Local 121RN*. Becker explained that SEIU is "separate and distinct" from its affiliated locals and the pledge did not require him to recuse himself if he did not represent the local involved during a two-year period before being appointed.

(iii) Investigation: Congress and interest groups, following the decisions in *SEIU, Nurses Alliance, Local 121RN* and other matters,[2] sought an investigation of Becker, asking whether his participation in matters involving SEIU violated his ethics pledge. The Board's Inspector General found that Becker did not violate government regulations or ethics pledge.

[2] *Aramark Uniform & Career Apparel, LLC*, Case 18-RD-2692; *Communications Workers Local 4309 (AT&T Midwest & Ohio Bell Telephone Co.)*, Case 8-CB-10487; *AT&T Mobility, LLC*, Case 19-RD-3854; *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC (Cequent Towing Products)*, Case 25-CB-8891, et al.; *Auto Workers Local Lodge No. 376 (Colt's Mfg. Co.)*, Case 34-CB-2631, et al.; *Dana Corp.*, Case 7-CA-46965, et al.; *Deco-Akal JV*, Case 28-CA-21082, et al.; *Electrical Workers Local 34, AFL-CIO, CLC*, Case 13-CB-18961, et al.; *Food & Commercial Workers Local 700 (Kroger Limited Partnership)*, Case 25-CB-8896; *Machinists (IAM) and IAM District Lodge 2777 (L-3 Communications Vertex Aerospace LLC)*, Case 15-CB-5169; *Los Angeles Times Communications, LLC*, Case 21-UD-415; *U.S. Foodservice*, Case 28-CA-21892, et al.

(b) Rulemaking: Posting of NLRA Rights

(i) On December 21, 2010, the NLRB published a Notice of Proposed Rulemaking, inviting comments on a rule that would require employers to notify employees of their rights under the NLRA. The proposal requires employers to post the employee rights notice where other workplace notices are typically posted. Additionally, for those employers who communicated primarily through electronic means, the notice would need to be communicated using those channels.

(ii) Member Hayes dissented stating his belief that 'the Board lacks the statutory authority' to do so. *See* Press Release, Board Proposes Rule to Require Posting of NLRA Rights (Dec. 21, 2010).

(c) Rulemaking: Electronic Voting

(i) On June 9, 2010, the Board announced that it would begin seeking "industry solutions regarding the capacity, availability, methodology and interest of industry sources for procuring and implementing secure electronic voting services both for remote and on-site elections."

(ii) Because the proposed electronic systems do not simply provide an on-site, electronic vote tabulating machine as an alternative to the traditional paper ballot, but instead include web-based and telephone-based voting platforms that allow votes to be cast from remote locations, employers perceive the potential problems outweigh any benefit provided by electronic voting.

(iii) The Board too recognizes the potential for error, and in the request for information states: "[T]he Agency requires a proven solution that supports mail, telephone, web-based and/or on-site electronic voting; that includes the necessary safeguards to ensure the accuracy, secrecy, observability, transparency, integrity, accountability, and auditability of Agency-conducted elections; and that has demonstrated experience in protecting similar type elections from both deliberate misconduct and simple error.

(iv) Commentators suggest that this is a response to EFCA's stalling in Congress. Electronic voting coupled with "quick snap" elections – elections where voting occurs very quickly after a union petition is filed – could have the practical effect of eliminating the employer's opportunity to communicate with employees about representation questions.

(d) Organizational Activities

(i) Organizational Activities by Off-Duty Employees on Employer's Property

(1) In *New York New York Hotel, LLC*, 334 NLRB 762, 763 (2001), the Board drew a distinction between individuals who work regularly and exclusively on the employer's property and those who do not for purposes of determining who "may engage in protected solicitation and distribution in nonwork areas of the owner's property . . . ."

(2) The D.C. Circuit reversed and remanded for further consideration, as the Board's decision raised a number of unanswered questions. *See New York New York Hotel, LLC v. N.L.R.B.*, 313 F.3d 585, 590 (D.C. Cir. 2002).

(3) The new Obama Board will address the issues posed by the D.C. Circuit, which have been pending for seven years.

(ii) Employee Access to Employer Property

(1) *Guard Publ'g Co. d/b/a Register-Guard v. N.L.R.B.*, 571 F.3d 53 (D.C. Cir. 2009)

a. The Bush Board held that absent a showing of discrimination, employees have no statutory right to use employer equipment for union organizing activities. Thus, employers are free to adopt "business use only" policies for email, provided they are enforced in non-discriminatory manner. *See Guard Publ'g Co. d/b/a Register-Guard*, 351 NLRB 1110 (2007).

b. The D.C. Circuit reversed the Board's decision, in part, finding that the employer discriminatorily applied its email policy when it disciplined an employee for using the company's e-mail system to disseminate union-related solicitations, because the employer permitted other employees to circulate personal solicitations and the policy made no explicit distinction between organizational and personal solicitations. 571 F.3d at 58.

c. Because the union did not appeal the issue, the D.C. Circuit's decision did not reach the Board's general holding that an employer does not violate the Act simply by maintaining a policy barring the use of company e-mail for all non-job-related solicitations, including union-related solicitations. *Id.* Thus, the Board's main holding—that employers have the right to prohibit all non-business use of e-mail systems—is still in effect.

