

Policymaking under the Bush II National Relations Board: Where do we go from here?

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Published in *Labor Law Journal*, vol. 59, no. 2, pp. 141-153, Summer 2008

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LABOR LAW JOURNAL

A CCH PUBLICATION

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SUMMER 2008

POLICYMAKING UNDER THE *BUSH* II NATIONAL LABOR RELATIONS BOARD: WHERE DO WE GO FROM HERE?

BY DAVID P. TWOMEY*

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With the decisions issued at the close of its fiscal year in September of 2007, on top of highly publicized decisions issued previously, the National Labor Relations Board (Labor Board or NLRB) has come under heavy criticism from union and political leaders, as well as academicians.¹ This article will discuss the politicization of the Labor Board. It will present the U.S. Supreme Court's analytical framework for reviewing administrative agency policymaking decisions, as set forth in its landmark *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* decision.² Two recent decisions of the Labor Board will be evaluated under the *Chevron* standards. The article will conclude with comments on whether or not the agency is fulfilling its statutory mission to administer the National Labor Relations Act (NLRA or Act) according to the terms of the Act itself, as interpreted by the U.S. Supreme Court and offers some suggestions on how to revitalize the agency.

THE POLITICIZATION OF THE NLRB AND CURRENT EFFECTS

The 1935 Wagner Act Congress recognized that the new agency it was creating to administer this act would be an adjudicatory body rather than a mediation and arbitration agency like that created by the Railway Labor Act of 1926 as amended in 1934. Consequently, it deleted references to the appointment of partisan members from management and union

backgrounds in the final draft of the act, and it was fully understood that the Board was to be staffed by three impartial public members, appointed from government service or academic careers.³ So also, the Congress that expanded the Labor Board to five members in 1947 continued to expect that the Board members would be impartial, neutral adjudicators.⁴ Presidents Roosevelt and Truman filled appointments to the Board with non-partisan appointees. Starting with President Eisenhower, however, appointment practices changed. Since 1970 a majority of appointments to the Board have come from management and union law practices rather than non-partisan and neutral backgrounds.⁵

While the NLRA is silent on the matter, a tradition has developed whereby both Democrats and Republicans are appointed to the Board, with the President's party holding a three-to-two majority of appointments and also the chair.⁶ Traditionally, at the confirmation stage each NLRB nominee had been given individual consideration by the Senate Labor Committee and the Senate as a whole and the President had the prerogative of staffing the Board with any reasonably well qualified individual of his choosing.⁷ Starting in the second Reagan administration and into the George H. W. Bush administration, greater Senatorial control over the appointment process occurred. Board appointments in both the George H.W. Bush and Clinton administrations tended to come in "packaged deals," whereby Senate power brokers in consultation with industry and labor interest groups insisted that the

President acquiesce to certain of their choices as the price of getting his Board nominee(s) confirmed by the Senate.⁸ Moreover, in both these administrations and continuing in the George W. Bush (Bush II) administration, recess appointments have been utilized while the Senate and White House bargained over packaged deals.⁹

The politicized appointment process has had an adverse impact on the perceived fairness of the agency as an adjudicative body responsible for applying the explicit policies set forth in the NLRA as well as the formulation of policies to fill in gaps left implicitly or explicitly by Congress to respond to the developing intricacies of our highly competitive global economy.

Thus, decision-making at the NLRB has undergone a transformation. Decisions formerly made by impartial neutral adjudicators are now perceived to be made by arguably partisan members from union- and management-side backgrounds, with the President's party holding the majority appointment. The politicized appointment process has had an adverse impact on the perceived fairness of the agency as an adjudicative body responsible for applying the

explicit policies set forth in the NLRA as well as the formulation of policies to fill in gaps left implicitly or explicitly by Congress to respond to the developing intricacies of our highly competitive global economy.

Management practitioners and former Board members criticized the Clinton Board for a number of its decisions, which overruled prior precedent and were perceived to afford greater protections for workers in the evolving economy of the period.¹⁰ In *New York University*, the Clinton Board extended coverage of the Act to teaching assistants, research assistants, and proctors.¹¹ In *M.B. Sturgis, Inc.*, the Clinton Board determined that employees obtained from a personnel staffing firm—contingent workers—may be included in the same bargaining unit as

the permanent employees of the employer to which they are assigned.¹² In *St. Elizabeth Manor*, the Clinton Board preserved representational rights of employees after a corporate merger or consolidation.¹³ And, in *Epilepsy Foundation of Northeast Ohio*, the Clinton Board held that unrepresented (non-union) employees, who make up more than 90 percent of today's private sector workforce, have a right to have a coworker present during investigatory interviews.¹⁴

The current Bush Board, which has had a majority of Republican appointees since December 2002, overruled all of the above Clinton Board decisions.¹⁵ On December 12, 2007, a letter signed by 57 Labor Law professors was sent to all members of Congress criticizing the actions of the Bush Board. It stated in part:

Recent decisions by the National Labor Relations Board reflect an ominous new direction for American labor law. By overturning precedent and establishing new rules, often going beyond what the parties have briefed or requested, the Board has regularly denied or impaired the very statutory rights it is charged with protecting—the rights of employees to join and form unions and to engage in collective bargaining. The Board's persistent efforts to undermine NLRA protections also have dramatized the need for Congress to enact serious labor law reform after nearly half a century with no substantial legislative change. ...¹⁶

The *Chevron* principles recognize that the agency to which Congress delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments when resolving competing policy interests which Congress itself did not resolve.

