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THE LABOR LAW JURISPRUDENCE OF WILMA LIEBMAN

David L. Gregory, Ian Hayes,** & Amanda Jaret****

INTRODUCTION

Wilma Liebman is the exemplar of the dedicated, intrepid public servant. This article will focus especially upon her influential, courageous leadership of the National Labor Relations Board (“NLRB”). Appointed to the NLRB by President Clinton on November 14, 1997,¹ she became the often lone voice of dissent against the wave of anti-union, pro-employer decisions rendered by the archconservative NLRB majority throughout the tenure of President George W. Bush.²

In an exquisite twist of political fate, one of the first official acts of President Obama was his appointment of Wilma Liebman to chair the NLRB.³ With the nearly absolute and deeply enigmatic vanishment, not to say banishment, of Obama Labor Secretary Hilda Solis from the public limelight, Wilma Liebman quickly became the de facto Frances Perkins equivalent of the Obama administration.⁴ Wilma Liebman’s

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1. *Wilma B. Liebman, Chairman – National Labor Relations Board*, COMMITTEE ON APPROPRIATIONS, U.S. HOUSE OF REPRESENTATIVES, http://appropriations.house.gov/_files/040611WilmaLiebmanBio.pdf (last visited Nov. 1, 2012).

2. See Christopher T. Hexter, Schuchat, Cook & Werner, Presentation at the University of Missouri Extension Labor Law Breakfast: Like a Tornado – The “Obama” Board’s Course Correction – But How Long Will It Last 2 (Jan. 12, 2011), available at <http://www.local562.org/upload/4d51a3968dc51.PDF>.

3. *Wilma Liebman*, ALLGOV, http://www.allgov.com/Official/Liebman_Wilma (last visited Nov. 1, 2012).

4. Frances Perkins was the first woman appointed to the United States Cabinet. *Social*

visibility steadily and sharply increased as she endeavored to undo a significant series of aberrational ultra-conservative decisions by the reactionary super majority wing of the NLRB throughout the tenure of President George W. Bush. With the deeply controversial pursuit of Boeing by the NLRB's then-Acting General Counsel, the NLRB chaired by Liebman became a bull's eye for the Republican attack machine.⁵ By the fall of 2011, many influential Republican senators vowed to effectively shut down the NLRB with the presumed help of a Republican president after the November 2012 elections.⁶ Throughout it all, Wilma Liebman remained resolute. Indeed, in addition to effectuating significant rectifications to the case law of the NLRB, her deep influence on National Labor Relations Act (the "Act" or "NLRA") policy and procedure seems likely to continue beyond her departure from the Board in the summer of 2011.⁷

I. LEGAL CAREER BEFORE APPOINTMENT TO THE NLRB

Wilma Liebman, a native of Philadelphia, attended Barnard College and George Washington University Law School.⁸ From 1974 to 1980, Liebman worked for the NLRB, first as a staff attorney from 1974 to 1978 with the Board's Division of Advice, and from 1978 to 1980 in the Oakland, California regional office.⁹ She then served as in-house counsel for the Teamsters until 1990, when she became an attorney for the Bricklayers Union until 1993.¹⁰

She reentered federal government service as the Deputy Director of the Federal Mediation and Conciliation Service.¹¹ During her time with

Security Pioneers – Frances Perkins, SOC. SECURITY ONLINE, <http://www.ssa.gov/history/fperkins.html> (last visited Nov. 1, 2012). She represented the labor movement in crafting the New Deal and was a strong voice and public face advocating on behalf of workers' interests. *See id.* Through her decisions, Wilma Liebman occupied the same kind of role during her service on the Board. *See infra* Part II.A.

5. The Board withdrew the case after Boeing and the International Association of Machinists reached a settlement. Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES (Dec. 9, 2011), <http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html> [hereinafter Greenhouse, *Board Drops Case Against Boeing*]. Although the Boeing case settled, the underlying issues that caused the political firestorm remain unresolved. *See id.*

6. *See id.*

7. *See* Hexter, *supra* note 2, at 3.

8. *NLRB Chairman Wilma B. Liebman*, LAWMEMO, <http://www.lawmemo.com/nlr/liebman.htm> (last visited Nov. 27, 2012).

9. *Wilma Liebman*, *supra* note 3.

10. *Id.*

11. *Id.*

the Service, Liebman participated in mediations that helped revive the stalled labor negotiations during the 1994-95 Major League Baseball strike.¹²

II. NATIONAL LABOR RELATIONS BOARD MEMBER, 1997-2009—THE EMERGENCE OF THE BUSH II BOARD’S “GREAT DISSENTER”

Liebman was appointed one of the designated Democratic members of the Board by President Clinton on November 14, 1997.¹³ Despite her history of neutral government service, Liebman was generally expected to harbor a union-side preference because of her private practice background.¹⁴ Her voting record corresponded with these expectations; during her first three years on the Board, she voted in favor of the union position in 92% of cases.¹⁵ The political composition of the Board was predominantly liberal during the balance of the Clinton administration.¹⁶ Consequently, she was often in the majority.

Although the NLRB decisions during the Clinton years, 1992-2000, were frequently favorable to the labor side, the Bush II Board, 2001-2009, bolstered by new deeply conservative appointees, unleashed a torrent of staunchly pro-management opinions.¹⁷ Liebman soon found herself in an increasingly marginalized position on the Board and frequently penned dissenting opinions. Several of the most important decisions from this time of the ascendant radical right are critically analyzed below.¹⁸

12. Murray Chass, *BASEBALL; New Game in Town as Baseball Talks Begin*, N.Y. TIMES (Aug. 24, 1994), <http://www.nytimes.com/1994/08/24/sports/baseball-new-game-in-town-as-baseball-talks-begin.html>.

13. Steven Greenhouse, *Labor Board's Exiting Leader Responds to Critics*, N.Y. TIMES (Aug. 29, 2011), http://www.nytimes.com/2011/08/30/business/national-labor-boards-leader-leaves-amid-criticism.html?pagewanted=all&_r=0.

14. See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1407 n.185 (2000).

15. *Id.* at 1412. While this may seem like a surprising figure, it is worth noting that Member Hurtgen decided in favor of management in nearly 97% of cases during the same time period, and Members Browning and Fox decided in favor of unions in 98% and 91% of cases, respectively. *Id.* at 1411-12.

16. See *id.* at 1366.

17. See Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 230-31 (2010) (characterizing the Bush II Board as “willing to erode the protections provided for workers using the very law that was intended to safeguard those protections.”).

18. Because space prohibits a comprehensive treatment of the Board’s decisions during this era, only cases to which Liebman contributed substantially will be considered here. For a more general but thorough treatment of the Board’s cases during the Bush board, see Catherine L. Fisk &

A. “Employee” Cases

At the close of the Clinton Board’s tenure and during the Bush II administration, a series of decisions assessed the statutory classification of certain workers. These cases provide valuable insight into the oscillations of the increasingly politicized Board. Although the NLRA only secures the organizational and collective bargaining rights of those who are defined as “employees” within the meaning of the statute,¹⁹ the text of the “Definitions” section 2(3) is particularly unhelpful in establishing parameters for those who might constitute a statutory “employee” and therefore be entitled to these protections. It states cryptically that “the term ‘employee’ shall include any employee”²⁰ Although this definition is subject to several exceptions, the Board has repeatedly noted that the “breadth of [section] 2(3)’s definition is striking.”²¹ Because the language of the Act itself can be unhelpful in resolving the important threshold question of who is an “employee,” the issue has been frequently litigated.

During Liebman’s tenure on the Board, how the members chose to resolve the question of who constituted an “employee” fluctuated dramatically, paradoxically making the inherently volatile issue a reliable barometer of the Board’s political preferences.²² This issue often had more than merely semantic significance; the inclusion of graduate students within the statutory meaning of “employee,” for instance, comprised a population “among whom organizing had spread rapidly.”²³

The Board’s first major foray during the Clinton administration into resolving the question of statutory “employee” status as applied to medical interns, residents, and clinical fellows was *Boston Medical Center*.²⁴ Although there were two cases from the 1970s holding that medical interns or residents were students, not employees,²⁵ the Board

Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013 (2009).

19. See 29 U.S.C. § 157 (2006).

20. *Id.* § 152(3).

21. *Bos. Med. Ctr.*, 330 N.L.R.B. 152, 160 (1999) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984)).

22. See *Fisk & Malamud*, *supra* note 18, at 2073-77 (discussing *Boston Medical Center* and two subsequent decisions).

23. *Id.* at 2073.

24. *Bos. Med. Ctr.*, 330 N.L.R.B. at 152.

25. See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976) (explaining that because interns, residents, and clinical fellows are primarily students, they do not fit the statutory definition of “employees” within the meaning of section 2(3) of the Act); *St. Clare’s Hosp. & Health Ctr.*, 229

overruled them and found instead that “while they may be students learning their chosen medical craft,” interns, residents, and clinical fellows “are also ‘employees’ within the meaning of Section 2(3) of the Act.”²⁶ The Board majority relied both on evidence of actual practices in hospitals²⁷ and on the common law analysis of the master-servant relationship in deciding that medical interns are “employees” and compared them to apprentices.²⁸ Liebman joined the majority in making this determination.²⁹

With respect to graduate students, the Board also reversed and restored precedent. As in *Boston Medical Center*, the Board initially faced two cases from the 1970s that purported to establish graduate teaching assistants’ status as primarily students, not employees.³⁰ In *New York University*,³¹ the Board affirmed the logic of *Boston Medical Center* and extended the “historic, broad and literal reading” of section 2(3)’s definition of “employee” to embrace graduate students.³² The majority’s decision was underscored by the same concerns about the practical realities of the students’ work and their relationship to the university as “indistinguishable from a traditional master-servant relationship.”³³

While Liebman joined the majority in both *Boston Medical Center* and *New York University*, she dissented when the Bush II Board dealt with this issue quite differently in *Brown University*.³⁴ By declaring that graduate students are not “employees” within the meaning of section 2(3) of the Act, the majority declined to grant them collective bargaining rights.³⁵ This was largely based on the majority’s belief that “there is a significant risk, and indeed a strong likelihood, that the collective-

N.L.R.B. 1000, 1004 (1977) (withholding collective bargaining rights for hospital house staff because of the academic nature of their work).

26. *Bos. Med. Ctr.*, 330 N.L.R.B. at 152.

27. *Id.* at 163 (including the realities of employment relationships).

28. *Id.* at 160 (noting that because the students receive compensation and benefits and spend the majority of their time providing patient care, they are employees under common law principles).

29. *See id.* at 152.

30. *Compare Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972) (excluding graduate students from a faculty bargaining unit because they are primarily students and as such lack a sufficient community interest with the regular faculty) *with Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974) (finding that research assistants are akin to the graduate students contemplated by *Adelphi Univ.* and refusing to recognize a bargaining unit of such non-employees).

31. 332 N.L.R.B. 1205 (2000).

32. *Id.* at 1205.

33. *Id.* at 1206.

34. 342 N.L.R.B. 483 (2004) (Member Liebman, dissenting).

35. *Id.* at 493.

bargaining process will be detrimental to the educational process.”³⁶

Liebman dissented and criticized this approach as a stark political maneuver that failed to pay due regard to the language of section 2(3),³⁷ an approach that was “woefully out of touch with contemporary academic reality.”³⁸ She traced the transformation of universities into increasingly complex corporations and justified graduate students organizing on this basis, noting that “even those who live the life of the mind must eat.”³⁹ Accordingly, she admonished the majority for behaving “as if there was no room in the ivory tower for a sweatshop.”⁴⁰ She noted the increasing prevalence of graduate student collective bargaining as well as the firm statutory basis for including these workers within the protective ambit of the Act.⁴¹

Liebman also emphasized the practical impacts of the majority’s decision. Not only did the Board’s decision allow universities to avoid dealing with graduate student unions, it also tacitly authorized retaliation against graduate students who act together to improve their working conditions.⁴² Liebman charged that this decision ran counter to over thirty years of experience with the viability of collective bargaining in the academic context.⁴³

The Board’s handling of graduate students is a recurring theme that receives different treatment as the Board members’ attitudes and political affiliations change. Although Liebman was not presented with this issue during her tenure as Chair of the Obama Board, the arguments she set forth in her eminently quotable dissent may be vindicated by her successors.⁴⁴ The NLRB has agreed to reconsider the *Brown* doctrine and may revert to the prior policy under *New York University*.⁴⁵

36. *Id.*

37. *Id.* at 496.

38. *Id.* at 493. It is glaringly obvious that graduate teaching assistants at many major public state universities, ranging from the University of Illinois to the University of California at Berkeley, have achieved the protections of state labor law without compromising their academic or worker identities and functions. For a more in-depth look at the graduate teaching assistant student or employee controversy, see Grant M. Hayden, “*The University Works Because We Do*”: *Collective Bargaining Rights for Graduate Assistants*, 69 *FORDHAM L. REV.* 1233 (2001).

39. *Id.* at 498.

40. *Id.* at 494.

41. *See id.* at 493-94.

42. *Id.* at 494.

