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"The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights"

Chairmen and members of the subcommittees, thank you for inviting me to testify before your committees on the impact of recent decisions by the National Labor Relations Board on the working men and women of this country.

My name is Jonathan Hiatt, and I am General Counsel to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which is a voluntary federation of 55 national and international labor unions. Members of unions affiliated with the AFL-CIO teach and care for our children, build our country's infrastructure and construct its skyscrapers, nurse us in hospitals and rehabilitation centers, drive the buses we travel on and the trucks that bring us food and other essentials, entertain us with music and Broadway shows, keep us safe in our communities and come to our rescue in emergencies, report our news, grow our food, take care of the planes – and us – when we fly to our destinations safely, expand our telecommunication capabilities, and provide our public services. The AFL-CIO was created in 1955 by the merger of the American Federation of Labor and the Congress of Industrial Organizations.

Since its founding, the AFL-CIO and its affiliate unions have been the single most effective force in America for enabling working people and their families to build better lives and futures. The U.S. Census Bureau data shows that workers with unions still make on average 29% more than their non-union counterparts; they still have a 73% to 16% advantage in having access to a guaranteed employment based pension; they still have a 92% to 68% advantage over non-union workers in access to at least some employer-paid health insurance. It is widely recognized that giving workers the right to bargain collectively is the best way to establish and maintain a middle class – and that this is in the economic interests of society as a whole. For these reasons, the National Labor Relations Act ("the Act") was enacted in 1935 to protect the rights of workers to form and join unions and bargain for better working conditions.

Indeed, the explicit purpose of the Act is to "encourag[e] the practice and procedure of collective bargaining and … protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. §151. The Act further charges the Members of the National Labor Relations Board with adjudicating cases in accordance with this expressed policy.

Meanwhile, however, the current Labor Board is no longer serving these noble goals. Shamefully, it has departed from its statutory responsibility and utterly abdicated its role as protector of worker rights. In decision after decision, the Board has denied workers the very protections it is supposed to guarantee.

Since its installation in 2002, the Bush Administration's Labor Board has embarked on a systematic and insidious effort to radically overhaul our federal labor law and its regulation of labor relations in the private sector. Its decisions are not merely a pendulum swing or a course correction at times characteristic of changes in political administrations. Rather, they evince a calculated effort to make fundamental changes to our nation's national labor law – changes that it is aggressively accomplishing without any Congressional action whatsoever.

In case after case, this Board has turned the Act on its head by narrowing its coverage, withdrawing its protections, and weakening its already ineffective remedies. These efforts attracted national attention in September of this year when the Board issued 61 decisions, approximately 20% of its annual total, most of which reflect a transparent anti-worker, anti-union and anti-collective bargaining bias, as described in the case summaries attached to my testimony.

These September decisions were by no means the first time this Board has been accused of deciding cases in order to undermine workers' rights. Noted labor scholar Theodore St. Antoine warned in 2005 that this Board was "resolving the doubts in borderline cases in the wrong direction" and voiced his concern that the "cumulative effect" is that "[a] multitude of smallish nibbles can add up to a large bite and eventually to a badly chewed – if not eviscerated – organism."[1] His warning was echoed by Professor James J. Brudney, Moritz College of Law at Ohio State University, who observed that the Agency's autonomy has "been associated not with making the NLRA effective or adaptable to changed circumstances but rather with the Act's diminished relevance or applicability to the modern American workplace."[2]

Now, however, this Board's rulings can no longer be described as "smallish nibbles." Indeed, its decisions have significantly narrowed worker protections while expanding the scope of anti-union conduct lawfully available to management; seriously limited the Act's coverage by directly and indirectly eliminating whole segments of the workforce from its definition of "employee;" and restricted its notoriously weak remedies by making it even less expensive and less burdensome for employers to violate the law. The bottom line is that fewer workers have fewer protections as this Board strips away the rights guaranteed by the National Labor Relations Act and squanders the national policies it enshrines.

Through its decisions, this Board has redirected the course of the Act away from its original purposes of fostering workplace democracy and redressing economic inequality and, instead, toward a regulatory regimen that elevates the rights of employers seeking to

establish union-free workplaces over the rights of workers who want to have a voice on their job and a seat at the bargaining table.

In September alone, in a number of highly divided, partisan decisions, dubbed the "September massacre," the Board has:

- Made it significantly harder for workers who were illegally fired or denied employment to recover backpay. *St. George Warehouse*, 351 NLRB No. 42 (2007); *The Grosvenor Resort*, 351 NLRB No. 86 (2007); *Domsey Trading Corp*., 351 NLRB No. 33 (2007)
- Made it a certainty that employers who violate the Act will incur only the slightest monetary loss and be required to undertake as little remediation as possible. *Intermet Stevensville*, 351 NLRB No. 94 (2007); *Albertson's, Inc*., 351 NLRB No. 21 (2007)
- Made it harder for workers to achieve union recognition without being forced to endure the hostile, divisive, delay-ridden NLRB representation process, *Dana Corporation*, 351 NLRB No. 28 (2007), while at the same time doing just the opposite for employers who wish to get rid of an incumbent union. *Wurtland Nursing & Rehabilitation Center*, 351 NLRB No. 50 (2007)
- Made it easier for employers to deny jobs to workers who have exercised their legal right to strike. *Jones Plastics & Engineerin*g, 351 NLRB No. 11 (2007)
- Made it easier for employers to file lawsuits in retaliation for protected union activities and to punish workers and their unions for their lawful, protected conduct. *BE&K Construction*, 351 NLRB No. 29 (2007)
- Made it easier for employers to discriminate against employees and job applicants who are also union organizers even though the U.S. Supreme Court has specifically held that such worker are employees entitled to the Act's protections. *Toering Electric Co*., 351 NLRB No. 18 (2007); *Oil Capital Sheet Metal, Inc.*, 349 NLRB No. 118 (2007)

These and other recent Board decisions attack the most fundamental aspects of workers' rights under the Act. By overruling precedent, changing the rules, and misapplying existing precedent, this Board has made it considerably more difficult for workers to form unions and bargain collectively to improve their working conditions; has withdrawn basic protections from workers who seek to strike or engage in other protected activities with their co-workers; has excluded yet more workers from the Act's coverage; has reduced its protections by giving employers more leeway to spy on, coerce and interfere with workers' union activities while restricting workers' ability to solicit union support; and has emboldened employers to violate workers' rights by weakening the Act's already miserably inadequate remedies.

Undermining Worker Organizing

This Board's efforts to dismantle worker protections come at a time when the right to organize is more and more under attack and they further entrench the "culture of near-

impunity that has taken shape in much of U.S. labor law and practice."[3] The numbers paint a stark and compelling picture of what workers face when they try to form a union. During organizing campaigns, more than one-fourth of employers discharge workers for union activity; more than half threaten a full or partial shutdown of their company if the union effort succeeds; and between 15 and 40 percent make illegal changes to wages, benefits, and working conditions, give bribes to those who oppose the union, and/or spy on union activists.[4]

As a direct result of this Board's failure to protect workers' participation in its representation process, unions have moved away from the NLRA's delay-ridden procedures, with its endless opportunities for employer coercion and interference, in favor of voluntary recognition by employers.[5] The Board's response has been to take aim and fire. In the crosshairs is the decades-old practice of voluntary recognition,[6] a path to unionization that has been approved by the both U.S. Supreme Court and Congress and that is ensconced in the very language of the Act.[7] This effort to dismantle the voluntary recognition process has been advocated and funded almost exclusively by the National Right to Work Legal Defense Foundation; its goal is to force workers back to the Board if they want a voice on the job, mandating a procedure that manifestly does not work for workers – where employers control the process and where their intense, unrelenting resistance to organizing efforts is either condoned or, because of delay and weak remedies, effectively tolerated.

On September 29 the Board stripped voluntary recognition of long-standing legal protections in a decision which punishes, rather than supports, private dispute resolution.[8] In the *Dana* decision, the Board tosses out a decades-old rule that allows an employer and union, following voluntary recognition, a reasonable period of time to negotiate a collective bargaining agreement without challenge to the union's majority status. Instead, the Board has crafted an entirely new set of rules which are triggered when an employer voluntarily agrees to honor the choice of its workers for union representation. A mere 30% of the workforce can now override the expressed desire of the majority of the workers, sabotage the majority's support for a union and force all workers into the NLRB's bureaucratic, delay-ridden, and divisive representation process. A sharp dissent accused the majority of "cutting voluntary recognition off at the knees."[9]

In the *Dana* decision, the Board elevates the rights of a *minority* of workers who do not support a union over the rights of a *majority* of workers who do. Notification to the Board when voluntary recognition is granted is now required in order to secure a period of time to engage in collective bargaining without challenge to the union's majority status – a period of time automatically granted to unions certified under the NLRB's representation process. Notification that the workers' union has been voluntarily recognized by their employer will trigger a mandatory NLRB notice posting at the workplace. This Notice to Employees requirement was first formulated in this decision, even though no party urged a government-issued notice. The notice that now must be posted in the workplace instructs employees on how 30% of them may file a petition for an election to undo the majority-supported recognition.

This notice requirement follows the recent implementation of another required notice involving the NLRA. Also instituted during the Bush administration, it informs workers how to withdraw financial support from a union.[10] That notice and the *Dana* notice are both aimed at informing workers of their rights to *refrain* from union activity. No mandatory NLRB Notice advises employees of their affirmative rights under the Act, except when an employer settles – or loses – an unfair labor practice case against it or during the 3-days prior to an NLRB conducted election when a notice detailing the polling locations and requirements must be posted. [11]