The following day a joint House and Senate subcommittee hearing listened to criticism and defense of the Bush Board's record.¹⁷ AFL-CIO General Counsel Jonathan Hiatt testified that the cumulative effect of the Bush Board's decisions has been to narrow worker protections while expanding the scope of anti-union conduct.¹⁸ Former NLRB

Chairman Robert J. Battista testified that the spurt of decisions in September was not politicized and that complaints are politically motivated and tied to the coming election cycle. He referred to the high enforcement achievement rate of his Board's decisions in the federal appeals courts.¹⁹ University of Illinois Law Professor Matthew Finkin testified that the current board majority has effectively removed whole categories of

workers from the Act's coverage, stripped away protections promised by the Act, and further diluted the strength of already inadequate remedies.²⁰ Professor Finkin disagreed with Mr. Battista's assertion that the rate of judicial affirmance is an indication that the Board is performing responsibly.²¹

STANDARDS FOR COURT REVIEW OF BOARD DETERMINATIONS ON "LAW AND POLICY"

The U.S. Supreme Court set forth the federal judiciary's role when reviewing an administrative agency's application of its organic statute (the statute(s) it administers) in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*²² The *Chevron* Court designed a two-step analytical framework for the reviewing court. First, the court must ask whether Congress has directly spoken on the question at issue.²³

If so, the reviewing court and the agency itself must give effect to this Congressional intent.²⁴ Second, if the statute is silent or ambiguous on the question at issue, the reviewing court then must ask whether the agency's interpretation is "based on a permissible construction of the statute."²⁵ The power of an agency to administer a Congressionally-created program necessarily requires the formulation of policy to fill gaps left implicitly or explicitly by Congress. If it is a reasonable policy choice, the agency's construction of the statute is controlling, even if the reviewing court would have chosen a different interpretation.²⁶ The agency's interpretation is to be given "controlling weight unless [it is] arbitrary, capricious or manifestly contrary to statute."²⁷

A reviewing court may, under the first *Chevron* step, conclude that the issue is one of law rather than one of delegated policy, and reject the agency's decision or rule. For example, in *Lechmere, Inc. v. NLRB*, dealing with the resolution of conflicts between Section 7 employee rights and employer property rights, a divided U.S. Supreme Court rejected the Board's interpretation of Section 7 as permitting a balancing of interests allowing non-employee union organizers the right of access to an employer's parking lot that was open to the public.²⁸ The Court rejected the Board's interpretation of the Act as contrary to the Court's prior interpretation of the Act in *NLRB v. Babcock & Wilcox Co.*²⁹ The dissent asserted that the majority's decision was "... at odds with modern concepts of deference to an administrative agency charged with administering a statute."³⁰

Under the second step, the *Chevron* Court noted that for "judicial purposes" in reconciling conflicting policies the administrator's interpretation is entitled to deference as opposed to the reviewing judges, who are not experts in the field.³¹ The Court stated in part:

...[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the

incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged

with the administration of the statute in light of everyday realities.³²

In addition to the general principles of administrative law discussed in the landmark *Chevron* decision, the United States Supreme Court has specifically emphasized that the Labor Board has the primary responsibility for developing and applying national labor policy.³³ The Court has stated that it will uphold a Board rule as long as it is rational and consistent with the Act.³⁴ And, it has stated that a Board rule is entitled to deference even if it represents a departure from the Board's prior policy.³⁵

**The Board majority,
without the benefit of briefs
from interested parties,
without oral argument
and without a request for
it to reconsider the long
established precedent
enduring through 170
hiring discrimination
cases tried before the
Board's administrative law
judges since the issuance
of *FES*, legalized hiring
discrimination involving
salts in some cases.**

EVALUATING TWO RECENT BOARD DECISIONS UNDER CHEVRON STANDARDS

IBM Corp.

The Bush Board's *IBM Corp.*³⁶ decision is an example of permissible administrative agency action in resolving conflicting policy considerations, which is not to be set aside by a reviewing court.

In 1973, the Labor Board issued its *Weingarten* decision, which held that an employer violates Section 8(a)(1) of the NLRA when it denies an employee's request for the presence of a union representative at an investigatory interview that the employee reasonably believes might result in disciplinary action.³⁷ The Board's decision was upheld by the Supreme Court in *NLRB v. Weingarten, Inc.* in 1975.³⁸ The *Weingarten* right of an employee to request and obtain the presence of a coworker at an investigatory interview was extended to nonunion

workplaces by the Board in *Materials Research Corp.* in 1982.³⁹ Three years later, in 1985, the Reagan Board reversed this decision in *Sears, Roebuck Co.*, holding that *Weingarten* principles do not apply in nonunion settings.⁴⁰ In *Epilepsy Foundation of Northeast Ohio*, decided in 2000, the Clinton Board reimposed the *Materials Research* holding, concluding that unrepresented employees have a right to have a coworker present during investigatory interviews.⁴¹ The Court of Appeals for the District of Columbia Circuit upheld the Board's renewed interpretation of the statutory language in question stating in part:

The agency itself with highly qualified nonpartisan professional staff and other individuals with proper professional and academic credentials can well provide the neutral pool of nonpartisan leadership for future appointments to the Board, as was the original intent of the Congresses that enacted and first amended the NLRA.

It is a fact of life in NLRB lore that [the meaning of] certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board. Because the Board's new interpretation is reasonable under the Act, it is entitled to deference.⁴²

Three years later on June 9, 2004, with the makeup of the Board changed again, the Bush Board reversed *Epilepsy Foundation in IBM Corp.*, ruling that nonunion employees do not have the right to have a coworker present during an investigatory interview.⁴³

The *Chevron* principles recognize that the agency to which Congress delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments when resolving competing policy interests which Congress itself did not resolve.⁴⁴ The *Epilepsy Foundation* decision, which for the first time in 18 years extended the right to have a coworker present during an investigatory interview to all unrepresented employees in the private sector, was considered a major adverse decision by American business interest groups.⁴⁵ That is, while less than 10 percent of private sector employees are unionized, prior to *Epilepsy Foundation* only they had *Weingarten* rights. After *Epilepsy Foundation*, all private sector individuals meeting the broad statutory definition of "employee" were entitled to these rights.⁴⁶