(2) *Roundy's, Inc.*, 356 NLRB No. 27 (2010).

a. Trade unions engaged in peaceful handbilling at 26 supermarkets, advising customers that Roundy's used non-union contractors which did not pay prevailing wages and asked customers not to patronize the store.

b. Company officials took steps to expel the agents from the front of the stores, calling police or arranging for landlords to make such calls.

c. The NLRB found that the company had failed to establish a property interest sufficient to justify its interference with the handbillers, thereby violating the NLRB.

d. However, the Board reserved ruling on whether the company violated the Act at two stores, by denying unions access to the property while permitting others to use the premises. *See Sandusky Mall Co.,* 329 NLRB 618 (1999), *rev'd* 242 F.3d 682 (6th Cir. 2001).

e. In a November 12, 2010 notice, the NLRB invited interested persons to file briefs expressing their views on the legal standards applied in union access cases, including whether the Board should continue to follow *Sandusky Mall Co.* and to address the impact of *Register-Guard.*

f. In a brief on behalf of NLRB, Acting General Counsel Solomon wrote that *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), established the general rule that an employer may prohibit nonemployee distribution of literature on company property, subject to exception only where a union has no other reasonable means of communicating with employees or where the employer applies the policy in a manner that discriminates against union activity.

i. Addressing the impact of *Register Guard,* the Acting General Counsel said "the Board's standards in employee and nonemployee cases must be determined independent of each other, and therefore the Board's discussion of discrimination in *Register Guard* should not govern the Board's standard for finding unlawful discrimination in employee access cases."

ii. But the brief added that the Acting General Counsel continues to believe that the Board erred in *Register Guard* by "treat[ing] employees as if they were nonemployees."

g. Business groups and unions disagree over whether the Board should follow *Register-Guard* in future cases.

i. The AFL-CIO addressed *Register Guard*, arguing that the case was incorrectly decided and the question of employee access "should be decided, not by the sort of discrimination analysis applied in deciding the question of nonemployee access, but by determining whether the employer has advanced sufficient managerial reasons for restricting employee access."

ii. Given that nonemployee unions engaged in consumer boycotts have much weaker (or nonexistent claims) to Section 7 protections than do employees engaged in union organizing, employer groups argued, "it is anomalous for the Board to apply a more demanding standard for discrimination in the present context. Any new standard that is adopted should be consistent with *Register Guard*."

(e) Elections and Voluntary Recognition

(i) Voluntary Recognition: *Rite Aid / Dana Corp.*

(1) In *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 61 LRRM 1396 (1966), the Board held that, when an employer voluntarily recognizes a union based on majority support in a card check, the employer and the union are afforded a reasonable time to bargain without challenge to the union's majority status.

(2) *Dana Corp.*, 351 NLRB 434, 182 LRRM 1457 (2007)

a. The Board, overturned *Keller Plastics* and held that when an employer voluntarily recognizes a union based on signed authorizations cards, it must post a notice advising employees of their right to file a petition, within 45 days, for an election to decertify the union or in support of a rival union.

i. The Board's General Counsel incorporated this ruling into a set of new procedures in GC Memo 08-07.

b. Members Liebman and Walsh dissented, stating that the notice requirement and decertification period "cuts voluntary recognition off at the knees." 182 LRRM at 1471. The purpose of voluntary recognition, according to the dissenting, is the avoidance of delay and costs associated with a formal vote. To allow for an immediate decertification petition places "the parties' bargaining relationship open to immediate attack by a minority of employees at the very outset of the relationship, when it is at its most vulnerable." *Id.*

(3) *Rite Aid Store #6473 / Lemon Gasket Co.*, 355 NLRB No. 157, 189 LRRM 1094 (2010)

a. A majority of the new Board, composed of Chairman Liebman and Members Becker and Pearce, granted review in case involving the *Dana Corp.* decision, which "raise[s] substantial issues concerning voluntary recognition."

b. Members Schaumber and Hayes dissented, stating that *Dana Corp.* "did no more than level the playing field by providing an electoral option similar to that already available to employees whose employer relied on a petition signed by a majority of unit employees to withdraw recognition from an incumbent union." Moreover, the available data, which shows union recognition via card check in approximately 1,100 cases and decertification in 15 of 54 cases where employees demanded a vote under *Dana Corp.*, indicates that "the *Dana* policy has served its intended function well, without any adverse impact on the legitimate process of voluntary recognition." 189 LRRM at 1097.

c. Chairman Liebman responded to the dissent. She argued that the statistics capture only voluntary recognition agreements that were reached and fail to capture hypothetical agreements that never came to fruition due to the parties' concerns regarding *Dana*. *Id.*

(4) *Dana Corp.*, 356 NLRB No. 49 (2010)

a. Dana Corp. and UAW entered into a Letter of Agreement setting forth ground rules for additional union organizing, procedures for voluntary recognition upon proof of majority support, and substantive issues that collective bargaining

would address if and when Dana recognized the UAW at an unorganized facility.

b. Three employees filed unfair labor practice charges and the Board issued a complaint alleging that, by entering into and maintaining the Letter of Agreement, Dana Corp. rendered unlawful assistance to the UAW in violation of Section 8(a)(2) and (1) of the Act and the UAW restrained and coerced employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A).

c. A majority of the Board composed of Chairman Liebman and Member Pearce held that the parties stayed well within the boundaries of what the Act permits with regards to prerecognition agreements.

d. Member Hayes dissented, citing to a 1964 Board decision in *Majestic Weaving Co.*, which held that employers violate the Act by negotiating a collective bargaining agreement with a minority union. In Hayes's view, allowing prerecognition agreements of this kind "threatens to reinstate the very practice that those statutory provisions were meant to prohibit, i.e., the establishment of collective-bargaining relationships based on self-interested union-employer agreements that preempt employee choice and input as to their representation and desired terms and conditions of employment." *Id.* at *10.

(ii) Representation Elections

(1) *Mastec N. Am. Inc. d/b/a Mastec Direct TV*, 356 NLRB No. 110 (2011). The Board held that even if pro-union employees make threatening statements to co-workers during a campaign, NLRB precedent favors certifying the union as the bargaining representative (no matter how close the vote is).

(2) In this case, alleged statements included union supporters stating that they would "whip [the] ass" of a worker who did not support the Union, sabotage that employee's work or "bitch slap" co-workers if the union lost the election. In another instance, an anonymous telephone call warned that the caller would "get even" if the employee "backstabbed" the Union. The Board held that it requires a "more compelling showing" to set aside the results of balloting "when the source of the alleged coercion is the conduct of third

parties rather than the conduct of the employer or union." The Board held that in assessing the seriousness of an alleged threat, they consider: "the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election."