43. *See id.*

44. *See* Mitchell H. Rubinstein, *NLRB About to Again Flip on Issue of Graduate Students Employee Status*, *ADJUNCT LAW PROF BLOG* (Nov. 1, 2010), <http://lawprofessors.typepad.com/adjunctprofs/nlr/page/2/>.

45. The Board agreed to reconsider the *Brown* decision in *New York Univ.*, 356 N.L.R.B. No. 7, 2010 WL 4386482 (Oct. 25, 2010).

Finally, the Board considered the “employee” status of union organizers who worked as “salts” in *Toering Electric Co.*⁴⁶ Just as the status of graduate students was politically significant because of their apparent proclivity towards unionization, the classification of “salts” was sensitive because of unions’ increasing reliance on salting as an organizational tactic⁴⁷ after the Supreme Court’s pro-employer decision sharply restricted non-employee organizers’ rights to be on company property in *Lechmere, Inc. v. NLRB*.⁴⁸

The Board’s decision drew Liebman’s ire, and she issued another incendiary dissent. Liebman contended that the majority dispensed with a carefully considered framework for how to balance salts’ and employers’ interests and effectively legalized hiring discrimination established by the Board’s decision in *FES*.⁴⁹ She was chagrined but “not surprise[ed]” to report that “the majority’s view rests on no real authority at all.”⁵⁰ Instead, the majority hastily dismissed bedrock Supreme Court precedent and rendered a decision that would hinder the administration of the Act’s major mandates—namely, “uncovering, redressing, and deterring hiring discrimination.”⁵¹ Liebman insisted that the majority’s “decision represents a failure in the administration of the National Labor Relations Act.”⁵² In her view, this was because the majority simultaneously overturned carefully considered precedent, failed to implement a workable approach to achieving its professed goals, and created a new form of legal hiring discrimination.⁵³

B. The NLRB Meets the Computer (or Not?!): Register-Guard and Rip Van Winkle

*Register-Guard*⁵⁴ may be the paradigmatic case of the polarized ideological politics of the Bush II Board. It also exemplifies the Board’s dramatic and inexplicable unwillingness squarely to confront the unique

46. 351 N.L.R.B. 225 (2007).

47. See Victor J. Van Bourg & Elyn Moscovitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer’s Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 15 (1998).

48. 502 U.S. 527 (1992).

49. *Toering Elec. Co.*, 351 N.L.R.B. at 238 (Member Liebman, dissenting) (citing *FES*, 331 N.L.R.B. 9 (2000)).

50. *Id.* at 242.

51. *Id.* at 240.

52. *Id.* at 245.

53. *Id.*

54. *Guard Publ’g Co. (Register-Guard I)*, 351 N.L.R.B. 1110 (2007).

challenges posed by the Internet and other manifestations of technological change.⁵⁵ The Board's failure to acknowledge the importance of accommodating e-mail communication within the section 7 framework disappointed many onlookers.⁵⁶

The Board's *Register-Guard* case concerned union president Suzi Prozanski's use of an employer's computer system during non-working time to send union-related e-mails.⁵⁷ The employer was a newspaper publisher that maintained a communication systems policy expressly proscribing e-mails intended "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations."⁵⁸ Notwithstanding this general prohibition, employees frequently sent e-mails that were unrelated to work.⁵⁹ The employer was aware that the e-mail system was being used for non-work-related purposes, including baby announcements, party invitations, offers of sports tickets, requests for services like dog walking, and solicitations for the employer's periodic United Way charitable campaign.⁶⁰ Despite the employer's general leniency about non-work-related e-mails, Prozanski's use of the e-mail system on three occasions to circulate union-related information was not excused.⁶¹ She was issued two written warnings.⁶²

The majority in *Register-Guard I* determined that Prozanski's use of the employer's computer system during non-working time to send union-related e-mails was not protected activity.⁶³ Accordingly, the employer was held to be free to discipline an employee for such activity, even in light of evidence that the policy had been discriminatorily applied to union-related e-mails.⁶⁴ The majority grounded its determination in the employer's "basic property right to 'regulate and

55. See David L. Gregory, *Unsafe Workplaces, Injured Employees, and the Bizarre Bifurcation of Section 7 of the National Labor Relations Act*, 111 W. VA. L. REV. 395, 397 n.11 (2009) (describing *Register-Guard* as an example of the Board's "spasmodic and unreal failure to understand the labor law ramifications of cyberspace.").

56. For a fine discussion of the far-ranging implications of *Register-Guard*, see Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 277-78 (2008).

57. See *Register-Guard I*, 351 N.L.R.B. at 1111-12.

58. *Id.* at 1111.

59. *Id.*

60. *Id.*

61. *Id.* at 1111-12.

62. *Id.*

63. *Id.* at 1114.

64. See *id.* at 1118.

restrict employee use of company property.”⁶⁵ It refused to treat e-mail communications as analogous to face-to-face solicitations that would undoubtedly receive section 7 protection under Supreme Court and Board precedent.⁶⁶ Nevertheless, the majority purported to recognize the “substantial impact” e-mail has had “on how people communicate, both at and away from the workplace.”⁶⁷

Liebman’s strongly worded dissent critiqued the Board’s lethargic reaction to the revolutionary changes to the workplace landscape that had been brought about as a result of technological progress and the near-ubiquity of computer-mediated work.⁶⁸ She concluded that the majority’s decision on this issue of first impression “confirms that the NLRB has become the ‘Rip Van Winkle of administrative agencies.’”⁶⁹ Liebman likened the Board to Rip Van Winkle because “[o]nly a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace.”⁷⁰ The majority’s decision failed, on Liebman’s view, because it allowed e-mail, a unique and revolutionary form of media, to be “treated just as the law treats bulletin boards, telephones, and pieces of scrap paper.”⁷¹

Liebman also challenged with equal ferocity the apparent lack of a legal justification for the Board’s decision.⁷² She emphasized the importance of safeguarding workers’ ability to engage in Section 7 activities.⁷³ She analogized the use of the Internet to the kind of solicitation the Supreme Court enshrined as protected concerted activity in *Republic Aviation Corp.* over sixty years earlier.⁷⁴ Consistent with existing precedent,⁷⁵ she recommended that employers should aim to impose rules that have the least restrictive limitations on employees’ communication rights that still protect the employer’s property

65. *Id.* (quoting *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663 (6th Cir. 1983)).

66. *Register-Guard I*, 351 N.L.R.B. at 1115 (discussing the inapplicability of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

67. *Register-Guard I*, 351 N.L.R.B. at 1116.

68. *See id.* at 1121 (Member Liebman, dissenting).

69. *Id.* (quoting *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)).

70. *Register-Guard I*, 351 N.L.R.B. at 1121.

71. *Id.*

72. *Id.* at 1121-22.

73. *See id.* at 1123-24.

74. *Id.* at 1123-24.

75. *See, e.g., NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (explaining that accommodation between Section 7 rights and employer property rights “must be obtained with as little destruction of one as is consistent with the maintenance of the other.”).

interests.⁷⁶ Because the overbroad communication systems policy at issue in this case captured legitimate employee section 7 activity, Liebman maintained that the Board paid too much heed to the employer's attenuated property interest at the expense of the employees' clear right to communicate in this fashion.⁷⁷

Liebman's commitment to modernizing Board precedent and ensuring that the Act retains vitality in an increasingly complex and technologically advanced workplace is one of the most fundamental aspects of her legacy. She consistently championed employees' rights to make use of new technology to conduct section 7 activities throughout her time as a member and eventually as Chairman of the Board.⁷⁸ Liebman's stance against the epidemic pro-employer tendency to encroach upon union members' section 7 communication rights is another salient feature of her legacy. In a fitting coda to the original *Register-Guard* saga, by July 2011, when Liebman was serving as Chair, *Register-Guard* again came before the Board.⁷⁹ Contrary to the *Register-Guard* Board majority, the D.C. Circuit determined that the communication systems policy was discriminatorily enforced against Prozanski for her union solicitations.⁸⁰ Without fanfare or extended discussion, the Board accepted the legal conclusions of the D.C. Circuit as accurate statements of the law and issued an order requiring the employer to rescind its disciplinary actions against Prozanski.⁸¹

C. IBM Corp. and the Radical Narrowing of the Scope of Weingarten Rights

The existence of so-called *Weingarten* rights for non-unionized employees has been a perennial and always hotly contested issue for the Board.⁸² The Supreme Court announced the existence of a certain

76. *Register-Guard I*, 351 N.L.R.B. at 1123.

77. *See id.* at 1132.

78. *See* Seth Borden, *NLRB Chair Wilma Liebman's Term Expires at Midnight: What's Next?*, LABOR RELATIONS TODAY (Aug. 27, 2011), <http://www.laborrelationstoday.com/2011/08/articles/nlr-administration/nlr-chair-wilma-liebman-term-expires-at-midnight-whats-next/>.

79. The case appeared on remand from the Court of Appeals for the District of Columbia. *See Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

80. *Id.* at 59.

81. *See* *Guard Publ'g Co. (Register-Guard II)*, 357 N.L.R.B. No. 27, 2011 WL 3151776 (July 26, 2011).

82. *See, e.g., IBM Corp.*, 341 N.L.R.B. 1288, 1306 (2004) (Member Liebman, dissenting) ("The right to representation in nonunion workplaces has had a surprisingly fitful history."); Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 LOY. U. CHI. L.J. 111, 114

measure of due process for employees acting “in concert for mutual aid and protection” in its decision in *NLRB v. J. Weingarten, Inc.*⁸³ by permitting them to seek union representation in investigatory interviews.⁸⁴ The Court recognized that an employee could avail herself of this right when five circumstances are present. First, the employee must be engaged in concerted protected activity within the meaning of section 7 of the Act.⁸⁵ Second, an employee must affirmatively request union representation in such an interview.⁸⁶ Next, the employee requesting union representation during an interview may only do so if the circumstances are such that she “reasonably believes the investigation will result in disciplinary action.”⁸⁷ The employee’s request for representation also may not abridge legitimate employer prerogatives.⁸⁸ Finally, the employer is under no duty to bargain with the union representative who is attending the interview.⁸⁹

In *IBM Corp.*,⁹⁰ the Board majority substantially curtailed non-unionized employees’ *Weingarten* rights to be accompanied by co-workers during investigations made by their employers.⁹¹ Although the Board had located *Weingarten* rights for non-union employees a mere four years earlier in *Epilepsy Foundation of Northeast Ohio*,⁹² the majority summarily abandoned that precedent.⁹³ Growing concerns about national security, raised sua sponte by the Board, purportedly animated the majority’s deeply controversial *IBM* decision.⁹⁴

Liebman dissented. She contended that the majority’s holding meant that “the overwhelming majority of employees” would be “stripped of a right integral to workplace democracy.”⁹⁵ She principally argued that this rule would unnecessarily abridge employees’ section 7 rights, explaining that “[w]orkers without unions can and do successfully stand up for each other on the job—and they have the legal right to try,

(2005) (describing the inconsistent findings of non-unionized employees’ *Weingarten* rights as a function of the shifting political accountabilities of Board members).

83. 420 U.S. 251, 256-57 (1975) (internal quotation marks omitted).

84. *See id.* at 260.

85. *Id.* at 256-57.

86. *Id.* at 257.

87. *Id.*

88. *Id.* at 258.

89. *Id.* at 259.

90. 341 N.L.R.B. 1288 (2004).

91. *See id.* at 1288.

92. 331 N.L.R.B. 676 (2000).

93. *IBM Corp.*, 341 N.L.R.B. at 1288.

94. *Id.* at 1290.

95. *Id.* at 1305 (Member Liebman, dissenting).

whether or not they succeed.”⁹⁶ Liebman called the majority’s bluff on its trumped-up claims of dormant security threats lurking within non-union employees’ accompaniment to investigatory interviews by adding that “we would hope that the American workplace has not yet become a new front in the war on terrorism and that the Board would not be leading the charge, unbidden by other authorities.”⁹⁷ Because the majority needlessly and abruptly stripped them of the due process rights afforded by *Weingarten*, Liebman contended that the *IBM* rule disserved two of the key purposes of the Act—providing “a vehicle for employee voice and a system for resolving workplace disputes.”⁹⁸

Journalists⁹⁹ and legal commentators¹⁰⁰ alike widely and rapidly recognized the *IBM* decision’s reverberations. Because accompaniment during such interviews can be crucial and because co-workers may serve as valuable witnesses and can deter employers’ misuse of their power or intimidation tactics,¹⁰¹ it is apparent why *IBM* generated so much discussion. Liebman’s final criticism of the majority’s decision is apposite to describe many others that arose during the Bush II era and encapsulates her role as the lone voice of dissent. She stated, simply, that the members of the majority had overruled sound precedent, “not because they must, and not because they should, but because they can.”¹⁰²

D. Oakwood Healthcare, Inc. and Transforming Employees into Supervisors

The Board’s decision in *Oakwood Healthcare, Inc.*¹⁰³ was a highly anticipated chapter in the ongoing chronicle of the Board’s characterization of certain kinds of professional employees as “supervisors.”¹⁰⁴ As with the classification of certain workers as

96. *Id.* at 1305.

97. *Id.*

98. *Id.* at 1310.