The Bush Board determined that policy considerations supported its decision to deny

unrepresented employees the right to have a coworker present during an investigatory interview that could lead to discipline. The policy considerations were that coworkers do not represent the interest of the entire work force as would a union representative;⁴⁷ that coworkers cannot redress the imbalance of power between employers and employees;⁴⁸ that coworkers do not have the same skills as union representatives;⁴⁹ and that the presence of a coworker may compromise confidentiality of information divulged at the interview.⁵⁰

Section 7 of the NLRA provides in part that employees shall have the right "to engage in...concerted activities for the purpose of ... mutual aid or protection." The plain language of Section 7 does not limit coverage to "unionized employees" nor does it turn on the skills or motives of the employees' representative.⁵¹ Issues of confidentiality are the very same for the coworker representative as a union representative. The Board carefully shaped the contours and limits of the statutory Section 7 rights enunciated in *Weingarten*. The employer can end the interview at any time at its discretion. It need not bargain with the representative permitted to attend the interview. It ordinarily will refuse disclosure and discussion of medical records, if relevant, in the presence of a representative. The *Weingarten* representative is present to assist the employee and may attempt to clarify facts or suggest other employees who may have knowledge of the event.⁵² The Board's stated policy reasons simply do not make out a strong "policy" case for refusing to allow nonunion workers the right to a coworker witness or representative at an investigatory interview.

In their dissent in *IBM Corp.*, Members Liebman and Walsh wrote, "Today American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy."⁵³ The dissent refers to the following language of Section 7 of the NLRA, "the right to...engage in...concerted activities for the purpose of... mutual aid or protection" and states that it is hard to imagine an act more basic to "mutual

aid or mutual protection" than an employee turning to a coworker for help when faced with an interview that might result in the employee's termination.⁵⁴ Citing the District of Columbia Court of Appeals' approval of *Epilepsy Foundation*, the dissent explained that the presence of a coworker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and ideally militates against imposition of unjust discipline by the employer.⁵⁵ They concluded:

[I]t is our colleagues who are taking a step backwards. They have neither demonstrated that *Epilepsy Foundation* is contrary to the Act, nor offered compelling policy reasons for failing to follow precedent. They have overruled a sound decision not because they must, and not because they should, but because they can.⁵⁶

The Bush Board was in compliance with *Chevron* and labor law precedent when it made the policy choice to overrule *Epilepsy Foundation*. A reviewing court would not have a basis under administrative law to set aside this decision even though the court might have chosen a different interpretation.

"Salting" cases and Toering Electric Co.

A "salt" is an individual who seeks employment, at least in part, for the purpose of organizing the employer. "Salting" occurs when a union sends a member to apply for employment at a nonunion employer to organize the employer from within when hired.⁵⁷ The salting strategy may be overt, where the applicants disclose their union affiliation and their intent to organize the employees within the parameters of the Act,⁵⁸ or covert where the applicants do not disclose their union affiliation and objective.⁵⁹ Under either strategy, the union organizer applicants retain their status and protections as statutory employees under the Supreme Court's decision in *NLRB v. Town & Country Electric, Inc.*⁶⁰ In that case, a unanimous Supreme Court held that paid

union organizers are “employees” and are therefore entitled to applicable protections of the NLRA.

Section 2(3) states in part:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise....⁶¹

The Supreme Court held that the Board’s broad, literal reading of the statutory definition of “employee” is entitled to considerable deference as the interpretation of the agency created by Congress to administer the Act.⁶² Further, Section 302(c)(1) of the Labor Management Relations Act of 1947 specifically contemplates the possibility that a company’s employees may also work for a union.⁶³

The Supreme Court rejected the employer’s agency law argument based on Comment a, of the Restatement (Second) Agency, Section 266, which stated in part that a person “... cannot be a servant of two masters at the same time in doing an act as to which an intent to serve one necessarily excludes an interest to serve the other.”⁶⁴ The Court pointed out that the Restatement (Second) Agency, Section 266, also stated that a person may be the servant of two masters “... at one time as to one act, if the service to one does not involve the abandonment of the service to the other.”⁶⁵

The Court noted the availability of alternative remedies other than excluding paid or unpaid union organizers from all protections under the Act to address the practical considerations raised by the employer, e.g., “salts” may quit when the company needs them, they may disparage the company or sabotage the firm or its products.⁶⁶

Employers have been very reluctant to comply with the Supreme Court’s *Town & Country Electric, Inc.* decision as evidenced by the many failures to consider and/or hire cases involving salting campaigns considered by the NLRB and the courts. For example, when Wayne Griffin, president of one of the largest non-

union electrical contractors in the Northeast discovered the International Brotherhood of Electrical Workers union had utilized covert salting as an organizing weapon targeting his company, he advised his employees that signing a union authorization card would be like “stabbing [him] in the back.”⁶⁷ Mr. Griffin told one of his foremen that “f-king with his company [was like] f-king with his kids.”⁶⁸ The Board found Griffin Electric had committed numerous unfair labor practices. Enforcing the Labor Board’s order, the Fourth Circuit Court of Appeals rejected Griffin’s contention that the Board was inappropriately favoring union salting.⁶⁹

Since the Supreme Court’s 1996 *Town & Country Electric* decision, numerous anti-salting bills filed on behalf of employer interests have been considered by but have failed to pass in Congress, the latest being the Truth in Employment Act of 2007.⁷⁰

In 2000, the Clinton Board, in *FES, a Division of Thermo Power*,⁷¹ established a framework for analyzing refusal-to-consider and/or hire cases by making clear the elements of the violation, the burdens of the parties, and the stage at which issues are to be litigated. To establish a discriminatory refusal-to-hire violation, the General Counsel must, at the hearing on the merits, show: (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that such requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants.⁷² The employer must then show that it would not have hired the applicants even in the absence of their union activity or affiliation.⁷³

In *FES*, the administrative law judge (ALJ) found that nine union pipe fitter-applicants would have been hired as welders by FES but for the company’s anti-union animus

and ordered back pay and reinstatement for each applicant. The Board adopted the ALJ's order,⁷⁴ and the Third Circuit Court of Appeals enforced it.⁷⁵