(3) Observing that "[l]oose talk is common, but acts of violence or other forms of retaliation perpetrated by employees rarely occur," the Board majority, basing its decision on their "experience enforcing the Act," held that the statements were "unlikely to have led other employees to fear actual physical harm" and were unlikely to have affected the results of the election.

(4) The dissent believed that the conduct of the supporters was "serious and likely to intimidate prospective voters to cast their ballots in a particular manner" and required the Board set aside the election.

(iii) Appropriate bargaining units.

(1) In what is likely to result in redefining just what constitutes an appropriate bargaining unit, the Board invited interested organizations to file amicus briefs on the composition of appropriate bargaining units in long-term care facilities. Many parties responded, including business groups representing thousands of employers, several international unions and three Republican senators. Although the invitation originated from *Specialty Healthcare & Rehab. Ctr.*, NLRB No. 15-RC-08873, it will have broader implications.

(2) Numerous groups raised concerns that a change in the NLRB's approach to unit determinations may only be done by amending the Act.

(3) Dissenting from the invitation for amicus briefs, Member Brian E. Hayes warned that the majority is "contemplating a broad revision of a test for determination of appropriate units in all industries under our jurisdiction—a test that has stood for at least 50 years."

(4) Following the initial invitation to submit briefs, on March 15, 2011 the NLRB decided to allow a limited round of additional briefing in this case. This extension came at the behest of involved legislators who had requested that the Board make public certain data relating to

NLRB representation cases and posting that data on the NLRB website. Government officials requested that this information be made public to ensure that if the NLRB intends to make major changes in the determination of bargaining units, it did so within the confines of an open rulemaking process, so that the legal standard can be fully understood before it is adopted and to give interested parties a chance to analyze the data. The Board extended the deadline to file briefs to March 29, 2011.

(f) Duty to Bargain

(1) Benefits: *E.I. DuPont De Nemours*, 355 NLRB No. 176 (2010)

a. The majority of Chairman Liebman and Member Becker ruled that unilateral changes to the terms of an employee benefit plan at a time when the parties' agreement had expired, negotiations for a successor agreement were ongoing, and impasse had not been reached violated Section 8(a)(5) of the Act.

i. The employer relied upon the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004), in asserting that the changes were consistent with an established past practice.

ii. The majority rejected this argument, finding that the *Courier-Journal* cases were inapposite because prior changes to the plan did not establish a past practice of changes implemented during out-of-contract periods.

b. Member Schaumber dissented, concluding that the modifications to the employees' benefit plan were implemented pursuant to a well-established past practice, and relying on established precedent that parties, by their actions, can create a past practice authorizing an employer's unilateral action.

(g) Successor Employer: UGL-UNICCO Service Company / MV Transportation

(1) *St. Elizabeth Manor*, 329 NLRB 341, 162 LRRM 1146 (1999)

a. Overruling its holding in *Southern Moldings, Inc.*, 219 NLRB 119, 89 LRRM 1623 (1975), the Board announced the creation of a "successor bar," pursuant to which a successor

employer is obligated to bargain with an incumbent union for a reasonable period of time.

(2) *MV Transportation*, 337 NLRB No. 129, 170 LRRM 1233 (2002)

a. The Board overturned *St. Elizabeth Manor* and returned to the *Southern Moldings* rule under which an incumbent union in a successor employer situation is entitled only to a rebuttable presumption of majority support, subject to immediate challenge by the employer, employees or a rival union.

(3) *UGL-UNICCO Service Company*, 355 NLRB No. 155, 189 LRRM 1089 (2010)

a. The Board granted review of *MV Transportation*.

b. Members Schaumber and Hayes wrote a dissenting opinion, expressing unease that "the newly-formed Board majority augur movement toward an activist agenda. . . . In a time of decreasing union density in the private sector, [the majority] appear[s] prepared to elevate and protect the rights of unions . . . at the expense of employees' free choice and unions' responsibilities . . . ." *Id.* at 1091.

c. Chairman Liebman countered Member Schaumber's "provocative characterizations" and defended the majority's action, which was simply to grant review and invite briefing on the issues, "which does not require a debate about basic questions of Federal labor law or American political thought." *Id.*

(h) Mandatory Bargaining Subjects

(1) Dues Checkoff

a. In *Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino*, 355 NLRB No. 154, 189 LRRM 1033 (2010), the issue was whether dues checkoff is subject to the unilateral-change doctrine articulated in *N.L.R.B. v. Katz*, 367 U.S. 736 (1962). In a July 2000 decision, the Board held that termination of dues checkoff is an exception to the Act's general requirement than an employer not make unilateral changes unless and until the parties have reached impasse. 189 LRRM at 1033. The decision was appealed to the Ninth

Circuit, which remanded the matter for a more detailed explanation of its holding.

b. After fifteen years of bouncing between the agency and the federal courts, the Board revisited *Hacienda Hotel* in 2010 and dismissed the complaint because it deadlocked. Member Becker recused himself, leaving Members Liebman and Pearce and Members Schaumber and Hayes. Unable to persuade either two-member group to accept the other's argument, the Board was compelled to apply precedent and dismiss the complaint. *Id.* at 1034. However, Chairman Liebman and Member Pearce wrote that "in an appropriate case," they would consider overruling a half century of precedent under *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962).

(2) Donning and Doffing Time

a. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009)

i. The Fourth Circuit held that employers and unions are permitted, pursuant to Section 203(o) of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, to bargain over compensation for time spent donning and doffing protective gear. 591 F.3d at 211.

ii. The circuits have split on this issue, with the Fourth, Fifth, and Eleventh Circuits finding that employers and unions may agree not to compensate employees for donning and doffing, *Allen v. McWane Inc.*, 593 F.3d 449, 2010 WL 47919 (5th Cir. 2010) and *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007), and the Ninth Circuit concluding that compensation for donning and doffing time is not negotiable, *Alvarez v. IBP Inc.*, 339 F.3d 894 (9th Cir. 2003).

iii. The United States Supreme Court recently declined review, *Sepulveda v. Allen Family Foods, Inc.*, --- S.Ct. ----, No. 09-1529, 2010 WL 2420333 (U.S. 2010).