99. See, e.g., Jim McKay, *NLRB: Employers Can Interrogate Nonunion Workers Without Witness*, PITTSBURGH POST-GAZETTE (June 18, 2004, 12:00 AM), <http://www.post-gazette.com/stories/business/news/nlr-employers-can-interrogate-nonunion-workers-without-witness-540459/>.

100. See, e.g., O’Brien, *supra* note 82, at 116 (“*IBM* represents a significant erosion of section 7 rights for non-union workers . . . it precludes any guarantee of a modicum of due process prior to the imposition of what may be unjust discipline . . .”).

101. *Id.* at 111-12.

102. *IBM Corp.*, 341 N.L.R.B. at 1310.

103. 348 N.L.R.B. 686 (2006).

104. Classification of a worker as a “supervisor” effectively places that individual beyond the

“employees” discussed above,¹⁰⁵ the decision to identify workers as “supervisors” is fraught with political implications because it strips those workers of rights under the Act.¹⁰⁶

Because the Bush II Board frequently sharply contracted protections for workers’ rights by restricting the scope of these threshold statutory definitions,¹⁰⁷ the outcome in *Oakwood* was distressing, but it was not surprising. Despite its admission that the Board is mandated “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect,”¹⁰⁸ the majority did just that. It interpreted the requirements for identifying workers as statutory supervisors broadly and found that registered nurses were “supervisors” because they had some authority to assign work to others and exercise independent judgment.¹⁰⁹

In a “stinging dissent,”¹¹⁰ Liebman emphasized that the majority’s decision “threatens to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees.”¹¹¹ Her concerns were rooted both in pragmatic evaluations of the potential reach of the majority’s decision and a desire to maintain fidelity to the Act’s legislative intent and history.¹¹² She explained the “gradations of supervisory authority possible in a workplace and why the Board must carefully take them into account, if it wants to be faithful to Congressional intent.”¹¹³

Despite initial concerns over the potentially devastating impact *Oakwood* could conceivably have had on employees’ rights under the Act,¹¹⁴ commentators’ fears have largely remained unsubstantiated. This was partially due to the Board’s decision in *Network Dynamics Cabling*,

protective ambit of the NLRA. See 29 U.S.C. §§ 152(3), 152(11) (2006).

105. See *supra* Part II.A.

106. See 29 U.S.C. § 152(3) (2006).

107. See *supra* Part II.A.

108. *Oakwood*, 348 N.L.R.B. at 688 (quoting *Chevron Shipping Co.*, 317 N.L.R.B. 379, 380-81 (1995)).

109. *Oakwood*, 348 N.L.R.B. at 698.

110. See Steven Greenhouse, *Board Redefines Rules for Union Exemption*, N.Y. TIMES (Oct. 4, 2006), <http://www.nytimes.com/2006/10/04/washington/04labor.html?pagewanted=all> [hereinafter, *Board Redefines Rules*].

111. *Oakwood*, 348 N.L.R.B. at 700 (Member Liebman, dissenting).

112. See *id.* at 701-02.

113. *Id.* at 708.

114. See Greenhouse, *Board Redefines Rules*, *supra* note 110 (“[L]abor experts predicted that the ruling could affect more than eight million workers who might also be deemed supervisors.”).

Inc.,¹¹⁵ which curtailed the seemingly limitless scope of *Oakwood*. While Liebman partially dissented in *Oakwood*, she joined the majority in narrowing the Act's definition of "supervisors" in *Network Dynamics Cabling*.¹¹⁶ This resolution of the underlying issue reflects her resilience and willingness to question the anti-worker initiatives of the Bush II Board.

*E. Accelerating Processes: To Be, or Not To Be? – or, Dana Corp.
Blows a Gasket*

In recent years, unions have increasingly relied on card check as a recognition mechanism.¹¹⁷ This shift has been attributed to card check's efficiency and unions' dissatisfaction with the seemingly endless process of conducting Board elections.¹¹⁸ The Board's policies determining the mechanics governing this process have become extremely contentious.¹¹⁹ In *Dana Corp.*, the Board changed the recognition bar doctrine¹²⁰ by imposing a new requirement providing that no recognition bar would exist after a grant of voluntary recognition "unless (a) affected unit employees receive adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days, and (b) 45 days pass from the date of notice without the filing of a validly-supported petition."¹²¹

Liebman's dissent from the majority's modification of the recognition bar doctrine reflected her concerns that unions' initial collective bargaining efforts would be hamstrung by the specter of a withdrawal of recognition.¹²² Because she recognized that the trend away from Board elections was indicative of unions' disillusionment with the Act and the Board's ability to robustly safeguard collective

115. 351 N.L.R.B. 1423 (2007).

116. *Id.* at 1425.

117. See Fisk & Malamud, *supra* note 18, at 201 ("[U]nions have increasingly begun seeking recognition based on a showing of signed union authorization cards . . . rather than an election supervised by the NLRB."). See also *Dana Corp.*, 351 N.L.R.B. 434, 444-45 (2007) (Member Liebman, dissenting) ("[L]abor unions have increasingly turned away from the Board's election process—frustrated with its delays and the opportunities it provides for employer coercion . . .").

118. See Lofaso, *supra* note 17, at 230.

119. See *id.*

120. This doctrine ensures that following designation as employees' bargaining representative, a union will be afforded a reasonable amount of time to bargain and execute a collective bargaining agreement. See *Dana Corp.*, 351 N.L.R.B. at 437 (quoting *Keller Plastics E., Inc.*, 157 N.L.R.B. 583, 587 (1966)).

121. *Dana Corp.*, 351 N.L.R.B. at 441.

122. See *id.* at 444-45 (Member Liebman, dissenting).

bargaining rights,¹²³ her opinion emphasized the pragmatic considerations served by the forty-year old recognition bar doctrine that the majority discarded. Chief among those was Liebman's contention that tampering with the recognition bar would seriously undermine "prospects for industrial peace."¹²⁴

Because Liebman had spoken out publicly against the Board's decision in *Dana* and was a very vocal dissenter, it did not surprise many that, on the final day of her tenure as Chairman, the Board decided to change course. In *Lamons Gasket Co.*,¹²⁵ Liebman and the Board majority decided to "overrule *Dana* and return to the previously well-established rule barring an election petition for a reasonable period of time after voluntary recognition."¹²⁶

The majority decision was rife with sharp critiques of *Dana*, noting that, in addition to being a decision that was "flawed, factually, legally, and as a matter of policy,"¹²⁷ it was also empirically deficient. The *Lamons Gasket* majority noted that the *Dana* majority did not proffer "any empirical evidence supporting the . . . suspicion that the showing of majority support that must underlie any voluntary recognition is not freely given or is otherwise invalid in a significant number of cases, or that the existing statutory mechanisms for preventing coercion . . . are inadequate."¹²⁸ Overruling *Dana* was a crucial component of Liebman's last days as Chair because the decision so clearly embodied the spirit of what some dubbed the Bush II Board's "September Massacre" in 2007.¹²⁹ To return to the state of the law prior to that wave of aggressively pro-employer decisions was therefore a major symbolic coup for Liebman and the Obama Board.¹³⁰

123. See *id.* at 444. ("[T]oday's decision will surely enhance already serious disenchantment with the Act's ability to protect the right of employees to engage in collective bargaining.").

124. *Id.* at 445.

125. 357 N.L.R.B. No. 72, 2011 WL 3916075 (Aug. 26, 2011).

126. *Id.* at *1.

127. *Id.*

128. *Id.*

129. See Lofaso, *supra* note 17, at 201.

130. Liebman enjoyed a similar victory with respect to the Board's so-called "merger bar doctrine," reversing the arch-conservative decision in *MV Transp.*, 337 N.L.R.B. 770 (2002), and reinstating the Board's original doctrine. That doctrine was articulated in *St. Elizabeth Manor, Inc.*, 329 N.L.R.B. 341 (1999) and stands for the proposition that a union has a reasonable period of time to remain unit bargaining representative to secure a contract with a successor employer after a corporate merger. *Id.* at 341. The Obama Board reversed *MV Transp.* in *UGL-UNICCO Serv. Co.*, 357 N.L.R.B. No. 76, 2011 WL 3916076 (Aug. 26, 2011).

III. DISENCHANTMENT

In 2007, Liebman published an article in the *Berkeley Journal of Employment and Labor Law*.¹³¹ The article responded to the growing dissatisfaction of legal commentators with the Board's decisions, which she candidly characterized as increasingly formalistic attempts to narrow the Act's coverage and cut back its protections.¹³² She agreed that the result of the Bush II Board's decisions had been intensified disenchantment with the agency in general and acknowledged the Act's shortcomings.¹³³ Liebman also noted that unions have become "[i]ncreasingly disillusioned with the law's ability to protect worker rights"¹³⁴ and lamented the apparently moribund spirit of New Deal optimism that formed the basis for the Act in the first place.¹³⁵ She observed that "[w]hether labor is right or wrong about the Board makes little difference. In this case, the perception of the law's failure is what matters."¹³⁶

Liebman then traced the development of the Act throughout its history.¹³⁷ She lauded its initial ability to help secure collective bargaining rights for millions of Americans and credited it with the creation of the American middle class.¹³⁸ Liebman also critically examined changing conditions at both the micro and macro levels that undermined the efficacy of the Act. At the micro level, she specifically pointed to the changing dynamics of the employment relationship and the increased emphasis on contingent and temporary work, which is less suited to organization and collective bargaining.¹³⁹ In terms of the macro level, Liebman described the massive geopolitical shifts that characterized the 1980s and beyond and especially cited technology, deregulation, the growth of the service sector and the decline of manufacturing in the United States, immigration, and globalization as trends that have thwarted efforts to harmonize the NLRA with contemporary workers' needs.¹⁴⁰

131. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569 (2007).

132. *Id.* at 571.

133. *See id.* at 571-72.

134. *Id.* at 571.

135. *Id.* at 572. This statement nicely reflects the link between Liebman and Frances Perkins.

136. *Id.* at 571-72.

137. *Id.* at 572-74.

138. *Id.* at 572-73.

139. *Id.* at 575.

140. *Id.* at 574.

Although Liebman acknowledged that the Act itself contains limitations because of its statutory text and age and admitted that “even a Board firmly committed to a dynamic application of the law would be limited in what it could do,” she insisted that the Bush II Board substantially compounded this problem with its consistently crabbed readings of the statute.¹⁴¹ She argued that the Board in its current form was “not only failing to maximize its available discretion,” but also that “its recent decisions [were] marginalizing statutory rights.”¹⁴² Liebman explained that the Bush II Board had a marked pattern of reflexively overruling the key victories for workers earned by the Clinton Board and discussed, *inter alia*, the controversial *Dana* and *Oakwood* decisions.¹⁴³

Despite her frank appraisal of the shortcomings of the agency, the tenor of Liebman’s piece remained cautiously optimistic.¹⁴⁴ Liebman firmly contended that “the Board, even under the current statutory scheme, can play a modest but meaningful role in preserving the values of this Act and in furthering its aims.”¹⁴⁵ She concluded that although the spate of anti-worker decisions handed down by the Bush II Board had obvious deleterious effects, they were generating increased public discussion of labor law and workers’ rights.¹⁴⁶

Liebman’s article is interesting for several reasons. First, it provides a snapshot of the historical and sociocultural circumstances within which the Bush II Board was situated.¹⁴⁷ It also helps explain her frustration with the Bush II Board’s trajectory and fleshes out many of the arguments she made in her dissents.¹⁴⁸ Finally, it memorializes her goals and visions for the future of the Act and how to adapt it to the changing needs of American workers.¹⁴⁹

IV. THE LEGACY OF CHAIRMAN LIEBMAN

On his first day in office, President Obama appointed Liebman the

141. *Id.* at 576, 580.

142. *Id.* at 580.

143. *Id.* at 580, 581 n.84, 582. For a thorough treatment of these cases, *see supra* Part II.D-E.

144. Liebman, *supra* note 131, at 572 (“There are reasons enough for disenchantment with labor law, I readily acknowledge, but there are also grounds to reject despair.”).

145. *Id.*

146. *Id.* at 587-89 (highlighting the extensive news coverage of *Oakwood* and the resulting segment on Comedy Central’s *The Colbert Report*).

147. *See id.* at 572.

148. *See id.* at 571, 583.

149. *See id.* at 589.

Chairman of the Board.¹⁵⁰ She was only the second woman to head the Board in its history.¹⁵¹ And, just like Betty Murphy, Liebman insisted on being addressed as the “Chairman” of the NLRB, because that is the explicit terminology used by the statute.¹⁵²

Liebman would serve as Chair for approximately thirty months, resigning in August of 2011.¹⁵³ Despite her short time leading the Board, however, the agency published hundreds of decisions, some of which served to scale back the vehemently pro-employer jurisprudence of the past decade.¹⁵⁴ Some of the Board’s most notable decisions with Liebman as Chair helped push American labor law into the twenty-first century by recognizing the pervasive role of Internet technology in workplace communication¹⁵⁵ and modern relationships between unions and employers.¹⁵⁶

Other decisions demonstrated what would have been called reasonable support for workers’ rights in other decades, but in the years since 2009 have been characterized as rabidly pro-union.¹⁵⁷ Political opposition to workers’ rights on the Board and in Washington had swelled to a crescendo by the time Liebman stepped down, swirling mainly around the Boeing controversy.¹⁵⁸ Despite a sick economy and the resulting panic, though, Liebman was able to show that the federal government is capable of respecting workers’ rights and forging fair law towards that end.

