

**Statement of Charles I. Cohen**

**Partner, Morgan, Lewis & Bockius LLP**

**Before the  
Senate Committee on Health, Education, Labor and Pensions  
Subcommittee on Employment and Workplace Safety  
and  
House Committee on Education and Labor  
Subcommittee on Health, Employment, Labor and Pensions**

**December 13, 2007**

Chairwoman Murray, Ranking Member Isakson, Chairman Andrews and Ranking Member Kline, and Members of the Subcommittees, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, I was appointed by President Clinton, confirmed by the Senate, and served as a Member of the National Labor Relations Board from March 1994 until my term expired in August 1996. Before becoming a Member of the Board, I worked for the NLRB in various capacities from 1971 to 1979 and as a labor lawyer representing management in private practice from 1979 to 1994. Since leaving the Board in 1996, I have returned to private practice and I am a Partner in the firm of Morgan, Lewis & Bockius LLP. I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce, and Chair of its NLRB subcommittee. I am testifying today in my personal capacity.

As I understand it, the purpose of today's hearing is to provide a forum to examine certain recent Board decisions and organized labor's concerns that these decisions have adversely impacted employees' rights.

Of course, I am not currently a Board member and have not had occasion to study the arguments and the records in the cases currently under scrutiny. I, therefore, do not know how I

might have voted on any particular case. What I hope to add to this hearing is perspective on the Board's decision-making processes and on how it is that we have reached this juncture where the rhetoric has gotten, in my estimation, out of proportion.

At the outset, I think it is important to note that concerns expressed by organized labor over NLRB decision-making are not new. In the 1980's, unions similarly complained about decisions issued by Boards comprised of a majority of Republican-nominated members. Organized labor claimed that the Board's decisions led to the destruction of well-established employee rights. Likewise, in the 1990's, it was business that complained about the pro-union tilt of the decisions of the majority Democrat-nominated members. In fact, a serious attempt was made to severely diminish the budget of the NLRB.

The National Labor Relations Act, as amended, includes two competing principles which invite considerable tension. Employees have the right to organize and to engage in collective bargaining. Once a union has been freely chosen, the practice and procedure of collective bargaining is to be encouraged. But, since 1947, employees also have had the right to refrain from union or concerted activities. This additional right puts a premium on how unions come to be recognized as the exclusive representative of all bargaining unit employees – whether they want a union or not.

Based on my decades of experience in this field, I do not believe that the Board's recent decisions constitute the sea change claimed by unions. Reversals of precedent are destabilizing, but that has not become more common in recent times. Recognizing that this Board is more conservative than the Clinton Board, it has carried out its responsibilities in a manner consistent with the established practice over the last few decades. Further, the Board's decisions have continued to hold true to the intent of the Act.

## **The NLRB's Operation, Practice and Procedure**

Organized labor has taken issue with the number of decisions issued by the Board in September 2007. The unions seem to suggest that the issuance of 61 September 2007 decisions is evidence of an attempt by certain Republican-nominated Board members to rush to issue business-friendly decisions. In reality, the number of September decisions was not extraordinary and largely is attributable to such benign factors as the Board's decision-making processes, the close of the Board's fiscal year, and the possible near term loss of three Board members.

The Board, like all federal government entities, operates on a fiscal year basis, which ends on September 30 of each year. Traditionally, the Board sets goals at the beginning of the year for the number of cases it hopes to decide in any given year. Although the Board has the entire year to issue decisions, the most significant amount of activity often occurs at the end of the fiscal year, in a final push to meet the previously established goals. Cases posing relatively routine issues are decided and released sooner. Difficult and older cases take longer simply because they are more difficult. Thus, the frenzy of activity at the end of the fiscal year in September is not unusual. This Board has issued more than 100 decisions in three of the four previous Septembers. Nor is it unique to Republican-majority Boards. For example, a Democratic-majority Board issued approximately 70 decisions in September 1999 and approximately 68 decisions in September 2000.

The potential loss of three Board members, in the near future, also may have influenced the Board's September productivity. As you know, at its full complement, the Board is comprised of five members. Being at full strength – which does not occur as frequently as it should given the difficulties in the nomination and confirmation process – aids the orderly issuance of decisions. New Board members typically take an extended period of time before

they issue decisions in difficult cases. The term of Chairman Battista expires on December 16, 2007, and Members Kirsanow and Walsh are currently serving recess appointments that will expire when this session of Congress adjourns. It is prudent, therefore, to seek to issue as many decisions as possible while still at full strength.

### **The Board's Alleged Destruction of Employees' Rights**

Organized labor has complained that the Bush Board has issued an inordinate number of reversals of prior Board decisions. The unions contend that these reversals disproportionately favor employers to the disadvantage of employees. As I stated before, reversals of precedent are troubling. The number of reversals, however, is not extraordinary. Under the Clinton Board, for example, the Democratic-majority reversed more than 50 prior Board decisions compared with the less than 25 reversals issued by the Bush Board.

Organized labor also has directed its complaints at the merits of the Board's recent decisions, claiming that these decisions favor employers and not employees – or better said, favor employers and not unions. Again, this is not necessarily the case. Rather, these decisions tend to be, with one important exception, extensions of well-established labor law principles formed long before the Bush Board took control.

### **The Board's Decision in *Dana Corp.* and *Metaldyne Corp.***

By far, the most significant decision of the group is the Board's recent decision in *Dana Corp. and Metaldyne Corp.*, 351 NLRB No. 28 (September 29, 2007). In this case, a 3-2 majority of the Board modified its recognition-bar doctrine and held that an employer's voluntary recognition of a union does not bar a decertification election petition or rival union election petition filed within 45-days of a notice of recognition. Previously, the Board had held that voluntary recognition barred a decertification election petition or a rival union's election

petition for a “reasonable period of time” – in reality, a one year period. Although this holding is a change in a highly technical area of the law, some background is necessary.