(i) Perfectly Clear Successors

(i) *S&F Market St. Healthcare LLC v. N.L.R.B.*, 570 F.3d 354 (D.C. Cir. 2009)

(1) The D.C. Circuit reversed a Board finding that S&F was a "perfectly clear" successor. The Supreme Court set forth the general rule that "although successor employers may be bound to recognize and bargain with the union . . . they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them [unless] it is perfectly clear that the new employer plans to retain all of the employees in the unit." *N.L.R.B. v. Burns Int'l Security Servs.*, 406 U.S. 272, 284 (1972). In *S&F Market*, the D.C. Circuit clarified that *Burns* requires an employer only to "signal its intent . . . to establish new terms and conditions of employment under which some of the predecessor's employees may be hired" to avoid perfectly clear successor status. 570 F.3d at 360.

(2) The Board mistakenly placed the burden on the employer to express its intention to change the core terms of employment, in contravention of *Burns*. The D.C. Circuit instructed that an employer need not make a formal announcement that the core terms of employment would change in order to avoid application of the "perfectly clear" exception to the general rule. *Id.* at 362-63.

(j) Restraint and Coercion

(i) *Legacy Health Systems*, 354 NLRB No. 45, 186 LRRM 1289 (2009)

(1) The Board found that a policy prohibiting employees from holding dual part-time positions – one job in a unit represented by a union and the other in a non-union job – was discriminatory and violated Section 8(a)(3) of the Act. The employer asserted that the policy was meant to avoid legal uncertainties that could arise when employees are employed in represented and non-represented jobs. However, the policy did not prohibit employees from holding two jobs in two different bargaining units.

(2) The Board found that the scheme created a different set of rules for employees who wished to work in a represented and non-represented units, thus adversely impacting Section 7 rights. *Id.* at 1290.

(ii) *Union of Needletrades, Industrial & Testile Employees (UNITE) v. Pichler*, 129 S. Ct. 1662 (2009)

(1) The Supreme Court denied *certiorari* in a matter where the Third Circuit addressed issues of first impression regarding application of the Driver's Privacy Protection Act of 1994 (the DPPA), 18 U.S.C. §§

2721-2725. The underlying issue involved the union's use of employee addresses for organizing purposes by recording the license plate numbers on cars in the employer's parking lot. *Pichler v. UNITE*, 542 F.3d 380, 384 (3d Cir. 2008). The Third Circuit held that obtaining the employees' addresses through vehicle registration records for the purpose of organizing violated the DPPA. *Id.* at 395-96.

(iii) *Teamsters Local 886 (United Parcel Serv.)*, 354 NLRB No. 52, 186 LRRM 1273 (2009)

(1) The two-member panel of Chairman Liebman and Member Schaumber, found that the union violated Section 8(b)(1)(A) of the Act when its steward told a grievant, in the presence of another union member, that his grievance was dropped because the company did not like him. *Id.* at 1274. The Board reversed the ALJ's ruling and found that the uninvolved member "reasonably could have believed that [the steward] was acting on behalf of the [union]. Accordingly, we find [the union] responsible for [its steward's] statement by virtue of his apparent authority, irrespective of any potential actual authority." *Id.*

(2) In July 2010, the Board revisited this matter as mandated by the Supreme Court in *New Process Steel.* With Member Becker joining them, Members Liebman and Schaumber readopted its findings in the July 2009 Order.

(iv) Bannering: *United Brotherhood of Carpenters and Joiners of America,* 335 NLRB 159, 189 LRRM 1041 (2010).

(1) In a case of first impression, the Obama Board ruled that a union protest urging a boycott of a business with which the union does not have a direct labor dispute, does not constitute an unlawful secondary boycott when done solely with banners and leafleting outside the business.

(2) In *United Brotherhood*, the union picketed a hospital and a restaurant that employed nonunion contractors, placing large banners on sidewalks outside the businesses and handing out leaflets.

(3) The Board majority, comprised of Chairman Liebman and Members Becker and Pearce, found the protests did not violate the NLRA, relying on the fact that the signs were stationary and positioned a sufficient distance from business entrances. It also emphasized that

for bannering to be transformed into unlawful picketing, there had to be some verbal or physical confrontation. *Id.* at 1045-48.

(4) Dissenting Board Members Schaumber and Hayes argued that the decision "invites a dramatic increase in secondary boycott activity," and noted that the decision makes it unclear as to what proof an employer needs to stop a union protest. *Id.* at 1058.

(k) Protected Concerted Activity

(i) *Media Gen. Operations, Inc. d/b/a The Tampa Tribune v. N.L.R.B.*, 560 F.3d 181 (4th Cir. 2009)

(1) The court examined whether an employee's use of profanity and inappropriate speech in the work place, related to contract negotiations, can justify termination without violating Section 7 of the Act.

(2) The Board concluded that the employee was unlawfully terminated because such speech was entitled to protection, as it was part of the dialogue between employer and employee regarding the substance and process of negotiations. *Id.* at 185.

(3) On appeal, the Fourth Circuit applied the four-factor balancing test in *Atlantic Steel Co. v. Chastain*, 245 NLRB 814 (1979), to determine whether the concerted action lost protection based on the fact that the comment was egregious or flagrant, examining: (1) the place of the discussion, (2) the subject of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. 560 F.3d at 186.

(4) The court concluded that the employee's speech was not protected because the employer had not engaged in any unfair labor practices and the employee's statements were not spontaneous outbursts, but were *ad hominem* attacks based on lawful letters the employee had not read. *Id.* at 187-89.

(ii) *Trump Marina Associates*, 354 NLRB No. 123, 187 LRRM 1207 (2009)

(1) The Board ruled that employer policies prohibiting employees from speaking to the media violate Section 8(a)(1) of the Act, because such policies interfere with the Section 7 right of employees to communicate with the public about an ongoing labor dispute. *Id.* at 1208.