This section will examine several of the Board’s major consequential decisions with Liebman as Chair. The aim is to show their treatment of traditionally important topics, in order to contrast with the Bush Board’s policies and show the drastic shift to the center that the Board effectuated in spite of its recent pro-employer stance.

150. Kimberly Atkins, *Obama Makes Top Labor, Employment Bias Agency Picks*, LAWYERS USA (Jan. 23, 2009), <http://www.highbeam.com/doc/1P2-19789678.html>.

151. Betty Murphy served as the first woman Chairman in the seventies. See *Board Members Since 1935*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Nov. 6, 2012).

152. Wilma Liebman, Chairman, Address at St. John’s University, School of Law (2010).

153. See *Chairman Liebman Departs NLRB As Third Term Ends; Member Pearce Designated New Chairman*, NAT’L LAB. REL. BOARD (Aug. 27, 2011), <http://www.nlr.gov/news/chairman-liebman-departs-nlr-third-term-ends-member-pearce-designated-new-chairman>.

154. See, e.g., discussion *supra* Part II.E.

155. See, e.g., *J&R Flooring, Inc.*, 356 N.L.R.B. No. 9, 2010 WL 4318372 (Oct. 22, 2010); *Tex. Dental Ass’n*, 354 N.L.R.B. No. 57, 2009 WL 2340684 (July 29, 2009).

156. See, e.g., *Dana Corp.*, 356 N.L.R.B. No. 49, 2010 WL 4963202 (Dec. 6, 2010).

157. See Sam Hananel, *Labor Board Flexes Muscle for Unions, To Chagrin of Republicans*, *Business Groups*, STARTRIBUNE.COM (Feb. 9, 2011), http://www.startribune.com/templates/Print_This_Story?sid=115661969.

158. See Greenhouse, *Board Drops Case Against Boeing*, *supra* note 5.

A. New Process Steel

In understanding the narrative of Liebman's role as leader of the NLRB, it is important to note the 2010 Supreme Court decision in *New Process Steel, L.P. v. NLRB*.¹⁵⁹ In that case, the Court ruled that the Board could not make binding decisions without a three-person quorum sitting, invalidating hundreds of decisions that Liebman issued as Chair.¹⁶⁰

From January 2008 until March 2010, the Board's membership fell to two members.¹⁶¹ Before Members Kirsanow and Walsh left the Board, the four members delegated their quorum authority to Members Liebman and Schaumber once the others' terms expired.¹⁶² Once Liebman and Schaumber remained, the two issued nearly 600 opinions under that authority over the course of 27 months.¹⁶³ One of those decisions concerned unfair labor practices ("ULPs") against New Process Steel. The company challenged the Board's authority to make decisions with only two members, and the case made its way to the Supreme Court to decide the issue of whether the Board had the authority to delegate power to the two-member panel.¹⁶⁴

The Court found that the Board did not have quorum power with only two members, even if a three-member quorum authorized such power.¹⁶⁵ The majority opinion relied on the Taft-Hartley Act's change to a five-member Board and its requirement of a three-member quorum.¹⁶⁶ While the Board had interpreted Taft-Hartley to allow a three-member quorum to authorize two members of that quorum to continue acting with full authority once one of the three left the Board, the Court interpreted the statute to require the Board to *maintain* a three-member quorum in order to exercise its authority.¹⁶⁷ Taft-Hartley's amendments to the NLRA require that three members of the Board

159. 130 S. Ct. 2635 (2010).

160. *See id.* at 2645.

161. *Id.* at 2639.

162. *See id.* at 2638.

163. *Id.* at 2639.

164. *Id.*

165. *See id.* at 2645.

166. *Id.* at 2638, 2645. *See also* 29 U.S.C. § 153(b) (2006) ("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.").

167. *New Process Steel*, 130 S. Ct. at 2640.

participate “at all times.”¹⁶⁸ To allow two members to act with the full authority of the Board would undermine the statute’s requirement of three members.¹⁶⁹ Given that Taft-Hartley did not explicitly authorize two members to act as a quorum, as Liebman and Schaumber had been acting, it would have been improper to read such an allowance into the statute’s language.¹⁷⁰ Finally, the Court relied on the fact that the Board had only allowed two members to act with full authority in rare cases where one member of a three-member quorum had been excused.¹⁷¹ Other considerations, such as the value of allowing the Board to function with only two members for efficiency’s sake, did not outweigh the Court’s decision that Taft-Hartley had set a clear requirement of three members.¹⁷²

Justice Kennedy, joined by Justices Ginsburg, Breyer, and Sotomayor, wrote a dissenting opinion, arguing that the Court’s holding conflicted with the underlying purposes of the NLRA and preferred one reading of Taft-Hartley’s language among several valid interpretations.¹⁷³ The dissent argued that the statute’s plain language allowed the Board to issue two-member decisions, meaning the Court’s decision deprived the Board of its statutory right to function with two members.¹⁷⁴ Justice Kennedy argued that, given that the statute allowed the Board to issue decisions by two members, the agency should be afforded that right in order to further the NLRA’s fundamental goal of promoting industrial peace in interstate commerce.¹⁷⁵ Instead of promoting that value, the majority’s interpretation of Taft-Hartley’s requirement “leave[s] the Board defunct for extended periods of time, a result that Congress surely did not intend.”¹⁷⁶

The Supreme Court’s holding rendered the over five hundred decisions made while the Board consisted of only Liebman and Schaumber invalid and established the rule that the Board has no decision-making authority without at least a three-member quorum.¹⁷⁷ Of the cases discussed below, only *Cintas Corp.*¹⁷⁸ and *Texas Dental*

168. *Id.*

169. *Id.* at 2640–41.

170. *Id.* at 2641.

171. *See id.*

172. *See id.* at 2644.

173. *See id.* at 2645 (Kennedy, J., dissenting).

174. *Id.* at 2646.

175. *Id.* at 2645 (citing *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939)).

176. *New Process Steel*, 130 S. Ct. at 2652.

177. *Id.* at 2645.

178. 353 N.L.R.B. 752 (2009).

*Ass'n*¹⁷⁹ were decided under the two-member Board. Regardless of their procedural flaws, the cases decided by Liebman and Schaumber illustrate the perseverance of the NLRB with Liebman as chair, as well as Liebman's dedication to the cause of workers' rights.

B. Cintas and Jurys Boston Hotel – Enforcing Employer Rules During Elections

In *Cintas Corp.*, the Board addressed the perennial issue of workers' right to display pro-union material during an organizing campaign.¹⁸⁰ Employees at Cintas facilities in Charlotte, North Carolina and Brandford, Connecticut received warnings from management for wearing hats with UNITE HERE insignia and displaying union stickers and flyers at work.¹⁸¹ When workers wore union hats and stickers at work, the employer told them that doing so violated company policy and warned them that they could be disciplined.¹⁸² When workers had worn non-union hats and adornments in the past, the employer had simply asked them to remove them, without reference to formal discipline.¹⁸³ When an employee displayed a union flyer at her workstation, she was told to remove it and not show it to anyone.¹⁸⁴ The employer also confiscated union flyers from the employee break room.¹⁸⁵

Cintas was one of the first decisions Liebman faced as Chair of the Board, and it provided her with the opportunity to demonstrate the Obama Board's evaluation of disparate treatment cases in the wake of *Register-Guard*.¹⁸⁶ Although *Register-Guard* had given employers much leeway in applying policies while avoiding charges of unlawful discrimination,¹⁸⁷ the Board found that the employer's behavior with respect to the union hats, stickers, and fliers was not "nondiscriminatory."¹⁸⁸ Whereas the employer had merely told employees wearing hats not related to unionization to remove them (or, in the case of head scarves, permitted them), it gave warnings to

179. 354 N.L.R.B. No. 57, 2009 WL 2340684 (July 29, 2009).

180. *Cintas Corp.*, 353 N.L.R.B. at 752.

181. *See id.* at 752, 766.

182. *Id.* at 752-53.

183. *Id.* at 752.

184. *Id.* at 753.

185. *Id.*

186. *See supra* Part II.B.

187. *See Guard Publ'g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1114 (2007).

188. *Cintas Corp.*, 353 N.L.R.B. at 752.

employees who wore union hats.¹⁸⁹ Similarly, the company had allowed employees to keep various personal belongings in their work areas, but verbally warned one worker for placing a union hat in hers, implying that failure to remove it would lead to her discharge.¹⁹⁰ Such uneven treatment of union materials was “disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status” under *Register-Guard*.¹⁹¹ The Board thus found NLR Section 8(a)(1) and 8(a)(3) violations for the warnings.¹⁹²

Cintas’ reaction to the presence of union flyers in the workplace was also discriminatory.¹⁹³ The employer ordered a worker to put a union flyer away, later claiming that displaying the flyer violated a no-distribution policy.¹⁹⁴ The Board found that the supervisor who warned the employee did not tell her that she had violated the policy, and that the worker could not have reasonably understood that the warning was because of such policy.¹⁹⁵ This action and the employer’s confiscation of union fliers from the employee break room constituted 8(a)(1) violations.¹⁹⁶

*Jurys Boston Hotel*¹⁹⁷ is an example of the Board’s increased intolerance for rules that could interfere with workers’ Section 7 rights, even when the employer acts much more amicably than in *Cintas*. In that case, the employer hotel had maintained a cooperative relationship with the union, instructing supervisors to display a “neutral if not positive” attitude towards the union during an election period.¹⁹⁸ However, the employer’s handbook had several requirements to which the union objected during the election period, including rules against solicitation on the employer’s property, loitering outside the hotel without permission, and “wear[ing] emblems, badges or buttons with messages of any kind other than the issued nametags or other official types of pins”¹⁹⁹ After the union had filed ULPs related to these rules and before the election, the employer sent a memo to workers stating that the rules were not meant to abridge their rights under the

189. *Id.*

190. *Id.* at 752-53.

191. *Register-Guard I*, 351 N.L.R.B. at 1118.

192. *Cintas Corp.*, 353 N.L.R.B. at 752.

193. *See id.* at 753.

194. *Id.*

195. *Id.*

196. *Id.*

197. 356 N.L.R.B. No. 114, 2011 WL 1127474 (Mar. 28, 2011).

198. *Jurys Bos. Hotel*, 2011 WL 1127474, at *1.

199. *Id.* at *1-2 (alteration in original).

NLRA and that the paragraph about wearing paraphernalia should be deleted from the handbook.²⁰⁰ In addition to the memo, the rules were not enforced against any workers during the election.²⁰¹ The union lost the subsequent election by one vote out of ninety-three.²⁰²

The Board held that the mere existence of the rules during the election was enough to set aside the election result, since the rules could reasonably be said to have affected the outcome of the election.²⁰³ In coming to this conclusion, the Board relied on the fact that the three rules, taken together or individually, could be seen as a constraint of employees' Section 7 rights from the workers' standpoint.²⁰⁴ Unlike in previous similar cases where the employer maintained a single objectionable rule,²⁰⁵ the hotel's several rules could have presented workers with the impression that they were not allowed to speak to their co-workers about supporting the union or to express their support in other ways.²⁰⁶ The Board was further convinced that the election should be set aside because of the very narrow margin by which the union lost the election.²⁰⁷ Although the employer had been cooperative with the union previously and had taken the step of informing employees that their rights should not be considered constrained under the rules, the Board was not convinced that the objectionable rules had no possible effect on the election result, and it thus ordered a second election.²⁰⁸

Cintas and *Jurys Boston Hotel* show the stance that the Board under Liebman took towards the existence and application of rules that could affect workers' Section 7 rights during the crucial period leading up to an election. Such cases presumably put employers on notice that they should err on the side of accommodating workers' right to organize. These decisions also signaled to the labor law world that the Bush Board's stance towards workers' rights was being reversed.

200. *Id.* at *2.

201. *Id.*

202. *Id.* at *4.

203. *Id.* at *3.

204. *See id.*

205. *See, e.g.,* *Delta Brands, Inc.*, 344 N.L.R.B. 252 (2005) (restriction of workplace solicitation); *Safeway, Inc.*, 338 N.L.R.B. 525 (2002) (confidentiality rule).

206. *Jurys Boston Hotel*, 2011 WL 1127474, at *3.

207. *Id.* at *4.

208. *Id.* at *5.