Last year, the Bush II Board with a 3-2 majority, materially altered the *FES* framework imposing on the General Counsel, who is responsible for investigating charges and prosecuting complaints before the Board, the ultimate burden of proving in all hiring discrimination cases that the alleged discriminatee had a genuine interest in seeking to establish an employment relationship with the employer.⁷⁶ The case, *Toering Electric Co.*,⁷⁷ involved an overt salting campaign. Under the Bush Board's new rule, if the General Counsel cannot prove that an applicant would have accepted a job offer from the employer, the applicant is not a statutory employee and there can be no violation of the Act and no remedy even if the employer's refusal to hire or consider the applicant was motivated solely by anti-union animus.⁷⁸ The Board majority, without the benefit of briefs from interested parties, without oral argument and without a request for it to reconsider the long established precedent⁷⁹ enduring over 170 hiring discrimination cases tried before the Board's administrative law judges since the issuance of *FES*,⁸⁰ legalized hiring discrimination involving salts in some cases. While many employers do not like it, the Board and the U.S. Supreme Court have long treated salting as a legitimate organizing tactic. The Supreme Court's *Town & Country Electric*⁸¹ decision makes clear that unless a salting campaign is accompanied by acts of violence, sabotage, or other unlawful or indefensible conduct, there is no basis for claiming that a salting campaign is statutorily unprotected or that salts are not statutory employees.⁸²

Applying the *Chevron* principles to the *Toering Electric Co.* decision, a reviewing court must give the agency's interpretation "controlling weight unless [it is] arbitrary, capricious or manifestly contrary to statute."⁸³ The fact that there was no request to reconsider

precedent before the Board in this case, and that the decision was made without the benefit of briefs from interested parties and without the benefit of oral argument is evidence of arbitrary conduct and renders the decision procedurally unsound. When an employer refuses to hire or consider an applicant solely because of the applicant's union affiliation, it is obvious that there has been "discrimination in regard to hire" in the words of Section 8(a) (3) of the Act. Permitting employers to discriminatorily refuse to hire union applicants by disregarding an employer's unlawful motive and instead making an applicant's intentions, in so far as the General Counsel can prove them, decisive is manifestly contrary to the NLRA. And, the majority's decision is contrary to the U.S. Supreme Court's holding in *Town & Country* that salts are statutory employees under Section 2(3), and entitled to the protection of the Act.⁸⁴

COMMENTS AND CONCLUSION

The Congresses that enacted the Wagner Act and Taft-Hartley Act expected that the Labor Board members would be nonpartisan, neutral adjudicators of the disputes brought before them for resolution. Through the evolution of the appointment process it is now evident that many Board members are perceived to operate in a partisan way as they, in their adjudicative functions, fulfill their responsibilities for developing and applying national labor policy within the scope and confines of the Act. "Democrat" appointees assert that they build their policymaking positions on the explicit policy of the Act as set forth in Section 1 of the NLRA:

to encourag[e] the practice and procedures of collective bargaining ... and protect the exercise by workers of full freedom of association, self organization and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection.⁸⁵

"Republican" appointees counter that their policymaking positions are drawn from the entire Act, recognizing that the NLRA was amended in 1947 by the Taft Hartley Act with the additional purpose of giving employees the equal right to refrain from union activities and representation and that the Board must enforce the entire law.⁸⁶

In the context of a highly competitive global economy with a management focus on cost cutting, outsourcing and flexibility, the Labor Board majority appointed by President George W. Bush has in fact done what the December 12, 2007 letter to Congress signed by the 57 labor law professors said it has done. In a remarkable number of cases it has overturned precedent and established new rules, often going beyond what the parties have briefed or requested. It has weakened or restricted certain statutory rights it has been charged with protecting arguably based on policy considerations within its zone of discretion. With each change in White House administration, it is inevitable and appropriate under the *Chevron* standards that the policymaking judgments of the Board reflect the incumbent administration's views as to what is wise policy.⁸⁷ The dissent in *IBM Corp.* recognizes that the Board majority overruled the *Epilepsy Foundation* precedent "not because they must, and not because they should, but because they can."⁸⁸ The Bush Board's *Toering Electric Co.* decision, rendered after five anti-salting bills failed to pass in Congress, is manifestly contrary to the NLRA, contrary to U.S. Supreme Court precedent, and a bold act of partisan management members, two of whom were heading back to management law practices in December of 2007.

While it is a widely held perception that many recent Labor Board members have acted in a partisan way, nevertheless the agency itself continues to function in certain respects despite this situation because of the nonpartisan professional staff. Independent of the Board members, the staff acts under the direction and delegated authority of the General Counsel. The General Counsel has

general supervision over the Board's Regional Directors and their staff regarding the investigation of unfair labor practice charges, the issuance of complaints and the prosecution of complaints before administrative law judges and the Board.⁸⁹ Moreover, impartial administrative law judges, appointed from a civil service roster, conduct formal hearings on unfair labor practices and their findings of fact are generally respected by the Labor Board.⁹⁰ Furthermore, representation activity under Section 9(c) of the Act is administered in major respects at the Regional Director's level by regional staff, with the Board having appellate jurisdiction over election decisions emanating from regional offices.⁹¹ Thus in Fiscal Year 2007, the regions obtained 7,214 settlements in unfair labor practice (ULP) cases, won in whole or in part 85 percent of cases progressed to the Labor Board, and recovered \$110 million on behalf of employees in back pay and reimbursement of fees, dues, and fines.⁹² Also during FY 2007, the Board conducted 1559 representation elections with a union win rate of 54.3 percent.⁹³

Some 50 years have gone by since the last major amendment to the NLRA.⁹⁴ Over this period of time Congressional action to balance or adjust legitimate and substantial employer and union reform issues has not been successful. In the vastly changed global economy since the NLRA was last amended, without public discussion and debate over the need for labor law reform not only for the benefit of employees but for employers as well, policymaking guidance will continue to fluctuate, on a case-by-case basis, as the composition of the Board changes in conjunction with the change in administrations in the White House. That is, with a change in administration and the usual "packages" of partisan appointments with the party in power maintaining the majority position, the majority then waits for, indeed hunts for, a case containing the policy issue it would like to change. It then squeezes its policy change into the decision often without a compelling policy reason but because it can. Hopefully public labor law reform debate will

occur in the near future, which will lead to Congressional action to bring American labor law into the 21st Century.