(iii) *Parexel Int'l LLC*, 356 NLRB No. 82 (2011)

(1) The majority of Chairman Liebman and Member Becker rules that an employer violates Section 8(a)(1) "by simply terminating [an] employee in order to be certain that she does not exercise her Section 7 rights." The employee was terminated by Parexel to prevent her from engaging in protected, concerted activity by protesting wage discrimination and favoritism based on national origin.

(2) The ALJ had found no violation, because there was no evidence that the employee had consulted with co-workers about the issue.

(3) The majority reversed, adopting a "pre-emptive strike theory" even though it had not been alleged in the Complaint. Since a threat to fire to dissuade protected activity is unlawful, so should a termination with the same object.

(4) Member Hayes dissented from the "unprecedented" opinion and criticized the majority for deciding the case on the preemptive strike theory, which, according to Hayes, was not properly before the Board.

(iv) Campaign & Election Misconduct

(1) *Community Med. Ctr.*, 354 NLRB No. 26, 186 LRRM 1161 (2009)

a. The Board concluded that an employer's "shared governance" plan, which allowed nurses to participate in resolving practice issues, violated Section 8(a)(1) of the Act because its purpose was to dissuade nurses from selecting a bargaining representative. *Id.* at 1162.

(l) Salts

(i) *KenMor Electric Co.*, 355 NLRB No. 173, 189 LRRM 1105 (2010).

(1) The majority of Chairman Liebman and Member Pearce ruled that the applicant referral system maintained by the Independent Electrical Contractor Association of Greater Houston ("IEC") had an "adverse impact" on union salts and violated Sections 8(a)(3) and (1) of the NLRA.

a. The IEC, during a salting campaign sponsored by IBEW Local 716 targeting the IEC's non-union employees, adopted a policy of imposing a $50 fee for any application that an

individual filed within a 30-day period following an initial application. Under the referral system, the IEC accepted applications and forwarded them to member contractors who decided whether to hire the applicants.

b. The majority found that the referral system "in its totality," unlawfully hindered the efforts of union members, creating an adverse impact on the union's ability to salt effectively. *Id.* at 1107.

(2) Member Schaumber dissented, finding that the referral system served a legitimate and substantial business purpose, not designed to discriminate against union salts and applied equally to all applicants regardless of union affiliation. *Id.* at 1118.

(ii) Are Salts "Employees?"

(1) The Obama Board is likely to revisit the decision in *Toering Electric Co.*, 351 NLRB 225 (2007), where the Board held that union salts may not always be considered employees under the Act, because employees are "genuinely interested in seeking to establish an employment relationship with the employer." *Id.* at 228.

(2) Members Liebman and Walsh dissented, claiming the decision is another step in the direction of undoing statutory protections for union salts seeking to uncover discriminatory hiring practices. *Id.* at 238.

(iii) Backpay for Salts

(1) The Obama Board may also revisit *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118, 182 LRRM 1001 (2007), which eliminated the presumption "that the backpay period should run from the date of discrimination until . . . a valid offer of reinstatement" is made, and placed the burden on the General Counsel to establish through "affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed." *Id.* at 1004.

(iv) Truth in Employment Act of 2009, H.R. 2808, S.1227, 111th Cong. (2009). Sponsored by Representative Steve King (R-IA) and Senator Jim DeMint (R-SC).

(1) Would amend the NLRA to provide that nothing in specified prohibitions against unfair labor practices by employers shall be

construed to require an employer to employ any person who seeks employment with the employer in furtherance of other employment or agency status (i.e., salts).

(m) Job Abandonment During Strikes

(i) *KSM Industries, Inc.*, 353 NLRB No. 117, 186 LRRM 1131 (2009)

(1) The Board affirmed the ALJ's ruling that striking employees did not voluntarily abandon their jobs when they tendered resignations to receive payouts from retirement funds and for accrued vacation pay. *Id.* at 1134.

(2) In determining whether a striking employee has voluntarily abandoned his/her job, the Board will consider "the relevant circumstances to determine whether the striker has expressed an unequivocal intention not to return to his former job." *Id.* at 1138 (quoting *Alaska Pulp Corp.*, 326 NLRB 522, 524 (1998)).

(3) Thus, an employee's resignation for the purpose of obtaining pension funds and accrued vacation pay is not evidence of abandonment. 186 LRRM at 1138.

(n) Arbitration of Statutory Claims

(i) *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 556 U.S. ---- (2009) (5-4 decision)

(1) The Supreme Court held that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act ("ADEA") is enforceable.

(2) The Court found the collective bargaining agreement, which contained an antidiscrimination provision requiring that all employees submit employment discrimination claims to binding arbitration, enforceable under NLRA and further concluded that nothing under ADEA precludes arbitration of age discrimination claims. *Id.* at 1465. Justice Thomas, writing for the majority, reasoned that unions have authority to negotiate binding dispute resolution procedures for claims arising under federal and state law, provided that the statute at issue does not remove the claim "from the NLRA's broad sweep." *Id.*

(3) Justice Steven wrote a dissenting opinion, in which Justices Souter, Ginsberg, and Breyer joined, noting that "the majority's preference for arbitration again leads it to disregard our precedent." *Id.* at 1475.

(ii) Operations Management Memo 10-13, issued by Associate General Counsel Richard A. Siegel in October, 2009, instructs regional office personnel to submit to the Division of Advice all cases where deferral to the arbitration decision is recommended. In the Memorandum, Siegel noted that District of Columbia Circuit's criticism of the Board's standards for deference to arbitration decisions in ULP matters, and also the Supreme Court's decision in *14 Penn Plaza*, above. Seigel also notes that "the Supreme Court's and D.C Circuit's approaches do not compel a change to the traditional *Spielberg/Olin* standards of review. Nevertheless, they raise questions that the Board must answer as it decides whether to defer to an arbitral award."