C. Texas Dental Association / Terry Machine—*Tenuous Territory for Supervisors*

Texas Dental Ass'n,²⁰⁹ also decided early in Liebman's service as Chair, addressed the issues of a supervisor's limited protection under the Act and unorganized employees' Section 7 rights when they are not actively unionizing.²¹⁰ Because the Board consisted of only two members at the time, Liebman and Schaumber did not rule on the issue of what notice an employer is obligated to provide when it violates the Act.²¹¹ However, Liebman noted that she would have held that the employer was obligated to give notice electronically, since that was how the employer normally communicated with employees.²¹²

Workers at Texas Dental met several times, discussing their dissatisfaction with some of the employer's policies.²¹³ They drafted a petition to send to the employer.²¹⁴ Out of fear of reprisal, the employees took several steps to ensure their anonymity, including meeting away from work and signing the petition with aliases.²¹⁵ Barbara Lockerman, a supervisor, went to part of the second meeting.²¹⁶ Later, the company's President warned Lockerman and other staff members that the employees involved could be fired and added that her job was in danger.²¹⁷ A member of management soon broadcasted to employees that anyone involved in the meetings had to report to her.²¹⁸ Lockerman refused to tell management the identities of the employees involved, and she was soon fired for her lack of cooperation.²¹⁹

Although supervisors are normally not directly protected by the Act, there is some protection for supervisors who refuse to further an employer's ULP.²²⁰ The Board reviewed this precedent, emphasizing

209. 354 N.L.R.B. No. 57, 2009 WL 2340684 (July 29, 2009).

210. *See Tex. Dental Ass'n*, 2009 WL 2340684, at *1, *2.

211. *See id.* at *1 n.4. While the Board adopted the administrative law judge's recommendation that the violations of the Respondent should be posted in the workplace, the Board never ruled that such an action would be the standard for similar cases. *See id.* at *5, *22.

212. *Id.* at *1 n.4. This issue would be revisited once the Board had a recognized quorum in *J&R Flooring*, 356 N.L.R.B. No. 9, 2010 WL 4318372 (Oct. 22, 2010).

213. *See Tex. Dental*, 2009 WL 2340684, at *1.

214. *Id.*

215. *Id.* at *3 n.11.

216. *See id.* at *1.

217. *Id.* at *3.

218. *Id.* at *2.

219. *Id.* ("Although Linn[Lockerman's superior] offered other explanations for the discharge, the judge properly found that the sole reason for the Respondent's action was her failure to divulge to Linn what Lockerman knew of the employees' protected concerted activities.")

220. *See id.* *See also* Parker-Robb Chevrolet, 262 N.L.R.B. 402, 403 (1982); Talladega Cotton

that, under the Act, employers cannot fire supervisors for failure to unlawfully prevent organizing.²²¹ The employees' meetings and petition were protected activity under the Act.²²² The Board compared Lockerman's case to *Howard Johnson Motor Lodge*,²²³ where the Board had held that a supervisor was illegally fired for failing to give the employer names of employees who had attended a union meeting.²²⁴ Relying on the company's warnings to Lockerman, its demand for information about the meetings, and other evidence of the employer's hunt for the names of organizing workers,²²⁵ the Board held that Lockerman's discharge was an 8(a)(1) violation.²²⁶

The Board added that, since the employer conceded that it fired the supervisor for her failure to divulge information, no *Wright Line* analysis was necessary to determine the legality of the employer's motive.²²⁷ Even if it were, though, it was clear that the employer's motivation in firing the manager – a campaign to flush out organizing employees – was illegal under *Wright Line*.²²⁸ Because the discharge was aimed at ending concerted activity, the illegal discharge had an inherent adverse influence on employees' Section 7 rights, even if the employees had not known of it.²²⁹

In *Terry Machine*,²³⁰ another case dealing with supervisor support for organizing activity, the Board held that pro-union supervisors who influence employees during a unionization campaign do not necessarily violate employee free choice.²³¹ In its supplemental decision to a 2006 case,²³² the Board analyzed the activity of seven supervisors who had

Factory, 106 N.L.R.B. 295, 319 (1953).

221. See *Tex. Dental*, 2009 WL 2340684, at *2.

222. See *id.* at *1.

223. 261 N.L.R.B. 866 (1982).

224. *Id.* at 870-71; *Tex. Dental*, 2009 WL 2340684, at *2.

225. *Tex. Dental*, 2009 WL 2340684, at *3 (“We find, based on (1) the warnings of May and Haufler to Lockerman, (2) [the employer’s] demand that employees, as a condition of employment, report their participation in the anonymous activity, (3) the computer forensic investigation, and (4) Clark’s termination after that investigation revealed evidence of his involvement, that the Respondent had embarked on an effort to identify participants in order to terminate them for exercising their rights under the Act.”).

226. *Id.*

227. See *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980); *Tex. Dental*, 2009 WL 2340684, at *4.

228. *Tex. Dental*, 2009 WL 2340684, at *4.

229. *Id.* at *4. See also *Parker-Robb Cevrolet, Inc.*, 262 N.L.R.B. 402, 404 (1982).

230. 356 N.L.R.B. No. 120, 2011 WL 1127481 (Mar. 28, 2011).

231. See *id.* at *1, *3.

232. See *Terry Mach. Co.*, 348 N.L.R.B. 919 (2006).

solicited employees for signatures on a showing-of-interest petition.²³³ The supervisors had each solicited between three and twenty employees over the course of one or two days.²³⁴ Meanwhile, the employer engaged in an aggressive anti-union campaign, which included captive audience meetings, one-on-one meetings, and letters to employees' homes.²³⁵ The employer also threatened to fire the pro-union supervisors, and most employees soon learned of the threat.²³⁶

The Board applied the two-prong standard from *Harborside Healthcare, Inc.*,²³⁷ which held that pro-union supervisory conduct was a violation of the Act when the activity tended to interfere with employee free choice to the extent that it materially impacted the election's result.²³⁸ The Board held that any potential influence the supervisors' activity had on employees' choice was mitigated by the employer's intense anti-union campaign.²³⁹ In particular, employees' knowledge of the threat to fire the supervisors cancelled out any compulsion they might have felt to follow those supervisors' preferences.²⁴⁰ Thus, the supervisors did not violate the Act and the employer's objections to the election based on their activity were overruled.²⁴¹

D. Stella D'oro Biscuit

The Board focused on a party's duty to provide financial documents during bargaining in *Stella D'oro Biscuit Co.*²⁴² The case also touched on employers' obligations when they have been temporarily bought by private equity firms, an increasingly popular practice in the modern business world.²⁴³

While *Stella D'oro* was negotiating a new contract with the union, it referred several times to its financial health, as well as that of Brynwood, the private equity firm that owned it.²⁴⁴ The company claimed that it would not be able to survive if it did not get concessions

233. *Terry Mach.*, 2011 WL 1127481, at *2.

234. *Id.*

235. *Id.* at *3.

236. *Id.*

237. 343 N.L.R.B. 906, 909 (2004).

238. *Terry Mach.*, 2011 WL 1127481, at *4. *See also Harborside*, 343 N.L.R.B. at 911.

239. *See Terry Mach.*, 2011 WL 1127481, at *5.

240. *Id.* at *4-5.

241. *See id.*

242. 355 N.L.R.B. No. 158, 2010 WL 3446122, at *6-8 (Aug. 27, 2010).

243. *See id.* at *1.

244. *See id.* at *1-2, *5.

from the union, since Brynwood conditioned its continued support of Stella on those concessions.²⁴⁵ When the union asked for proof of the company's financial status, the employer gave the union a one-page summary.²⁴⁶ It also let the union see a full nineteen-page financial audit at a bargaining session, but refused to let the union photocopy it.²⁴⁷ When the union brought ULP charges against the company for Stella's refusal to present the document, the employer claimed it had only expressed an *unwillingness* to bargain, not an inability to pay for labor costs.²⁴⁸

Before holding that the employer violated 8(a)(1) and 8(a)(5) for its refusal to furnish financial information, the Board reviewed a history of cases that said an employer must provide full financial documents when it claims an inability to pay the union during bargaining.²⁴⁹ The Board found that Stella made statements that amounted to saying that the company's existence was contingent on getting concessions,²⁵⁰ despite statements about Brynwood's willingness to take on short-term economic losses.²⁵¹ Although Brynwood was willing to provide money to Stella, the majority framed the issue as Stella's ability to pay, not its parent company.²⁵² Stella's statements about its inability to pay triggered an obligation to give the union the requested financial proof.²⁵³

The company's sole given reason for failing to allow the union to photocopy the full audit was the fear that the information's confidentiality would be compromised.²⁵⁴ The Board, however, debunked this as pretextual, since the union was willing to sign a confidentiality agreement regarding what it read in the audit.²⁵⁵ Given

245. *See id.* at *2.

246. *Id.*

247. *Id.*

248. *See id.* at *5.

249. *See id.* at *5-6. *See also* Lakeland Bus Lines, Inc., 335 N.L.R.B. 322, 322 (2001); Stroehmann Bakeries, Inc., 318 N.L.R.B. 1069, 1080 (1995); Shell Co., 313 N.L.R.B. 133, 133 (1993).

250. *Stella D'oro*, 2010 WL 3446122, at *5.

251. *Id.*

252. *Id.* (citing *Sioux City Stockyards (United Stockyards Corp.)*, 293 N.L.R.B. 1, 2 (1989)). Member Schaumber dissented, arguing that *Stella D'oro* did not claim an inability to pay. *See Stella D'oro*, 2010 WL 3446122, at *14. Schaumber interpreted the company's statements as a declaration that it was able to pay for requested wages and benefits, but that Brynwood's expectation of future profitability made *Stella unwilling* to pay for the increases. *See id.* at *14-15. Because Brynwood had made clear that it was willing to invest in the company as a temporary loss, it was inaccurate to say that the employer had claimed a total inability to pay. *See id.*

253. *Id.* at *6.

254. *Id.* at *8.

255. *Id.*

the lack of justification for the company's refusal, the Board found that Stella violated its duty to provide the information by refusing to allow the union to photocopy the document.²⁵⁶ The majority, following *American Telephone & Telegraph Co.*,²⁵⁷ relied on "the volume and nature of the information; whether furnishing a photocopy would give greater assurance of accuracy and completeness; and the comparative cost and convenience to both parties of providing the photocopy."²⁵⁸ It found that all three factors favored the union's position.²⁵⁹

E. Dana Corp. (2010) - Encouraging Cooperative Relationships

The Board addressed the legality of the now common practice of employers and unions making preliminary agreements to cooperate during organizing in *Dana Corp.*²⁶⁰ The United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) and Dana had entered a Letter of Agreement (LOA) in which they set rules for future organizing of Dana facilities by the UAW.²⁶¹ The LOA stated that during an organizing campaign the employer would remain neutral, the union would receive employee names and addresses, and there would be no strike or lockout.²⁶² The LOA also said that the parties would bargain once there was a showing of majority support for the labor contract, which would include several substantive terms, including healthcare costs, minimum classifications, and mandatory overtime.²⁶³ After the parties signed the LOA, Dana announced to employees that it had created a neutrality agreement with the union.²⁶⁴ Afterwards, three Dana employees filed ULP charges against the parties, alleging that Dana had violated Section 8(a)(2) and (1) and the UAW had restrained employee

256. *Id.* Member Schaumber dissented on the Board's second point as well, arguing that the nature of the document in the case made the employer's proposal to review the document at its offices a sufficient offering of information. *See id.* at *16. The financial statement, according to Schaumber, was "not a detailed, complex document, especially for an attorney or accountant familiar with financial statements." *Id.* Beyond that, visiting the employer's office to review the document would not have presented a substantial burden to the union. *Id.* Thus, the employer's office satisfied the requirements of information offers under Board precedent. *Id.*

257. 250 N.L.R.B. 47 (1980).

258. *Stella D'oro*, 2010 WL 3446122, at *6 (citing *Am. Tel. & Tel. Co.*, 250 N.L.R.B. at 54).

259. *See id.*

260. 356 N.L.R.B. No. 49, 2010 WL 4963202, at *1 (Dec. 6, 2010).

261. *See id.* at *1-2.

262. *Id.* at *2.

263. *Id.* at *2-3.

264. *Id.* at *3.

free choice in violation of Section 8(b)(1)(A).²⁶⁵

The Board held that the employer had not violated the Act by signing the LOA, and it did not discuss the charge against the union.²⁶⁶ The majority opinion began its discussion by noting that the primary purpose of Section 8(a)(2) was to stop company-dominated unions, which had been a popular way of suppressing worker power when the NLRA was enacted.²⁶⁷ Such company unions have been rightly regarded as antithetical to meaningful collective bargaining.²⁶⁸ However, the Board emphasized that the Act allows some degree of cooperation between employers and unions.²⁶⁹ Parties can create “members-only” agreements, indicate that they wish to enter into a bargaining relationship once majority support is established, and agree to voluntary recognition through card check.²⁷⁰ Employers that have multiple facilities, such as Dana in this case, can also agree to future recognition of the union at other sites when they bargain for a labor contract.²⁷¹

In coming to its conclusion, the Board’s opinion drew distinctions between this case and precedent in *Bernhard-Altman*²⁷² and *Majestic Weaving Co.*,²⁷³ both of which had put restrictions on cooperation between employers and unions.²⁷⁴ In *Bernhard-Altman*, the Supreme Court held that an employer violated section 8(a)(2) when it recognized a minority union as the exclusive bargaining representative and agreed to end a strike, and detailed certain terms over which the parties would bargain.²⁷⁵ Three years later in *Majestic Weaving*, the Board relied on the Court’s decision to hold that the employer violated 8(a)(2) under similar facts.²⁷⁶ In that case, the employer had negotiated a full collective bargaining agreement before the union had shown majority support.²⁷⁷ After the collective bargaining agreement was completed, the union presented authorization cards from a majority of the

265. *Id.*

266. *See id.* at *12.