In this writer's view, however, the public discussions leading to the national elections for the fall of 2008 do not presently have the focus and fervor to generate sufficient momentum for national labor law reform legislation. If the legislative paralysis of the past 50 years is destined to continue, some basic internal Labor Board reforms led by nonpartisan, public-minded Board members may rejuvenate the NLRA. The agency itself with highly qualified nonpartisan professional staff and other individuals with proper professional and academic credentials can well provide the neutral pool of nonpartisan leadership for future appointments to the Board, as was the original intent of the Congresses that enacted and first amended the NLRA.⁹⁵

As noted above, policy changes by the Labor Board are made on a case by case basis. Most administrative agencies modify or "change" policy matters before them pursuant to the notice-and-comment procedures of the Administrative Procedures Act, which allows for widespread public comment on concrete agency proposals, with public response and discussion often providing new information and insights regarding the strengths and weaknesses of the proposals.⁹⁶ Utilizing its rulemaking powers,⁹⁷ a nonpartisan Labor Board acting primarily in the public interest, could select issues ripe for adjustment or reversal and propose rules on these issues, with public response from all interested parties before making final rules.⁹⁸ Such could revitalize the Act and the agency responsible for its administration. ▲

ENDNOTES

* The author wishes to express his appreciation to the following faculty at Boston College: Christine Neylon O'Brien and Stephanie Greene for their thoughtful review and comments, and particularly to Margo E. K. Reder, for her research assistance and helpful comments. Special thanks to M.B.A./J.D. candidate Brandon Thompson for his assistance in the preparation of this manuscript.

¹ Michelle Amber, *Labor Unions Protest NLRB Decisions Demand Agency "Close for Renovations"*, Daily Lab. Rep. No. 221 (BNA) Nov. 16, 2007 at A-10; Susan J. McGolrick, *Congressional Democrats Criticize NLRB For Decisions Undermining Workers' Rights*, Daily Lab. Rep. No. 240 (BNA) Dec. 14, 2007 at AA-1, 2.

² 467 U.S. 837 (1984).

³ James J. Brudney, *The National Labor Relations Board in Comparative Context; Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 243 (2005).

⁴ *Id.* at 244. The five members of the NLRB are appointed by the President with the advice and consent of the Senate, and serve five-year staggered terms. The Presi-

dent designates one member chairperson. 29 U.S.C. § 153(a) (2000).

⁵ 26 COMP. LAB. L. & POL'Y J. at 245.

⁶ Mathew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. LAB. RES. 699, 700 (2001).

⁷ Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L. J. 1361, 1427 (2000).

⁸ *Id.* at 1429.

⁹ With the adjournment of Congress in January 2008 the Bush II Board consisted of just two members. Former Chairman Robert J. Battista's term expired on December 16, 2007 and the recess appointment of members Peter Kirsanow and Dennis Walsh expired with the adjournment of Congress in January. Members Liebman and Schaumber, as a quorum of a three-member group, which included member Kirsanow prior to the expiration of his appointment, will issue decisions and orders in unfair labor practices and representation cases. See Daily Lab. Rep. No. 221 (BNA) Nov. 16, 2007 at A-11.

¹⁰ See, e.g., Edward B. Miller,

NLRB Forum: Strikes, Lock-outs and Boycotts, 51 LAB. L. J. 89, 94 (2000); Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative*, 16 LAB. LAW. 75, 80 (2000).

¹¹ 332 N.L.R.B. 1205 (2000).

¹² 331 N.L.R.B. 1298 (2000).

¹³ 329 N.L.R.B. 321 (1999).

¹⁴ 331 N.L.R.B. 676 (2000).

¹⁵ N. Y. Univ., 332 N.L.R.B.

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ruled by MV Transp., 337

N.L.R.B. 770 (2002). *Epi-*

lepsy Found., 331 N.L.R.B.

676 (2000), *overruled by*

IBM Corp., 341 N.L.R.B. No.

148 (2004). For other Bush

Board decisions reversing

Clinton Board precedent,

see, e.g., *Jones Plastic &*

Eng'g Co., 351 N.L.R.B. No.

11 (2007) (addressing signif-

icance of at-will employment

relationship to status as

permanent striker replace-

ment), *overruling Target*

Rock Corp., 324 N.L.R.B. 373

(1997); *TruServ Corp.*, 349

N.L.R.B. No. 23 (2007) (per-

mitting decertification peti-

tion to be processed after post-petition settlement of unfair labor practice charges against employer), *overruling Douglas-Randall, Inc.*, 320 N.L.R.B. 431 (1995); and *Crown Bolt, Inc.*, 343 N.L.R.B. 776 (2004) (rejecting presumption that employer's plant-closure threat was widely disseminated), *overruling Springs Indus.*, 332 N.L.R.B. 40 (2000).

¹⁶ www.americanrightsatwork.org/dmtdocuments/NLRB/nlr_b_legal_scholars_sign_on_letter.pdf

¹⁷ Susan J. McGolrick, *Congressional Democrats Criticize NLRB for Decisions Undermining Workers Rights*, Daily Lab. Rep. No. 218 (BNA) Dec. 14, 2007 at AA-1.