Historically, voluntary recognition by an employer of a union has been lawful, but organizing had not been a top down process emanating from employer agreements. This changed in the last decade as a result of unions pressuring for, and often receiving, card check and neutrality agreements. Indeed, one of the highest priorities of unions today is to obtain agreements from employers that would allow the union to become the exclusive bargaining representative of a group of employees without there ever being an NLRB-supervised election. As a consequence, the Board’s relevance through its traditional role of conducting secret ballot elections has been on the wane. *See* Charles I Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, *The Labor Lawyer* (Fall 2000); Charles I. Cohen & Jonathan C. Fritts, *The Developing Law of Neutrality Agreements*, *Labor Law Journal* (Winter 2003); Charles I. Cohen, Joseph E. Santucci, Jr., & Jonathan C. Fritts, *Resisting Its Own Obsolescence – How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 *Notre Dame Journal of Law, Ethics & Public Policy* 521 (2006), *available at* <http://www.morganlewis.com/pubs/NotreDameJournalResistingObsolescence.pdf>. Despite considerable rhetoric to the contrary, it is the view of the Supreme Court, and my own personal view as well, that Board-conducted secret ballot elections remain the most reliable indicator of employee choice. Against this backdrop comes the *Dana Corp./Metaldyne Corp.* case.

As another preliminary matter, it is important to note what the Board’s decision in *Dana Corp./Metaldyne Corp.* did not do. It did not proscribe voluntary recognition of unions. And, it did not prohibit immediate bargaining between the employer and the voluntarily recognized union.

In determining that a 45-day window was appropriate for the filing of competing petitions, the Board majority found that an immediate insulation period for employees seeking to have an election was not necessary when an employer voluntarily recognized a union. During this 45-day time period, employees can decide whether they prefer to participate in a Board-conducted election, instead of relying on the voluntary recognition alone. Ultimately, the Board concluded that the recognition bar doctrine did not provide sufficient protection for employees' right to a free choice of a representative – or no representative. As a result of this decision, for the recognition and contract bars to be effective, employers must now notify the Board in writing of any voluntary recognition, receive an official Board notice, and post it for the 45-days. While some might quibble over the need for, and the wording of, the notice, it is certainly true that this procedure provides a mechanism for employee choice on this issue.

It is beyond the scope of this testimony to re-argue the merits of the Employee Free Choice Act – which failed to pass Congress earlier this year. *See* Charles I. Cohen, Statement on “Employee Free Choice Act: ‘Strengthening America’s Middle Class Through the Employee Free Choice Act,” before the House Committee on Education and Labor: Subcommittee on Health, Employment, Labor, and Pensions (Feb. 8, 2007). But the irony is nonetheless present. At a time when a major push was made to eliminate secret ballot elections, the Board has reaffirmed the importance of those elections.

Regardless of one’s view of the wisdom of the Board’s *Dana Corp./Metaldyne Corp.* decision, it would be a mistake to brand it pro-employer. The decision did not prohibit voluntary recognition agreements; it merely guaranteed employees the right to a secret ballot election to overturn those agreements. Unions and employers are still free to reach these agreements and engage in collective bargaining absent an employee vote to the contrary. Some employers

support voluntary recognition agreements and are disappointed by the Board's decision to deny bar quality unless they comply with the posting requirements. In any event, it is important to recognize that Section 7 rights belong exclusively to employees – not to unions or employers.

### **Other Decisions**

From the outcry over the September 2007 decisions, one would think that the Board that the Board issued 61 anti-union decisions. This is not the case. In fact, in a majority of the unfair labor practice decisions issued in September, the Board found at least one violation of the Act by the employer involved.

Lost in the labor criticism of the Board is a significant pro-union decision issued in August 2007. The Board's decision in *Provena Hospitals*, 350 NLRB No. 64 (Aug. 16, 2007) is important to employers whose employees are already represented by a union. There, the Board continued to disregard the decisions of the Court of Appeals for the District of Columbia and the Seventh Circuits that require use of the "contract coverage standard," and instead continued to apply its unworkable "clear and unmistakable waiver" standard. *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Dept. of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); and *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). Simply stated, this issue relates to whether a collective bargaining agreement must "clearly and unmistakably waive" a union's right, or whether the employer, having bargained a contract, can argue that the language in the collective bargaining agreement demonstrates that the parties have bargained about a subject and have a subsequent dispute resolved by an arbitrator. It is well accepted that the "contract coverage" standard is an easier burden for employers to meet. Yet, notwithstanding the clear opportunity to make a favorable change for employers, the Bush Board notably declined to adopt this change.

In another recent decision, *Kravis Center for the Performing Arts*, 351 NLRB No. 19 (Sept. 28, 2007), the Board reached another pro-union outcome. In *Kravis*, the Board relied on the U.S. Supreme Court's decision in *NLRB v. Fin. Inst. Emp. of Am., Local 1182 (Seattle-First)*, 475 U.S. 192 (1986), and concluded that a lack of a vote by union members to be represented by a successor union did not alleviate the employer's duty to bargain with the union. Applying the new *Seattle-First* standard, the Board determined that a union merger or affiliation does not have to be approved by a vote and the lack of a vote does not create a question concerning representation sufficient to support a withdrawal of recognition. Given the fact that union mergers have become commonplace these days, this is a significant case.

### **Conclusion**

This concludes my prepared oral testimony. I look forward to any questions you might have, but before that, I would again like to thank the Subcommittee for inviting me here today.