267. *See id.* at *5.

268. *See id.* at *6.

269. *Id.*

270. *See id.*

271. *Id.* (citing Hous. Div. of the Kroger Co., 219 N.L.R.B. 388, 388-89 (1975)).

272. Int’l Ladies’ Garment Workers’ Union v. NLRB (*Bernhard-Altman*), 366 U.S. 731 (1961).

273. 147 N.L.R.B. 859 (1964).

274. *See Bernhard-Altman*, 366 U.S. at 739; *Majestic Weaving*, 147 N.L.R.B. at 862.

275. *Bernhard-Altman*, 366 U.S. at 732-34.

276. *See Majestic Weaving*, 147 N.L.R.B. at 860.

277. *See id.*

bargaining unit, some of which had been solicited by a supervisor.²⁷⁸

The Board distinguished these cases from *Dana* by pointing out that Dana Corp. had not granted the UAW exclusive recognition, the parties had not bargained a collective bargaining agreement, and there was no solicitation of authorization cards by a supervisor.²⁷⁹ Rather, “the LOA did no more than create a framework for future collective bargaining, if (as specified in the agreement) the UAW were first able to provide proof of majority status”²⁸⁰ In fact, the LOA explicitly stated that the union did not have majority status, and likewise did not recognize the union as exclusive bargaining representative.²⁸¹ The Board’s opinion went on to say that such an agreement was unlikely to pressure workers into supporting the union and that, in this case, the bargaining unit actually voted not to support the union.²⁸² The Board reasoned that prohibiting agreements like the LOA would undermine the NLRA’s foundational goal of promoting industrial peace by facilitating cooperation between unions and employers.²⁸³ Collaborative steps like card check and neutrality agreements have strengthened peaceful and productive relationships between unions and businesses in past decades.²⁸⁴ Prohibiting such cooperation would, rather than promote the goals of section 8(a)(2), weaken the means by which parties can forge healthy long-term relationships.²⁸⁵ Therefore, relying on the distinctions between *Majestic Weaving* and this case and the force of the policy of promoting fruitful industrial relations, the Board dismissed the claims against the employer.²⁸⁶

Dana is another example of steps the Liebman-led majority took to bring Board law in synch with the realities of the twenty-first century. The majority noted the increasingly important role of neutrality agreements in successful and peaceful organizing,²⁸⁷ implicitly recognizing the non-zero-sum nature of the relationships between unions and employers. Although the Board declined to state a definitive rule governing such agreements,²⁸⁸ *Dana*’s strong language made clear that

278. *See id.* at 859-60.

279. *Dana Corp.*, 356 N.L.R.B. No. 49, 2010 WL 4963202, at *8 (Dec. 6, 2010)

280. *Id.*

281. *See id.*

282. *See id.* at *12.

283. *See id.* at *10.

284. *See id.*

285. *See id.*

286. *See id.* at *8, *12.

287. *See id.* at *10.

288. *See id.* at *11.

such cooperative measures should be encouraged as a logical extension of the NLRA's purpose.²⁸⁹

F. Jackson Hospital Corp. / The Humane Society for Seattle

Given the vitriol aimed at the Board, and particularly at Liebman as she retired from her position as chair,²⁹⁰ it is worthwhile to note some specific examples of the Board's evenhanded application of labor law.

In *Jackson Hospital Corp.*,²⁹¹ the Board held that one employee, Gross, had been justly fired by the employer, while another, Combs, had been illegally fired for union support.²⁹² Gross had failed to carry out a necessary part of the detailed procedure for blood transfusions, resulting in a transfusion going to the wrong patient.²⁹³ Although the employer was aware of the worker's past union support, the Board's *Wright Line* analysis concluded that Gross had been discharged for a nondiscriminatory reason.²⁹⁴

By contrast, another employee at the hospital, Combs, was found to have been discharged for her union support, with the employer's stated reason being a pretext.²⁹⁵ After Combs asserted her *Weingarten* right to union representation at a meeting with management, the employer placed her on an investigatory suspension.²⁹⁶ Whereas similar suspensions had normally lasted no more than two weeks, Combs's lasted for over a year.²⁹⁷ Based on the circumstances of the suspension, the Board found that the employer had violated sections 8(a)(1) and 8(a)(3).²⁹⁸

*The Humane Society for Seattle/King County*²⁹⁹ addressed the application of Board precedent when there is confusion about whom the employees voted for in a Board election.³⁰⁰ The majority, including Liebman, concluded that an election had to be overturned because the

289. *See id.* at *9-10.

290. *See Greenhouse, Board Drops Case Against Boeing, supra* note 5.

291. 355 N.L.R.B. No. 129, 2010 WL 3421928 (Aug. 27, 2010), *enforcement denied by, Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

292. *Jackson Hosp.*, 2010 WL 3421928, at *1.

293. *See id.* at *2-3.

294. *See id.* at *3.

295. *See id.* at *6.

296. *See id.* at *5.

297. *See id.* at *6 n.11.

298. *Id.* at *7.

299. 356 N.L.R.B. No. 13, 2010 WL 4474381 (Oct. 28, 2010).

300. *See id.* at *5.

kind of confusion that had been created was partially the union's fault.³⁰¹

The Animal Control Officers Guild (ACOG) won an election by one vote, with the employer challenging two votes on the grounds that the union had made material misrepresentations about what a "yes" vote meant.³⁰² Before the election, some employees were under the impression that they were voting for their own independent union, rather than for a bargaining unit affiliated with ACOG.³⁰³ The Board reviewed relevant precedent, showing that in some cases similar confusion was not strong enough to overturn an election.³⁰⁴ However, the Board held that *Pacific Southwest Container*,³⁰⁵ where the Board overturned an election where employees were misinformed about the identity of the union they voted for, was controlling.³⁰⁶ The Board relied on the apparent confusion among employees, the closeness of the vote, and the fact that ACOG had been responsible for some of the confusion, and ordered the election overturned.³⁰⁷

In both *Jackson Hospital* and *The Humane Society*, the Board ruled against the unions and union members involved.³⁰⁸ Rather than simply affirming the administrative law judges' decisions, Liebman's Board applied precedent fairly and changed the decision below to square with reality. Although this analysis cannot examine every mundane decision the Board made while Liebman was chair, it is important to notice that Liebman took her role as impartial decision-maker seriously, despite her obvious pro-union stance.³⁰⁹ Recent criticism has painted the Board as a left-wing sect of an overbearing government,³¹⁰ when in fact the agency has applied precedent that furthers the purposes of the NLRA evenly.

301. *Id.* at *6.

302. *Id.* at *4.

303. *See id.* at *1, *7.

304. *See id.* at *5 (citing Nev. Sec. Innovations, 337 N.L.R.B. 1108 (2002)).

305. 283 N.L.R.B. 79 (1987).

306. *See Humane Society*, 2010 WL 4474381, at *5, *6.

307. *See id.* at *6.

308. *See Jackson Hosp. Corp.*, 355 N.L.R.B. No. 129, 2010 WL 3421928, at *1, *3 (Aug. 27, 2010); *Humane Society*, 2010 WL 4474381, at *1, *3.

309. *See Flynn, supra* note 14, at 1412.

310. *See Benjy Sarlin, After Appeal from Nikki Haley, Newt Gingrich Jumps into SC Boeing/Labor Fight*, TPM (May 11, 2011, 9:58 AM), <http://tpmdc.talkingpointsmemo.com/2011/05/after-appeal-from-nikki-haley-newt-gingrich-jumps-into-sc-boeinglabor-fight.php>; Carter Wood, *Criticisms Mount Against NLRB's Attack Against Boeing, Business, SHOPFLOOR* (Apr. 21, 2011 4:57 PM), <http://www.shopfloor.org/2011/04/criticisms-mount-against-nlrbs-attack-against-boeing-business/20153>.

G. J&R Flooring's *Wake Up Call* to Register-Guard

Attempting to make up for the Board's past status as "the 'Rip Van Winkle of administrative agencies[,]'"³¹¹ *J&R Flooring, Inc.*³¹² stands as an example of Liebman's determination to guide the agency into the twenty-first century. The holding applied existing Board jurisprudence to the realities of the modern working life, including employees' reliance on electronic communication and the decentralization of the workplace.³¹³ In introducing the case, the majority alluded to *Weingarten's* statement that the Board, as an administrative agency, should adapt the Act to changes in industrial life.³¹⁴

In a supplemental decision to a case decided several months earlier where the employer had violated the Act by failing to recognize employees through card check,³¹⁵ the Board held that the employer's duty to give notice of its violation carried an obligation to post that notice electronically.³¹⁶ Relying on the Board's section 10(c) power to order a party to give notice of a ULP it has committed,³¹⁷ the majority applied existing doctrine to hold that this duty obliges an employer that normally communicates with workers electronically to post notice of a ULP through the same means.³¹⁸

The Board's precedent said that employers must post notice of rights violations in order to counteract the damage done by ULPs, to inform employees of their rights and what steps should be taken, and to deter future violations by the employer.³¹⁹ To make sure these goals are met, postings must usually be made for sixty days in a conspicuous place where other notices are usually posted.³²⁰ However, the Board stated that paper notice had in some cases become outdated, given modern communication's reliance on electronic means.³²¹ As electronic communication increases in ubiquity, the Board reasoned, paper notice

311. *Guard Publ'g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1121 (2007) (Members Liebman and Walsh, dissenting) (quoting *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)).

312. 356 N.L.R.B. No. 9, 2010 WL 4318372 (Oct. 22, 2010).

313. *J&R Flooring*, 2010 WL 4318372, at *1, *3.

314. *Id.* at *1.

315. *See J&R Flooring, Inc.*, 355 N.L.R.B. No. 123, 2010 WL 3385367, at *1 (Aug. 26, 2010).

316. *J&R Flooring*, 2010 WL 4318372, at *3.

317. *See Pa. Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 50, 52 (1935); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399-401 (D.C. Cir. 1981).

318. *J&R Flooring*, 2010 WL 4318372, at *1, *3.

319. *Id.* at *2 (citing *Teamsters Local 115*, 640 F.2d at 399-401).

320. *J&R Flooring*, 2010 WL 4318372, at *2.

321. *Id.* at *3.

will be less likely to reach employees.³²² The increasing decentralization of the workplace, created by employees' increasing ability to do work from home, presents a similar problem with paper notices posted at the employer's facility.³²³ The Board's holding that employers should post notice electronically if it is the customary means of communication foreclosed the argument that such notice would be a burden, since obligated employers would already have the ability to send such messages.³²⁴

In its explanation of the holding, the Board stressed that it was not broadening the posting requirement, but merely applying the existing standard that required posting notice in a conspicuous place.³²⁵ The decision shows the Board's willingness to adapt federal labor law to the realities of modern technology. Such decisions, as well as the subsequent Board rule that all private employers post section 7 rights,³²⁶ show the agency's commitment to the purposes of the NLRA, one of which is to make workers aware of their right to act collectively and enforce their statutory rights.³²⁷

H. *Eliason & Knuth of Arizona* and Sheet Metal Workers International

In *Eliason & Knuth of Arizona*,³²⁸ the Board dealt with the novel question of the legality of a union displaying a banner outside a secondary employer during a labor dispute.³²⁹ The majority, including Liebman, held that a union does not violate section 8(b)(4)(ii)(B) when its representatives hold a stationary banner outside a secondary employer while unobtrusively distributing fliers to passersby.³³⁰

While the United Brotherhood of Carpenters and Joiners of America was in a primary dispute with four construction employers,³³¹ it

322. *Id.* (citing Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 3 (2000)).

323. *See J&R Flooring*, 2010 WL 4318372, at *3.

324. *See id.*

325. *Id.* at *4; Int'l Union of Operating Eng'rs, Local 150, 352 N.L.R.B. 360, 361 (2008). *See also* Ferguson Electric Co., 335 N.L.R.B. 142, 142 n.3 (2001) (treating electronic communications the same as traditional paper records for purposes of the Act); Bryant & Stratton Bus. Inst., 327 N.L.R.B. 1135, 1135 n.3 (1999) (findings similar to *Ferguson*).

326. *See* discussion *infra* Part V.

327. *See* 29 U.S.C. § 151 (2006).

328. United Bhd. of Carpenters and Joiners of Am., Local Union No. 1506 (*Eliason & Knuth of Ariz.*), 355 NLRB No. 159, 2010 WL 3452309 (Aug. 27, 2010).

329. *Eliason & Knuth*, 2010 WL 3452309, at *1.

330. *See id.* at *1.