(1) But see, Memorandum GC 11-05; "Guideline Memorandum Concerning Referral to Arbitration Awards…"

(iii) The Arbitration Fairness Act of 2009, H.R. 1020, S. 931, 111th Cong. (2009). Sponsored by Rep. Henry C. Johnson, Jr. (D-GA) and Senator Russ Feingold (D-WI)

(1) The bill invalidates pre-dispute arbitration clauses that require arbitration of: (1) an employment dispute, (2) a dispute arising under a civil rights statue, or (3) a dispute arising under a statute regulating transactions between parties of unequal bargaining power. The Act would overrule *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), in which the Supreme Court upheld an employer practice of requiring employees to enter into pre-dispute arbitration agreements as a condition of employer, but would not apply to the specific issue of arbitration provisions in collective bargaining agreements addressed in *14 Penn Plaza*.

(2) The last action taken on the bill occurred on June 21, 2010, when it was discharged by the Subcommittee on Commercial and Administrative Law.

(o) Remedies

(i) Backpay Orders

(1) *NLRB v. Consolidated Bus Transit, Inc.*, 577 F.3d 467 (2d Cir. 2009)

a. The Second Circuit required an employer to pay backpay to a bus driver, covering a period of time when he was

unauthorized to drive a school bus because of failed driving tests. The court found that the employer illegally targeted and then discharged the bus driver due to his participation in union activity. *Id.* at 479. Over the employer's objection, the court ordered that the backpay run from the date of termination until the next regularly scheduled driving test because, were it not for being singled out on the basis of union activity, the bus driver presumably would have been employable in that capacity. *Id.* at 477.

(2) *Jackson Hosp. Corp. d/b/a Kentucky River Med. Ctr.*, 354 NLRB No. 42, 186 LRRM 1241 (2009)

a. The Board ordered an employer to pay backpay despite the employee's post-discharge felony drug conviction, because the hospital employed other convicted felons, so that it could not prove that the felony in this case would have resulted in termination of her employment with the hospital. *Id.* 1243-41. Additionally, the Board ordered the backpay award to cover the time while the former employee left an interim job for child-care reasons. *Id.*

b. On remand following *New Process Steel*, the order was affirmed by a three-member panel.

c. The Board unanimously adopted a new policy under which interest on back pay and other monetary awards will be compounded on a daily basis, using established methods for computing backpay and for determining the applicable rate of interest.

(ii) Electronic Posting of Notices

(1) *J&R Flooring Inc., d/b/a J. Picini Flooring*, 356 NLRB No. 9 (Oct. 22, 2010)

a. The Board held that employers and labor organizations who customarily use intranets, website, e-mails or other electronic means of communication with union members and employees must distribute notices of unfair labor practice using electronic means, in addition to posting paper notices. The Board reasoned that electronic communications "are overtaking, if they have not already overtaken bulletin boards." As with *Jackson Hospital*, the Board invited interested parties to submit briefs on the issue of electronic posting.

b. Member Hayes dissented from the ruling, arguing that the electronic posting requirement imposes too great a burden on employers. Electronic posting was, prior to this ruling, reserved as an extraordinary remedy for cases involving egregious unfair labor practices and repeated violations. Hayes expressed concern that electronic postings will be subject to "anonymous alter[ation] and broad[] distribut[ion] to nonemployees . . . perverting the remedial purposes of the Act, and becom[ing] punitive."

(iii) Injunctive Relief under Section 10(j)

(1) Circuit Split

a. "Section 10(j) provides that a district court shall award temporary injunctive relief 'as it deems just and proper.'" *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 541 (4th Cir. 2009). However, the Supreme Court has not defined these terms, which "has vexed the courts and spawned three competing standards for judging the propriety of § 10(j) relief." *Id.* The Fourth Circuit then surveyed the legal standards.

b. The Third, Fifth, Sixth, Tenth, and Eleventh Circuits apply a two-step approach that asks whether: (1) 'reasonable cause' exists to believe a violation of the Act has occurred, and (2) injunctive relief is 'just and proper.'" *Id.*; *see also Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 234–36 (6th Cir. 2003); *Sharp v. WEBCO Indus., Inc.*, 225 F.3d 1130, 1133–34 (10th

Cir. 2000); *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992); *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188–89 (5th Cir. 1975).

c. The Fourth, Eighth, and Ninth Circuits use a balancing test that incorporates a four-factor standard, including: "(1) the possibility of irreparable injury to the moving party if relief is not granted; (2) the possible harm to the nonmoving party if relief is granted; (3) the likelihood of the moving party's success on the merits; and (4) the public interest." *Muffley*, 570 F.3d 541. *See also Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1038–39 (8th Cir. 1999); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 456–60 (9th Cir. 1994) (en banc); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195–96 (4th Cir. 1977).

d. The First and Second Circuits follow a hybrid standard, which "incorporates the traditional four-part equitable standard into the 'just and proper' analysis, yet retain[s] a separate 'reasonable cause' step." *Muffley*, 570 F.3d 541. *See also Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 365, 368 (2d Cir. 2001); *Pye v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 63 (1st Cir. 1994).

e. This is important because of the Acting General Counsel's announced initiative to more aggressively pursue Section 10(j) relief. See *Memoranda* GC:10-07 and GC 11-01.

(iv) Bargaining Orders

(1) *Regal Health & Rehab Ctr., Inc.*, 354 NLRB No. 71, 187 LRRM 1020 (2009)

a. A two-member panel of Chairman Liebman and Member Schaumber adopted the decision of an ALJ to grant a *Gissel* bargaining order, finding that the employer unlawfully discharged three nurses in retaliation for their union activity and threatened other employees with job loss and unspecified reprisals for engaging in union activities, promised employees a reward for surveillance of other employees, and interrogated employees concerning their union sympathies and activities. *Id.* at 1022-23.

b. On remand following *New Process Steel*, the order was affirmed by the Board on August 5, 2010.

(p) Nonmember Dues For National Litigation

(i) *Locke v. Karass*, 129 S. Ct. 798, 555 U.S. ---- (2009)

(1) The Supreme Court held that the First Amendment permits a local union to charge nonmembers for national litigation expenses, provided that the subject matter of the litigation would be chargeable if the litigation were local and the charge is reciprocal in nature, such that the all locals are expected to contribute similarly to the national's resources used for costs of similar litigation. *Id.* at 802. The Court upheld the particular litigation expense in *Locke* because it related to collective bargaining and contributing nonmembers received access to the national's financial resources. *Id.* at 807.