¹⁸ *Id.* at AA-2. Mr. Hiatt testified in part about the September 2007 Board decisions that in September alone, in a number of highly divided, partisan decisions, dubbed the "September massacre," the Board has: (1) Made it significantly harder for workers who were illegally fired or denied employment to recover backpay. *St. George Warehouse*, 351 NLRB No. 42 (2007); *The Grosvenor Resort*, 351 NLRB No. 86 (2007); *Domsey Trading Corp.*, 351 NLRB No. 33

(2007). (2) Made it a certainty that employers who violate the Act will incur only the slightest monetary loss and be required to undertake as little remediation as possible. *Intermet Stevensville*, 350 NLRB No. 94 (2007); *Albertson's Inc.*, 351 NLRB No. 21 (2007). (3) Made it harder for workers to achieve union recognition without being forced to endure the hostile, divisive, delay-ridden NLRB representation process, *Dana Corporation*, 351 NLRB No. 28 (2007), while at the same time doing just the opposite for employers who wish to get rid of an incumbent union. *Wurtland Nursing & Rehab. Ctr.*, 351 NLRB No. 50 (2007). (4) Made it easier for employers to deny jobs to workers who have exercised their legal right to strike. *Jones Plastics & Eng'g*, 351 NLRB No. 11 (2007). (5) Made it easier for employers to file lawsuits in retaliation for protected union activities and to punish workers and their unions for their lawful, protected conduct. *BE&K Constr.*, 351 NLRB No. 29 (2007). (6) Made it easier for employers to discriminate against employees and job applicants who are also union organizers even though the U.S. Supreme Court has specifically held that such workers are employees entitled to the Act's protections. *Toering Elec. Co.*, 351 NLRB No. 18 (2007). http://help.senate.gov/Hearings/2007_12_13/Hiatt.pdf

¹⁹ *Id.* at AA-1, AA-2. Mr. Battista testified in part "Our critics declare that the National Labor Relations Act was passed by Congress in 1935 'to encourage workers to have unions and to bargain collectively.' However, they lose sight of the fact that the statute was amended in 1947 by the Taft-Hartley Act to give employees the equal right to refrain from union activities and representation, and to protect employees from not only employer interference but also union misconduct. Often critics fail to comprehend that the Board's mission to enforce the *entire* law as enacted by Congress despite what any affected party may wish for—a return to 1935 or to some future legislative result. http://help.senate.gov/Hearings/2007_12_13/Battista.pdf

²⁰ *Id.* at AA-2.

²¹ Professor Finkin testified in part: "...In principle, an agency may not alter the basic focus or function of its organic law, but that principle fails to address the systematic narrowing of the organic statute's mission by a combination of numerous decisions no one of which, taken only on its own, can be said to lie outside the ambit of administrative decision. The appearance of legal continuity is thus maintained even as the Act's stated purpose, of 'encouraging the practice... of collective bargaining,' is transformed or the rights of employees are curtailed or eviscerated. That is just what has happened in the course of the past few years." http://help.senate.gov/Hearings/2007_12_13/Finkin.pdf.

²² 467 U.S. 837 (1984).

²³ *Id.* at 842.

²⁴ *Id.* at 843.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 844.

²⁸ *Lechmere, Inc. v. NLRB*, 502 U.S. 529, 537 (1992).

²⁹ *Id.* at 538.

³⁰ *Id.*

³¹ *Chevron*, 467 U.S. at 865.

³² *Id.* at 865, 866. *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 786 (1990).

³³ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987).

³⁴ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975).

³⁵ *Id.*

³⁶ 341 N.L.R.B. 1288 (2004).

³⁷ 202 N.L.R.B. 446 (1973).

³⁸ 420 U.S. 251, 260 (1978).

³⁹ 262 N.L.R.B. 1010 (1982).

⁴⁰ 274 N.L.R.B. 230 (1985). In *Slaughter v. NLRB*, 794 F.2d 128 (3rd Cir. 1986), the Third Circuit Court of Appeals remanded to the Board the case of an employee discharged by his employer, *E.I. Dupont*, for refusing to submit to an investigatory interview with his supervisor without the presence of a coworker. The court determined that it is permissible, though not required, to determine that Section 7 of the NLRA protecting concerted activity as guaranteeing union members and unorganized employees alike the right to have a representative present at investigatory interviews. *Id.* at 128. On remand in *E.I. Dupont*, the Board determined that although the Act did not compel its interpretation, nevertheless it was a permissible interpretation of the Act to conclude that the Act did not confer *Weingarten* rights on nonunionized employees. 289 N.L.R.B. 627, 629-630 (1988). Thus, the conclusion set forth in *Sears Roebuck* that *Weingarten* rights do not apply in nonunion settings continued as a result of the *Dupont* decision.

⁴¹ 331 N.L.R.B. 676 (2000).

⁴² *Epilepsy Foundation of Northeast Ohio v. NLRB*, 269 F.3d 1095, 1097 (3rd Cir. 2001).

⁴³ 341 NLRB 1288 (2004).

⁴⁴ *Chevron*, 467 U.S. at 865, 866.