331. *Id.* at *2.

regularly sent representatives to hold large banners saying “SHAME ON [employer]” near the entrance of three secondary employers and gave out literature describing the main labor dispute in detail.³³² The three or four protesters present did not block the sidewalk or entrance to the buildings.³³³ They also did not chant or yell, choosing only to engage people near them by handing out fliers.³³⁴ The employers filed charges against the union under section 8(b)(4)(ii)(B) of the Act.³³⁵

The Board analyzed the text, legislative history, cases, and underlying policies of 8(b)(4)(ii)(B),³³⁶ concluding that the provision does not prohibit the union’s activity against secondary employers in this case.³³⁷ The section states that it is a ULP for a union to “threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce” with the aim of forcing parties to stop doing business.³³⁸ The Board concentrated on the “threaten, coerce, or restrain” language, as it is the source of case law on point, concluding that holding a stationary banner without blocking the movement of people passing by does not fall within the plain meaning of the three verbs.³³⁹

In looking at the legislative history behind the provision, the Board drew from the Supreme Court case of *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,³⁴⁰ where the Court had examined the legislative intent behind the NLRA’s restrictions on secondary boycotts, including picketing.³⁴¹ The Act was not meant to ban all activity associated with secondary boycotts, but rather only on picketing that had a coercive effect on a business.³⁴² The Board pointed out that it is important not to read section 8(b)(4)(ii)(B) too broadly, for fear of restricting constitutionally protected activity.³⁴³ Although there is no definition of “picketing” in the Act,³⁴⁴ Board and

332. *Id.* at *2-3.

333. *Id.* at *3.

334. *Id.*

335. *Id.*

336. *See id.* at *5-6.

337. *Id.* at *6.

338. 29 U.S.C. § 158(b)(4)(ii)(B) (2006).

339. *See Eliason & Knuth*, 2010 WL 3452309, at *5-6.

340. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988).

341. *See Eliason & Knuth*, 2010 WL 3452309, at *5.

342. *See id.*

343. *See id.* at *5. *See also DeBartolo*, 485 U.S. at 584 (citing 105 CONG. REC. 15,673 (1959)).

344. *Eliason & Knuth*, 2010 WL 3452309, at *6.

Supreme Court precedent has established that the Act restricts only picketing that consists of union representatives holding picket signs and marching in front of a business.³⁴⁵ These elements are an important part of prohibited activity because it creates a context of confrontation for people entering the businesses' premises.³⁴⁶ In this case, there was no confrontation with people nearby, therefore the policy interests undergirding section 8(b)(4)(ii)(B) were not relevant.³⁴⁷ Similarly, there was no element of coercion, since the union's actions did not threaten to be a direct cause of the secondary employers' operations when they peacefully stood on the edge of the sidewalks outside of the secondaries.³⁴⁸

The Board also went through a detailed constitutional analysis.³⁴⁹ Again relying on Supreme Court precedent, the Board recognized that the Court had held that handbilling was not captured by the "threaten, coerce, or restrain" language from section 8(b).³⁵⁰ In *NLRB v. Fruit & Vegetable Packers & Warehouse Men, Local 760 (Tree Fruits)*,³⁵¹ the Court also stated that picketing should only be proscribed by section 8(b)(4)(ii)(B) when there is a clear legislative intent against it,³⁵² a requirement that was not met here, according to the Board.³⁵³

Because the union's holding of the banner was constitutionally protected speech and the legislative history behind section 8(b)(4)(ii)(B) did not clearly restrict such activity, the Board held that the union had not violated the Act.³⁵⁴

The following year, in *Sheet Metal Workers International Association, Local 15*,³⁵⁵ the Board applied its reasoning from *Eliason & Knuth* to hold that displaying an inflatable rat in front of a secondary employer was not picketing or coercive activity under Section

345. *Id.* at *7 (citing *United Mine Workers of Am., Dist. 2 (Jeddo Coal Co.)*, 334 N.L.R.B. 677, 686 (2001); *Serv. Emps. Union, Local 87*, 312 N.L.R.B. 715, 743 (1993); *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 618-19 (1980) (Stevens, J. concurring)).

346. *See Eliason & Knuth*, 2010 WL 3452309, at *8; *NLRB v. United Furniture Workers of Am.*, 337 F.2d 936, 940 (2d Cir. 1964).

347. *Eliason & Knuth*, 2010 WL 3452309, at *8.

348. *See id.* at *5.

349. *See id.* at *14.

350. *See id.* at *14 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988)).

351. 377 U.S. 58 (1964).

352. *Id.* at 63.

353. *Eliason & Knuth*, 2010 WL 3452309, at *18.

354. *See id.* at *20.

355. 356 N.L.R.B. No. 162, 2011 WL 2097960 (May 26, 2011).

8(b)(4)(ii)(B) of the NLRA.³⁵⁶ In that case, the union displayed a sixteen-foot tall inflatable rat in front of a hospital that had hired an employer with whom the union had a primary dispute.³⁵⁷ Union members also gave out handbills near the entrance, and one member stood by a vehicle entrance holding a sign announcing the labor dispute with the primary employer.³⁵⁸ The case was notable because of the pervasive use of similar tactics by unions in the twenty-first century. The giant inflatable rat has become the only contact many people have with the labor movement, with unions using them at primary and secondary employers around the country.³⁵⁹

After summarizing its previous holding from *Eliason & Knuth*, the Board stated that the factual similarity between that case and the present one allowed the conclusion that the union's conduct should not be considered picketing or coercive under the Act.³⁶⁰ As in the previous case, the union's conduct was more fairly characterized as persuasion, rather than intimidation.³⁶¹ In making this finding, the Board relied on the fact that the union members were stationary, stayed over a hundred feet from the hospital's entrances, did not accost people entering the hospital, and did not carry themselves in a way that could be perceived as threatening.³⁶² The behavior was not considered coercive for similar reasons. There were only six union members accompanying the display and they conducted themselves in a non-threatening way, rather than shouting, moving, or blocking access to the hospital.³⁶³ As in *Eliason & Knuth*, the majority noted the "constitutional avoidance doctrine," under which the Board should attempt to construe the NLRA in a way that does not impede workers' First Amendment rights.³⁶⁴ In doing so, the Board referred to the variety of offensive forms of expression that are constitutionally protected in the United States, holding that the union's conduct here, including displaying the inflatable rat, should be considered protected "expressive activity" under the First Amendment.³⁶⁵

Member Hayes dissented, arguing that the presence of the rat

356. *Sheet Metal Workers*, 2011 WL 2097960, at *2-4.

357. *See id.* at *1-2.

358. *Id.* at *2.

359. *Id.* at *10 (Member Hayes, dissenting).

360. *See id.* at *3-4.

361. *See id.* at *3.

362. *See id.* at *4.

363. *Id.* at *5.

364. *Id.*

365. *See id.* at *5.

should be considered picketing, as it is an implicit signal to third parties that the union had established an “invisible picket line that should not be crossed.”³⁶⁶ The majority disagreed, interpreting the rat as an announcement to the public that there was a labor dispute.³⁶⁷ Even if such a message is meant to induce the public to boycott the secondary employer, the union’s activity is protected.³⁶⁸ Such conduct would only be illegal under Section 8(b)(4)(ii)(B) if it were a signal for employees of the secondary employer to strike.³⁶⁹ The majority stated that there was no evidence of a call to strike, noting that no employees at the hospital stopped working as a result of the union’s display.³⁷⁰

I. *The Wake of Eliason & Knuth*

The Board continued to apply the reasoning it had laid out in *Eliason & Knuth* in many other cases while Liebman acted as Chair. In *Southwest Regional Council of Carpenters*,³⁷¹ the Board held that a union’s decision to hold banners at the construction sites of secondary employers was not picketing or otherwise a violation of section 8(b)(4), despite the fact that there were workers represented by the union at two of the sites.³⁷² In determining that the union’s banner displays were not signal picketing, the Board distinguished the factual setting from that in *Warsawsky & Co. v. NLRB*,³⁷³ where the D.C. Circuit had held that a union’s handbilling had “sought to induce” secondary workers to strike.³⁷⁴ The Board in *Southwest Regional* held that the union’s conduct was not a signal to strike because the union did not time its conduct to parallel worker reporting times, the union did not talk to secondary workers aside from distributing handbills, no secondary worker stopped working, and the banners were on roads used by the public.³⁷⁵ As in other cases, the Board cited *Eliason & Knuth* heavily as it simultaneously carved out the specific outline of what was protected union conduct in relation to secondary employers.³⁷⁶ The majority

366. *Id.* at *10 (Member Hayes, dissenting).

367. *Id.* at *6.

368. *See id.*

369. *See id.*

370. *Id.* at *6 n.14.

371. 356 N.L.R.B. No. 88, 2011 WL 341653 (Feb. 3, 2011).

372. *Sw. Reg'l*, 2011 WL 341653, at *2-3.

373. 182 F.3d 948 (D.C. Cir. 1999).

374. *Id.* at 953.

375. *Sw. Reg'l*, 2011 WL 341653, at *6.

376. *See id.* at *2-5.

opinion also emphasized that *Eliason & Knuth* and similar cases following it signified the new stance of the Board that peaceful stationary bannering at secondary employers was not to be considered a signal to strike absent compelling evidence.³⁷⁷

In *Local Union No. 1827, United Brotherhood of Carpenters and Joiners of America*,³⁷⁸ the Board further expanded the discretion left to unions in *Eliason & Knuth*.³⁷⁹ The union in that case had displayed banners that said “State Farm Insurance, a Greedy Corporate Citizen,” rather than explicitly announcing a labor dispute.³⁸⁰ The banners were protected by the interpretation of section 7 rights from *Eliason & Knuth* as well as the First Amendment because the message was clearly intended to refer to a labor dispute when taken in context.³⁸¹ The union conduct was also not a violation of the Act when a secondary employer threatened to take its business elsewhere and a customer of the secondary employer refused to patronize it.³⁸² A Teamsters local cancelled its reservation at a secondary employer, and another secondary wrote a letter to the primary saying that it might be forced to cease using the primary for future business in light of the union’s activity.³⁸³ The Board held that neither response to the bannering showed that the conduct was coercive, since there was no confrontation involved and no secondary employee reacted to the banners by stopping work.³⁸⁴ Again, the Board showed the amount of deference it was willing to allow unions in their protected right to protest at secondary employers, refusing to find a violation of the NLRA without clear proof of coercive behavior or resultant strikes.³⁸⁵

J. Pacific Coast M.S. Industries

In *Pacific Coast M.S. Industries Co.*,³⁸⁶ the Board revisited the

377. *See id.* at *4 (“[W]e have now decided 10 cases, including this case, involving similar banner displays conducted by local unions affiliated with the United Brotherhood of Carpenters and Joiners of America, and many of the cases involved displays at multiple locations sometimes for extended periods of time. . . . The signal the General Counsel alleges is being sent by the banners does not appear to have been understood as such by any secondary employees.”).

378. 357 N.L.R.B. No. 44, 2011 WL 3585516 (Aug. 11, 2011).

379. *Local Union No. 1827*, 2011 WL 3585516, at *1.

380. *Id.* at *2.

381. *See id.*

382. *See id.* at *4.

383. *Id.*

384. *See id.* at *5.

385. *See id.* at *6, *6 n.17.

386. 355 N.L.R.B. No. 226, 2010 WL 3864538 (Sept. 30, 2010).

controversial question of which workers should be counted as supervisors. The case scaled back the extensive definition of supervisory employees introduced in *Oakwood Healthcare*,³⁸⁷ holding that workers who have minimal duties related to discipline, scheduling, and evaluation of other workers are not necessarily supervisors under the NLRA.³⁸⁸ While the opinion cited *Oakwood* in coming to its conclusion, the case stood as another example of the Liebman-led Board undoing some of the work of the Bush II Board.

After an organizing campaign at the employer's automotive parts manufacturing plant, the company challenged the votes of several employees with the status of "team leader" (TL), arguing that the workers were supervisors under the Act.³⁸⁹ The employer's hierarchy consisted of general management staff, "group leaders," TLs, and finally team members, in descending order of authority.³⁹⁰ Group leaders were counted as supervisors and team members were employees, leaving the TLs' status in dispute.³⁹¹ In resolving the question of TLs' status, the Board began by recognizing the precedent, relied on in *Oakwood*, that a worker is a statutory supervisor if she has the authority to carry out or recommend one of the indicia listed in section 2(11) of the NLRA.³⁹² The Board addressed the employer's argument that the workers should have counted as supervisors because of their duties in assigning team members to particular schedules, their role in filling out disciplinary reports, and their input on employee evaluation forms.³⁹³ The Board held that the employer failed to carry its burden of proof relating to all three kinds of duties.³⁹⁴

TLs were responsible for creating the schedules that team members followed, which consisted of placing groups of workers into constantly rotating shifts according to a larger predetermined schedule.³⁹⁵ The company argued that this task required that the TLs exercise independent

387. See *supra* Part II.D.

388. See *Pac. Coast*, 2010 WL 3864538, at *2-5.

389. *Id.* at *1.

390. *Id.*

391. *Id.*

392. *Id.* at *2; 29 U.S.C. § 152(11) (2006) ("The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.")

393. See *Pac. Coast*, 2010 WL 3864538, at *2-5.

394. *Id.* at *5.