(q) Independent Contractors

(i) In *FedEx Home Delivery and Local 25*, 351 NLRB No. 16 (2007), the Board found that FedEx Home Delivery's refusal to bargain violated Sections 8(a)(1) and (5) of the Act because the unit workers were employees, not independent contractors.

(ii) The D.C. Circuit disagreed, finding that the drivers were independent contractors; "while all the considerations [of the common law formulation of independent contractor test] remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position represents the opportunities and risks inherent in entrepreneurialism." *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 497 (D.C. Cir. 2009).

(1) The court called uncertainty about independent contractor status "particularly problematic" under the NLRA, because the Board has absolutely no authority over independent contractors under the Act. *Id.* at 496.

(2) Responsible for ensuring that the Board only exercises the power granted by the Act, the D.C. Circuit said it would not defer to NLRB decisions on independent contractor status, but would uphold the Board's decision if it reflected that the agency made a choice between "two fairly conflicting views." *Id.*

(r) Supervisors

(i) *N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001)

(1) The Supreme Court rejected the Board's test for determining supervisory status as inconsistent with the Act.

(2) Under Section 2(11), employees are "supervisors," and therefore excluded from the Act's coverage, if they: (1) exercise one of twelve enumerated supervisory functions; (2) exercise "independent judgment"; and (3) hold their authority in the employer's interest.

(3) The Board read into the statute "a categorical exclusion . . . that does not suggest its existence" when it held that registered nurses do not use "independent judgment" under Section 2(11) when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." *Id.* at 714.

(ii) *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006); *Golden Crest Healthcare Ctr.*, 348 NLRB 727 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006)

(1) In response to the Supreme Court's opinion, the Bush Board issued three decisions (*The Kentucky River Three*) that collectively redefined the requirement of "independent judgment" applicable to all supervisory tasks, as well as clarifying the definitions of two of the supervisory tasks.

(2) "Assign"

a. The Board declared that the supervisory term "assign" refers to the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period)," and, lastly, delegating "significant overall duties" to another employee.

b. With regard to the authority to delegate significant overall duties, the Board clarified that the types of delegations covered by the term "assign" include those involving major or repetitive obligations, "not ad-hoc instructions" to "perform a discrete task."

c. If an employee has the authority to perform one of these three functions, then he or she will be found to have the authority to "assign" employees and therefore, if the authority

is exercised in the interest of the employer and while exercising independent judgment, the employee will be regarded as a supervisor not entitled to union membership.

(3) "Responsibly to Direct"

a. The Board also defined the term "responsibly to direct," to refer to an employee with the authority to direct the work of, and oversee, other employees while possessing the power to correct the monitored employees' behavior. Further, the overseeing employee must remain accountable not only for his own oversight but for the work performed by the other employees.

b. Using this definition, the NLRB distinguished between those employees for whom the direction of others is merely the completion of their own assigned task, and those for whom the direction of others involves a managerial interest.

(4) "Independent Judgment"

a. The Board held that an employee exercises independent judgment when he or she has the ability to make decisions that are not preordained by explicit or formulaic policies or directives, and that are not exclusively within the decisional province of, or dictated by, higher management.

b. Where employees have considerable latitude in determining which factors to weigh or how much weight each should be accorded when making decisions, they are likely exercising independent judgment.

c. It is this freedom to utilize discretion, a fact specific inquiry not lending itself to general depiction, that is the touchstone for determining whether an employee is exercising independent judgment.

(iii) What's Likely to Happen Next?

(1) Members Liebman and Walsh dissented in *The Kentucky River Three*, finding the definitions of "assign" and "responsibly to direct" too broad, because assigning employees tasks is a "quintessential function of the *minor supervisors* whom Congress clearly did not intend to cover in Section 2(11)." *Oakwood*, 348 NLRB at 702.

(2) The Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act ("RESPECT Act"), H.B. 1644, S. 969, 110th Cong. (2007). Sponsored by Rep. Robert Andrews (D-NJ) and 164 co-sponsors.

a. The bill, which seeks to clarify (and narrow) the definition of "supervisor" under the NLRA, contains three substantive provisions, that: (1) require an individual to spend the majority of his/her time supervising, (2) eliminate the term "assign" in the statute, such that persons who assign tasks would not be automatically deemed supervisors and excluded from the Act's coverage, and (3) eliminate the term "responsibly to direct."

(3) Although the RESPECT Act stalled in the prior Congress and has not been reintroduced yet, expect that the Obama Board will revisit the *Kentucky River Three* to accomplish the objectives of the RESPECT Act.

(s) Temporary Employees

(i) *H.S. Care LLC d/b/a Oakwood Care Ctr.*, 343 NLRB 659, 176 LRRM 1033 (2004)

(1) A Bush Board majority ruled in favor of limiting the Act's coverage and overruled *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which had held that collective bargaining units combining "employees who are solely employed by a user employer and employees who are jointly employed by the user employer and a supplier employer are permissible under the Act." The *Sturgis* Board found, to the contrary, that "such units constitute multiemployer units, which, in accordance with the statute, may be appropriate only with the consent of the parties." 176 LRRM at 1033.

(2) Predictably, Members Liebman and Walsh wrote a dissenting opinion, accusing the majority of excluding "yet another group of employees- the sizable number of workers in alternative work arrangements – from organizing labor unions, by making them get their employers' permission first." *Id.* at 1038.

(3) The Obama Board will likely revisit this matter and possibly reinstate the *Sturgis* rule.

(t) Graduate Student Assistants

(i) *Brown University*, 342 NLRB No. 42, 175 LRRM 1089 (2004)

(1) The Board concluded that graduate students are categorically excluded from coverage by the NLRA, because they are "students" and not "employees" within the meaning of the Act. Members Liebman and Walsh dissented, calling collective bargaining "a fact of American university life." 175 LRRM at 1100.

(ii) The ruling reversed *New York University*, 332 NLRB 1205 (2000), in which a Clinton-era Board held that graduate student assistants are employees under the Act.