⁴⁵ Major business groups filed amicus curiae briefs in support of the employer's petition for review of the *Epilepsy Foundation* decision before the U.S. Court of Appeals for the D.C. Circuit in 2001, including the Chamber of Commerce of the United States, the National Association of Manufacturers, the Associated Builders and Contractors, Inc., the International Mass Retail Association and the Florida Hospital Association. The AFL-CIO filed an amicus curiae brief in support of the Board's application for enforcement of the decision against the employer. It is interesting to note that in the *IBM Corp.* case the Board granted the joint request of LPA, Inc., The Equal Employment Advisory Council, Associated Builders and Contractors, the Chamber of Commerce of the United States, the Society for Human Resource Management, the International Mass Retail Association, and the National Association of Manufacturers, to file an amicus brief on behalf of the employer. The AFL-CIO did not file a brief in this case. However, Wal-Mart Stores, Inc. filed a response in support of the amici briefs because an Administrative Law Judge, following the Board's *Epilepsy Foundation* decision had found that Wal-Mart had unlawfully discharged an unrepresented employee because he refused to participate in an investigatory interview, which he reasonably believed might result in discipline against him, unless Wal-Mart granted his request for his own witness. Since the *Epilepsy Foundation* decision was overruled by *IBM*, the ALJ's ruling was later overturned by the Board and Wal-Mart could lawfully deny the employee's request for a witness and could lawfully require that he continue the investigatory interview without the presence of the requested witness. *Wal-Mart Stores, Inc. and UFCWU Local 343*, 343 N.L.R.B. No. 127 (Dec. 16, 2004). The decision, however, did not resolve the legality of the dismissal of the employee in question. This matter was referred to a three member panel, consisting of members Liebman and Walsh, the dissenting members in the *IBM Corp.* case, along with Chairman Battista. *Wal-Mart Stores, Inc. and UFCWU Local 343*, 351 NLRB No. 17 (September 28, 2007). Members Liebman and Walsh concluded that retroactive application of *IBM* to the employee would work "a manifest injustice" effectively permitting Wal-Mart to punish the employee for relying on his then-existing rights under the Act. *Id.* at 6, 7. The employee was ordered reinstated with backpay. *Id.* at 7; Chairman Battista dissented. *Id.* at 8.

⁴⁶ In 2003 8.2 percent of private-sector employees were unionized. See Bureau of Labor Statistics, "Union Members in 2003" News Release USD L 04-53 (Jan. 21, 2004). Union membership in the private sector in 2007 was 7.5 percent, up from 7.4 percent in 2006, see <http://www.bls.gov/news.release/union2.toc.htm>.

⁴⁷ *IBM Corp.*, 341 NLRB 1288 at 1291.

⁴⁸ *Id.* at 1292.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1308 (Members Liebman and Walsh dissenting).

⁵² *Weingarten*, 420 U.S. at 260.

⁵³ *IBM Corp.*, 341 NLRB at 1305.

⁵⁴ *Id.* at 1305.

⁵⁵ *Id.* at 1310, quoting *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001).

⁵⁶ *Id.*

⁵⁷ See *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), *enfd.*, 84 F.3d 1202 (9th Cir. 1996). In *Aneco Inc. v. N.L.R.B.*, 285 F.3d 326,