395. See *id.* at *2.

judgment because they assigned certain workers for certain shifts.³⁹⁶ The Board, however, was unconvinced, holding that such a task did not constitute the exercise of independent judgment under *Oakwood*.³⁹⁷ Individual employees were already assigned to specific tasks before TLs assigned them to work in certain shifts, leaving the TLs to simply fit each worker into an available shift.³⁹⁸ Rather than evaluating each worker's respective skills and assigning them likewise, the TLs' task was routine, requiring no independent decision-making.³⁹⁹ Further, the TLs were required to do this only sporadically, rather than being a regular task upon which team members relied daily.⁴⁰⁰

The employer also argued that the TLs' occasional duty to fill out and deliver disciplinary reports to team members means that they should be categorized as supervisors.⁴⁰¹ However, the Board noted that employees could also initiate these forms, and that managers were mainly responsible for delivering the reports and disciplinary warnings to workers.⁴⁰² Beyond that, the Board held that the employer had failed to show that the TLs' role in disciplinary procedures affected the working conditions, employment status, or tenure of any employees below them.⁴⁰³ The TLs' duties related to discipline were therefore not grounds to count the workers as supervisors.⁴⁰⁴

Finally, the company argued that the TLs' role in evaluating temporary employees amounted to an effective recommendation to hire.⁴⁰⁵ The form that TLs used in evaluating temporary workers had a final section where they could say whether they recommended that the worker be hired.⁴⁰⁶ In reviewing the record, however, the Board relied on the fact that the TLs who had testified denied ever filling out that section of the form.⁴⁰⁷ Because their duties did not include effectively

396. *See id.*

397. *Id.*

398. *See id.* at *3.

399. *See id.* at *2-3.

400. *Id.* at *3 ("The early-arriving team members begin work without awaiting [a TL's] instructions, demonstrating that their daily assignments within the rotation are not dependent on any independent decision by [the TL].").

401. *See id.* at *4.

402. *Id.*

403. *Id.*

404. *See id.*

405. *See id.*

406. *Id.*

407. *See id.* at *5 (stating that only one TL testified to using the recommendation section of the evaluation form and, since that testimony had been discredited, the remaining TL testimony would be relied upon).

recommending workers for hire,⁴⁰⁸ the Board found that TLs could not be considered supervisors on such grounds.⁴⁰⁹

Having rejected the basis on which the employer had argued the TLs should be regarded as supervisors, the Board demonstrated the limited effect that *Oakwood* should have on workers' supervisory status. While the TLs might have counted as supervisors under the more expansive reading of the NLRA, *Pacific Coast* carved out grounds upon which similar workers could retain protection of their section 7 rights.

K. Rules to Expedite Representation Elections

Shortly before Liebman stepped down from the Board, the NLRB proposed new rules that would shorten the period between a union's request for a representation election and the date of the election.⁴¹⁰ The proposal was to require employers to provide unions with more information about workers in a bargaining unit and would shift the time for objections to voter eligibility to the period after workers voted.⁴¹¹

Unions had long cited bureaucratic delays as a source of opportunity for employers to repress worker support for unionization during the critical period between a request for an election and the vote itself.⁴¹² Pro-labor groups applauded the proposed rules as a step away from antiquated Board procedures and recognized that the shortened election period would mean less worker intimidation.⁴¹³ Pro-business groups, in turn, criticized the proposal as a blatant attempt to help unions rush towards recognition, suppressing employee free choice.⁴¹⁴ Supporters of the shortened election procedure had complained that employers were able to spread an anti-union message any time employees were at work, and with an expedited election process, the time that employers had to clamp down on union support would be reduced.⁴¹⁵

Although Liebman left the Board in August 2011,⁴¹⁶ the NLRB

408. See 29 U.S.C. § 152(11) (2006).

409. See *Pac. Coast*, 2010 WL 3864538, at *5.

410. See Steven Greenhouse, *N.L.R.B. Rules Would Streamline Unionizing*, N.Y. TIMES (June 21, 2011), http://www.nytimes.com/2011/06/22/business/22labor.html?_r=0 [hereinafter Greenhouse, *N.L.R.B. Rules*].

411. See *id.*

412. See *id.*

413. See *id.*

414. See *id.*

415. See *id.*

416. See Steven Greenhouse, *New Rules Seen as Aid to Efforts to Unionize*, N.Y. TIMES (Aug.

approved a new election procedure several months later that was similar to the proposals made under Liebman.⁴¹⁷ The shortened election process became a source of contention among worker- and business-oriented groups, mirroring other controversies that the Board sparked while Liebman was chair.⁴¹⁸ Throughout the fighting, Liebman steadfastly supported the small step towards promoting workers' ability to unionize, saying, "controversy is unfortunate, but it is not a good reason for the board to abandon its responsibilities."⁴¹⁹

One of the most politically contentious cases decided by the Board during the final days of Liebman's tenure as Chair was *Specialty Healthcare and Rehabilitation Center of Mobile*.⁴²⁰ In *Specialty Healthcare*, the Board overruled *Park Manor Care Center*,⁴²¹ a case which had imported a rule defining appropriate bargaining units in acute care hospitals into the non-acute care setting, and returned to the traditional community-of-interest analysis ordinarily used in bargaining unit determinations.⁴²² The Board justified its decision to overrule *Park Manor* on the basis of that decision's failure to adequately address the express terms of the acute care hospital rule and concluded that adhering to precedent that was wrongly decided was not beneficial.⁴²³ The majority also noted that the need for fluidity in responding to the rapidly changing dynamics of the healthcare industry made abandoning *Park Manor* permissible.⁴²⁴ The Board then proceeded to apply the community-of-interest test, albeit characterizing it as an "overwhelming" community-of-interest test⁴²⁵ and concluded that the union's proposed bargaining unit was appropriate.⁴²⁶

Member Hayes dissented and lamented that the majority had swept unnecessarily broadly in overruling *Park Manor*.⁴²⁷ Hayes argued that the Board's erosion of the 1989 acute care rule would destabilize the balance struck by the regulations governing the formation of bargaining

25, 2011), <http://www.nytimes.com/2011/08/26/business/labor-agency-to-require-posting-unionization-rights.html> [hereinafter Greenhouse, *New Rules*].

417. See *Board Adopts Amendments to Election Case Procedures*, NAT'L LAB. REL. BOARD (Dec. 21, 2011), <https://www.nlrb.gov/news/board-adopts-amendments-election-case-procedures>.

418. See discussion *supra* Part IV.

419. Greenhouse, *N.L.R.B. Rules*, *supra* note 410.

420. 357 N.L.R.B. No. 83, 2011 WL 3916077 (Aug. 26, 2011).

421. 305 N.L.R.B. 872 (1991).

422. See *id.* at 875.

423. *Specialty Healthcare*, 2011 WL 3916077, at *8.

424. *Id.*

425. See *id.* at *18.

426. *Id.* at *20.

427. See *id.* at *21, *28-29.

units in these hospitals.⁴²⁸ He specifically charged that the majority's decision would lead to the "proliferation of bargaining units," something Congress had expressly sought to prevent in developing presumptive rules for bargaining units in the healthcare industry.⁴²⁹ Because the community-of-interest test proposed by the majority would likely have the effect of making it easier to organize healthcare workers, Member Hayes argued that the decision merely rested on shifting political accountabilities among the Board members.⁴³⁰

V. CONCLUSION

Wilma Liebman was, and is, the metaphoric Frances Perkins of the Obama Administration. Her strong and insistent fidelity to the purposes and policies underlying the National Labor Relations Act while serving on the Board made her both a catalyst for much-needed change and a lightning rod for political controversy. Although Liebman personally accomplished a significant amount during her time as member and then Chair of the NLRB, she lacked the administrative and Congressional support that Perkins enjoyed to help carry out the massive overhauls of the New Deal.⁴³¹ It is unsurprising that Liebman's gains for workers were marginal at times given the constraints within which she was operating and the total legislative gridlock that characterized the early 2010s.⁴³²

Liebman stepped down as Chair of the Board on August 27, 2011.⁴³³ She departed the NLRB at a time when the agency was under extraordinary criticism and the subject of widespread public debate.⁴³⁴ Much of the political controversy at the time grew out of the decision by the Board's acting General Counsel Lafe Solomon to bring charges against Boeing for anti-union retaliation in the spring of 2011.⁴³⁵ Boeing

428. *See id.* at *21.

429. *Id.* at *24.

430. *See id.* at *28.

431. *See supra* note 4.

432. The politics surrounding the Board, and not the Board's decisions, were the center of focus during this time. *See* Barbara Morrill, *Recess Appointment for Craig Becker to NLRB*, DAILY KOS (Mar. 27, 2010), <http://www.dailykos.com/story/2010/03/27/851530/-Recess-Appointment-For-Craig-Becker-to-NLRB#>.

433. *See* Greenhouse, *New Rules*, *supra* note 416.

434. *See id.*

435. *See* Steven Greenhouse, *Labor Board Case Against Boeing Points to Fights to Come*, N.Y. TIMES (Apr. 22, 2011), <http://www.nytimes.com/2011/04/23/business/23labor.html?pagewanted=all> [hereinafter Greenhouse, *Fights to Come*].

had announced that it would start production of its new Dreamliner planes in a new factory in the right-to-work environment of South Carolina, rather than its usual factory in Washington.⁴³⁶ After several Boeing executives made public statements that the decision came partially because of past strikes by its unionized workers in Washington, Solomon filed a charge against the company for anti-union retaliation.⁴³⁷ He stated that Boeing was moving its operations in response to the protected striking of its union workers.⁴³⁸ While the business had other reasons for starting operations in South Carolina, the public statements by its executives led many to believe that the Board's charges against the company would result in a definitive statement about whether such a reaction to protected striking violated the NLRA.⁴³⁹

The summer of 2011 saw a widespread bitter cultural reaction to the charge against Boeing. Republicans in Congress responded to the Board's charges with vitriol, citing it as an example of government overreach and the blatant anti-business stance of the NLRB.⁴⁴⁰ Commentators joined in the chorus against the Board's decision to file the charge, accusing the agency of a fundamental opposition to the freedoms of American business.⁴⁴¹ The Board had its defenders among some politicians and commentators, but much of the defense was lost in the months of apocalyptic hand-wringing by the pro-business segment of political commentary. The Boeing controversy was also folded into the larger political squabbling over the federal debt ceiling.⁴⁴² Much of the invective relating to the Boeing controversy was aimed directly at Liebman because of her obvious beliefs in the rights of workers to organize and be protected from the most egregious treatment by their employers.

The widespread indignation over the charges against Boeing revealed the extent to which many in U.S. society oppose even the meager protections offered by federal labor law today. While the blatantly anti-union maneuvering of Boeing and the boasting by its executives would have been decried as un-American fifty years prior, in 2011 that criticism was made against the Board for attempting to stop

436. *See id.*

437. *Id.*

438. *Id.*

439. Greenhouse, *Board Drops Case Against Boeing*, *supra* note 5.

440. *See* Greenhouse, *Fights to Come*, *supra* note 435.

441. *See id.*

442. *See* Jeanne Sahadi, *Goofy Debt Ceiling Demands*, CNNMONEY (June 14, 2011, 2:18 PM), http://money.cnn.com/2011/06/14/news/economy/debt_ceiling_demands/index.htm.

such tactics by a business. Antagonism towards the most minimal promotion of workers' rights was demonstrated further in the months after Liebman left the NLRB. The Board instituted a rule that employers must post a statement of workers' rights under the NLRA in an area where most workers would see it.⁴⁴³ The Board's rule was met with the same raging opposition as the charges against Boeing.⁴⁴⁴ Although Liebman had accomplished much in the time she spent on the Board, the political context that existed in the summer of 2011 and afterwards remained fundamentally opposed to the most minimal advancement of workers' rights under federal law.

The Board remains under the public microscope. Despite Liebman's retirement and the settlement of the Boeing case, the resurgence in protection for workers occasioned by the Obama Board's commitment to more generous readings of the statute has not gone unnoticed. With the recent appointment of three new members, the NLRB has the requisite quorum and remains operational. Because the majority of these members are Democrats,⁴⁴⁵ it is safe to assume Liebman's project will be continued during their tenure.

The outcome of the 2012 presidential and congressional elections may be a major proving ground in determining the lasting effects of Liebman's tenure. Significant Republican victories in these elections may mean the appointment of more pro-employer Board members who will strive to swing the political pendulum back toward the ideological pole where the Bush II Board members resided. Accordingly, Liebman's efforts to ameliorate the harshness of the Bush II Board's anti-worker offensive may be undone to some extent. Although this is possible, Liebman's work is nevertheless commendable because she made appreciable strides in a short period of time and found opportunities to generate public discussion of an agency that had long been relegated to relative obscurity. Despite her political views, she also embodied effective, responsible leadership and principled decision-making. Given her long service as a member and then Chair of the NLRB, it seems certain that Liebman's influence will have a lasting

443. See *Final Rule for Notification of Employee Rights*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights> (last visited Nov. 23, 2012).

444. See Greenhouse, *New Rules*, *supra* note 416.

445. See Jenny Chang & Gregg A. Fisch, *President Obama Appoints Three to NLRB During Purported Congressional "Recess,"* NAT'L L. REV. (Jan. 16, 2012), <http://www.natlawreview.com/article/president-obama-appoints-three-to-nlr-during-purported-congressional-recess>.

effect on both the policies and procedures of the Board and the broader conversation about the fate and future of American labor law.