(iii) *New York University*, 356 NLRB No. 7 (2010)

(1) On June 8, 2010, the New York Regional Office of the NLRB dismissed a new representation petition for NYU graduate student assistants. The Graduate Student Organizing Committee of the UAW asked the Board for reversal of *Brown* "on the basis that it was wrongly decided as a matter of law and policy."

(2) The Board reversed 2-1 the dismissal of the UAW's petition on October 25, 2010. Members Becker and Pearce, in reinstating the UAW's petition and remanding the matter to the Regional Director for a hearing, stated that "there are compelling reasons for reconsideration of the decision in *Brown University*."

(u) Exempt Employers

(i) Religious Educational Institutions: *Carroll Coll. Inc. v. N.L.R.B.*, 558 F.3d 568 (D.C. Cir. 2009)

(1) The D.C. Circuit reversed the decision of the Board finding that the employer violated Section 8(a)(5) of the NLRA by refusing to bargain with the UAW, the certified representative for Carroll College's faculty. *Id.* at 575.

(2) The Board, the court applied the *Great Falls* "bright-line rule" that a "school is exempt from NLRB jurisdiction if it (1) holds itself out to students, faculty and the community as providing a religious educational environment, (2) is organized as a 'nonprofit,' and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to

religion." *Id* (quoting *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002)).

(3) Court reversed Board despite College's failure to raise lack of jurisdiction.

(ii) Jurisdiction over Indian Tribes: *Little River Band of Ottawa Indians v. N.L.R.B.*, No. 09-141 (W.D. Mich. September 20, 2010)

(1) Employees challenged the tribal law of the Little River Band of Ottawa Indians banning strikes, claiming that it interferes with the Section 7 rights of casino employees. The federally-recognized tribe promulgated a Fair Employment Practices Code, pursuant to which the Band governs labor relations and collective bargaining within its jurisdiction and prohibits employees from engaging in strikes.

(2) The district court dismissed the Band's complaint, which sought to enjoin the NLRB from investigating the charge. The district court found that it lacked jurisdiction to determine the Board's jurisdiction over the matter. The court further found that the issue would have to be resolved by the Board itself.

(iii) NLRB invites *amici* to file briefs on Illinois Charter School's status: *Chicago Mathematics & Science Academy Charter School, Inc. v. NLRB*, (13-RM-1768), Chicago, IL, January 10, 2011.

(1) The Board issued a notice and invitation to file briefs on whether a Chicago charter school is an employer subject to the Board's jurisdiction or a "political subdivision" of the State of Illinois within the jurisdiction of a state agency. The Board noted that state laws on charter schools vary, and that NLRB regional directors have asserted jurisdiction in some cases involving charter schools, while declining jurisdiction in other cases.

(2) On March 11, 2011, four groups submitted briefs in response to the Board's invitation to file amicus briefs on the issue of whether a Chicago charter school is a "political subdivision" outside the Board's jurisdiction. *(Chicago Mathematics & Sci. Acad. Charter Sch. Inc. v. NLRB*, NLRB, No. 13-RM-1768, amicus briefing closed 3/11/11).

(v) Section 8(g): Strike Notice for Healthcare Employers

(i) *N.L.R.B. v. Special Touch Home Care Servs., Inc.*, 566 F.3d 292 (2d Cir. 2009)

(1) The Second Circuit remanded to the Board the question of whether an employee who violated a company call-in policy, but whose union had complied with the relevant notice requirements of Section 8(g), lost the protections of the Act. *Id.* at 297. The court instructed the Board to consider various factors, including the employer's attempts to maintain a regulated workforce, the employees' interest in striking, and what degree of risk the employee exposed clients to by failing to provide individual notice. *Id.* at 300.

(ii) *Correctional Med. Servs. Inc.*, 356 NLRB No. 48 (2010)

(1) The Second Circuit had addressed the issue of disciplining non-union employees for participation in unlawful picketing and reversed a Board decision upholding an employee's termination. *Id.* at 90. The court disagreed with the Bush Board's reasoning that an "employee who pickets in violation of Section 8(g) is engaged in unprotected conduct, and is thus vulnerable to employer discipline," because Section 8(g) is silent about an employee's obligation to provide notice. *Id.* The Second Circuit vacated the Board's 2007 ruling and remanded the case to the Board. *See Civil Serv. Employees Ass'n v. N.L.R.B.*, 569 F.3d 88 (2d Cir. 2009)

(2) On remand, the Board accepted as "the law of the case" the Second Circuit's conclusion that the employees were engaged in activity protected by the Act even though the union's picketing was unlawful and held that the employer violated the Act by firing those employees.

(iii) *SEIU, United Healthcare Workers-West v. N.L.R.B.*, 574 F.3d 1213, 1219 (9th Cir. 2009)

(1) The Ninth Circuit upheld the Board's decision finding that SEIU violated Section 8(g) of the Act by failing to give ten days' notice of the decision not to work overtime, because it took an active role in the employees' decision not to work.

(w) Social Media Issues

(i) *Am. Medical Response of Connecticut, Inc.*, No. CA-12576 (Oct. 27, 2010)

(1) The NLRB issued a Complaint, against American Medical Response of Connecticut, Inc., alleging that the ambulance service illegally terminated an employee for her use of social networking cites to criticize her supervisors, and also for maintaining and enforcing "an overly broad blogging and Internet posting policy." The employee

posted a negative remark about the supervisor on her personal Facebook page, which drew supportive responses from her co-workers, and led to further negative comments about the supervisor from the employee.

(2) The agency found that the Facebook postings were protected concerted activity," and that the company's blogging and Internet posting policy contained unlawful provisions, including one that barred employees from making disparaging remarks when discussing the company or supervisors and another that prohibited employees from depicting the company in any way over the Internet without company permission. "Such provisions constitute interference with employees in the exercise of their right to engage in protected concerted activity."

(3) On February 7, 2011, the parties reached a settlement agreement, pursuant to which the company agreed to revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that the company would not discipline or discharge employees for engaging in such discussions.