- 328 (4th Cir. 2002), Judge Luttig described salting as the process "where union organizers seek to become employees of a company targeted by the union," and they work for the targeted employer "as long as there is a prospect of success at organizing its workers."
- ⁵⁸ *Smucker Company*, 341 N.L.R.B. No. 10 (Jan. 30 2004).
- ⁵⁹ *Griffin Electric Inc. v. N.L.R.B.*, 2002 U.S. App LEXIS 10948 at **5 (4th Cir. 2002).
- ⁶⁰ 516 U.S. 85 (1995).
- ⁶¹ 29 U.S.C. § 152(3) (1988 ed.).
- ⁶² *N.L.R.B. v. Town & Country Electric, Inc.*, 516 U.S. 85, 89-90.
- ⁶³ *Id.* at 92.
- ⁶⁴ *Id.* at 93.
- ⁶⁵ *Id.* at 94-5.
- ⁶⁶ *Id.* at 97.
- ⁶⁷ *Griffin Electric Inc. v. N.L.R.B.*, 2002 U.S. App LEXIS 10948 at **5 (4th Cir. 2002).
- ⁶⁸ *Id.* at **9.
- ⁶⁹ *Id.* at **12.
- ⁷⁰ See *The Truth in Employment Act*, H.R. 2670 and S. 1570, 110th Cong. (2007); H.R. 1816 and S. 983, 109th Congress (2005); H.R. 1793, 108th Congress (2003); H.R. 2800, 107th Congress (2001); H.R. 1441 and S. 337, 106th Congress (1999); H.R. 758 and S. 328, 105th Congress (1997). See also, *Rep. King Says His Anti-Salting Bill Would Combat Unfair Economic Weapon*, Daily Lab. Rep., June 22, 2005, at A-12 (Rep. Steve King explaining the bill by stating, "[I]f a job applicant's 'primary purpose' in seeking a job is to further the interests of another, then they are not a 'bona fide' applicant.>").
- ⁷¹ 331 N.L.R.B. 9 (2000).
- ⁷² *Id.*
- ⁷³ *Id.*
- ⁷⁴ *Id.* at 40.
- ⁷⁵ *N.L.R.B. v. FES (A Division of Thermo Power)*, 301 F.3d 83 (3rd Cir. 2002).
- ⁷⁶ *Id.* at 9. The Board's September 29, 2007 majority decision remanded to the ALJ allegations regarding the refusal in 1996 to hire 18 alleged discriminatees for further action under its altered *FES* framework. (*Id.* at 14.) On July 29, 1996 a union organizer submitted a batch of 18 resumes of union members in response to a "blind" help wanted ad for journeymen and apprentice electricians. In a cover letter, the union advised the then unidentified employer of the union's right to file charges with the NLRB should the recipient refuse to nondiscriminatorily consider the applications and stated further, "If for any reason you refuse to accept this applicant or if you consider same deficient in any manner please advise me immediately so that remedial action may be taken." Toering Electric made no response to the submissions. Its office manager testified that he did not do so because the resumes were Xerox copies and not up-to-date; and that this led him to believe that the applicants were not interested in employment. The ALJ found that while many of the resumes were not current others clearly indicated recent preparation. [*Id.* at 25]. A shortage of qualified electricians existed in the area in 1996. [*Id.*] See the NLRB General Counsel Memorandum GC-08-04, Feb. 15, 2008, setting forth Guidelines Concerning *Toering Electric Company*. See also the Associate General Counsel's Memorandum OM 08-29(CH), Feb. 15, 2008 concerning the Board's *Oil Capitol Sheet Metal* decision, 349 N.L.R.B. No. 118 (May 31, 2007) whereby the burden of proving the duration of a salting discriminatee's backpay period was shifted from the employer who violated Section 8(a)(3) to the General Counsel.
- ⁷⁷ 51 N.L.R.B. No. 18 (2007).
- ⁷⁸ *Id.*
- ⁷⁹ *Id.* at 14.
- ⁸⁰ *Id.* at 24.
- ⁸¹ 516 U.S. 85 (1995).
- ⁸² *Id.* at 96-97.
- ⁸³ *Toering Electric Co.*, 351 N.L.R.B. No. 18 at 6.
- ⁸⁴ See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).
- ⁸⁵ 29 U.S.C. § 151 (2000).
- ⁸⁶ Testimony of NLRB Chairman Robert J. Battista before the Senate Committee on Health, Education, Labor and Pensions Subcommittee on Employment and Workplace Safety and House Committee on Education and Labor Subcommittee on Health, Employment, Labor and Pensions. (December 13, 2007). http://help.senate.gov/Hearings/2007_12_13/Battista.pdf
- ⁸⁷ *Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).
- ⁸⁸ *IBM Corp.*, 341 N.L.R.B. 1288, 1310 (2004).
- ⁸⁹ Section 3(d) of the NLRA. See Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the NLRB, effective Apr. 1, 1955, 20 Fed. Reg. 2175 (1955), as amended.
- ⁹⁰ *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). But see *Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008), where the ALJ issued a Decision and Order finding that TNT Logistics Inc. had terminated employees Jolliff and Daniels for engaging in an activity writing a letter complaining about working conditions which was a concerted activity protected by the Act. The General Counsel filed a brief urging the 3-member panel of the Board to affirm the ALJ's decision. The Board however, ruled 2-1 against the employees finding that the employees lost protection of the act because the letter contained a false statement with actual malice. The employees petitioned the Sixth Circuit Court of Appeals for review. The unanimous decision of the court, setting aside the decision of the Board, identified that Chairman Robert Battista wrote the decision for the Board majority, stating that "the Board based its finding of actual malice, in part, on a bizarre reading of a statement made by Jolliff...." and it concluded that the Board reached its finding of actual malice by supplementing the thin record "with unwarranted inferences and misinterpretations of testimony."
- ⁹¹ NLRB Rules and Regs. § 102.67.
- ⁹² General Counsel Reports NLRB Nearly Met Their New Case Handling Goals in FY 2007, 235 Daily Lab. Rep. (BNA Dec. 7, 2007), A-10.
- ⁹³ Battista testimony before Congress, Dec. 13, 2007, p 10; Daily Lab. Rep. 240 (Dec 14 2007) p AA-1.
- ⁹⁴ The Landrum-Griffin Act, also known as the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 141-144, 167, 172-187.
- ⁹⁵ The current Labor Board as of this writing consists of two members, Wilma B. Liebman, a Democrat whose term expires August 27, 2011 and Chairman Peter C. Schaumber, a Republican whose term expires August 27, 2010. If no appointments are made due to Senatorial tactics, the new President elected in November of 2008 will have three appointments to make upon taking office. On January 25, 2008 President Bush nominated Robert J. Battista, a Republican to be Chairman of the Board with a term to expire on December 16, 2009, Dennis P. Walsh, a Democrat, for a term that expires on August 28, 2008, and then for a five year term that runs until August 27, 2013 and Gerard Morales, a Republican to fill a term that expires Dec. 16, 2012. Mr. Walsh had five years experience as a Labor Board attorney and had served as Chief Counsel to two Board members before his prior appointment to the Board which expired on December 16, 2007. Gerard Morales, currently a management attorney, has served as a NLRB field attorney, served as an adjunct professor at the University of Arizona College of Law and is an Arbitrator with the American Arbitration Association. Mr. Battista was the recent Chairman of the Labor Board during the Bush Administration whose term expired on December 16, 2007. Senator Kennedy, who chairs the Senate committee charged with approving the nominations, termed Mr. Battista's nomination "unbelievable." On May 5, Mr. Battista announced that he had accepted a position with Littler Mendelson, a national law firm representing management. Chairman Schaumber testified before a Senate Committee that he and Member Liebman are agreeing on most cases, but are putting aside approximately 15 percent of cases because of disagreement. Daily Lab. Rep. No. 64 (BNA) April 3, 2008 at AA-2.
- ⁹⁶ The Administrative Procedure Act, 5 U.S.C. § 1001 et. seq.
- ⁹⁷ 29 U.S.C. § 156 (2000) states: The Board should have authority from time

to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of the Act.

On February 26, 2008, the two member Labor Board, Chairman Schaumber and Member Liebman, took the unusual, indeed remarkable, initiative of utilizing the rule-making procedures of the Administrative Procedures Act to deal with perceived deficiencies in the Board's elections procedures. Pro-

ponents of the Employee Free Choice Act, H.R. 800 and S.1041, 110th Cong. (2008) under consideration by Congress claim, in part, that this legislation, which would give unions the right to waive secret ballot elections, is necessary because of delays in NLRB elections. (Member Liebman, testifying on April 2, 2008 before a Senate Hearing observed that unions perceive Board-conducted elections as taking too long and leaving workers vulnerable to intimidating and coercive

tactics by employers, Daily Lab. Rpt. No. 64 (BNA) April 3, 2008 at AA-1). The proposed rule would create a new expedited consent election procedure under which a union and employer could jointly file a petition for a Board-conducted election that would be held within 28 days. The 30 percent minimum showing of interest currently required for Board elections would be eliminated, and the so-called "RJ Petition" initiating the process would state the date, place and hours

of the election, describe the appropriate unit agreed to by the parties, stipulate eligibility requirements and state the names and addresses of employees eligible to vote. Motions to intervene could be filed by rival unions within 14 days of the docketing of the petition. See Daily Lab. Rep. No. 37 (BNA) Feb. 26, 2008 at A-1. See also Susan J. McGolrick, *Nine Interested Parties Filed Comments Responding to NLRB 'RJ Petitions' Proposal*, Daily Lab. Rep. No. 65 (BNA) April 4, 2008 at B-1.