For the Board to require notices on how to refrain from unionization, while not requiring a corresponding posting of a workplace notice to inform workers of their rights to "join, form or assist" unions – rights specifically protected by Section 7 of the Act – is especially egregious in view of a pending petition filed with the Board by Charles Morris, Professor Emeritus of Law at Southern Methodist University. This petition, filed over 14 years ago and supported by the AFL-CIO, has yet to be acted upon. The petition requests that the Board craft a rule providing for the posting of notices in all workplaces subject to the jurisdiction of the Board to advise employees of their general rights under the Act – both their rights to participate and their rights to refrain from participating in union activity.[12]

The notice required by the Dana decision, informing employees of how to negate their co-workers' choice to unionize, is novel in two other respects. It is the only required NLRB Notice which includes the location, address and phone number of the nearest NLRB office, a toll-free number for the NLRB, and the NLRB's website address. And, shockingly, it does not even include the recitation of workers' core rights under the Act, which is "boilerplate" language in the Board's remedial and election-related notices. Rather, the formulation of the notice is yet another stunning example of this Board elevating the rights of workers who do not support a union over the rights of workers who do.

As if its Dana decision were not transparent enough evidence of this Board's outright bias, on the very same day that *Dana* case was decided the Board issued another case involving workers' signatures, this time with the petition used to support an employer's attempt to withdraw recognition from a union. [13] A comparison of these two cases illustrates the Board's grossly disparate and hypocritical treatment of employee rights. Shedding all pretense of scholarly analysis and legal precedent, the decisions are based simply on whether the outcomes favor forming or eliminating the union.

In *Dana*, the union supported its majority status on the basis of cards signed by a majority of the workers. The Board attacked and criticized the signed cards for a whole host of reasons: card signing is a "public action, susceptible to group pressure….;" "misrepresentations about the purpose for which the card will be used may go unchecked;" employees "may not even understand the consequences of voluntary recognition...;" "card signings take place over a protracted period of time;" and "[t]here are no guarantees of comparable safeguards [compared with an NLRB election], in the voluntary recognition process."

Meanwhile, however, not one of these concerns was raised by the Board in the companion case involving an employer's efforts to get rid of a union. In *Wurtland*, even though a petition signed by a majority of workers stated that they wished "for *a vote to remove the union*," the Board concluded that no election need be conducted because the "more reasonable interpretation" was that the workers wanted to remove their union, not that they wanted to *vote to remove the union*."[14] Instead of challenging the legitimacy of the signed cards, as in *Dana*, the Board in *Wurtland* presumed that "signatory employees rejected union representation" without addressing any of the concerns that they claimed troubled them about the signatory employees in *Dana*.

In *Dana*, when workers wanted to gain union representation, the Board held that the choice of a majority of workers for collective bargaining can be held hostage – legally – by a small minority of anti-union workers while the NLRB's representation process lumbers ponderously through its bureaucratic maze. Why? Because, according to the Board, although its election process "may result in substantial delay in a small minority of Board elections," this is preferable "for resolving questions concerning representation."[15] Yet in *Wurtland*, where the employer wanted to withdraw recognition, the Board expressed the opposite concern – that requiring an NLRB election would unduly prolong the time during which the union would remain the workers' representative, i.e., "until the election results were certified, including any period required for the resolution of challenges and objections."[16]

And in another Board decision this past August where the employer wanted to withdraw recognition from a union on the basis of "slips" signed by workers, the Board never questioned the "comparable safeguards" of using signed slips to record worker sentiment; forgot all about its preference for elections to determine questions concerning representation; and suddenly worried that an election process would not yield a prompt result. Far worse was its fear that "employees will be forced to endure representation that they have unquestionably rejected."[17] Could a rationale be more result-oriented? This case provides another astonishing example of the disparate rules this Board applies depending on whether the outcome of the case will result in employees selecting or rejecting union representation.

Excluding Workers from the Act's Protection

Narrowing the Act's protections and thwarting workers' organizing efforts can be easily accomplished by simply excluding them from the Act's protections altogether. And this Board has done exactly that. Decisions by this Board have overturned precedents to deny representation and bargaining rights to tens of thousands of the nation's workforce who were previously covered, including teaching and research assistants,[18] and, effectively, temporary employees working jointly for a supplier employer and a user client, unless both employers consent.[19] Existing precedents have been artificially construed and applied in order to characterize workers as "non-employees," "managers," and "independent contractors" in order to exclude such categories as disabled individuals

working as janitors,[20] faculty members,[21] artists' models,[22] and newspaper carriers and haulers.[23]

In a trilogy of cases with enormous impact, the Board radically expanded the statutory definition of "supervisor."[24] This re-drawing of supervisory lines affects the continued organizing and collective bargaining rights of hundreds of thousands of professional, technical and skilled employees who rely on less highly trained or experienced personnel to help them accomplish their work.[25] The impact of these cases is currently being debated in Congress through its consideration of the RESPECT Act which would eliminate the current ambiguity regarding supervisory status and ensure that thousands of workers are not denied their labor law rights by being wrongfully classified as supervisors.[26]

In its zeal to convert otherwise covered employees into "supervisors," the Board *sua sponte* reconsidered an earlier decision involving a nurse at a long-term care facility in Missouri who was fired, according to her employer's own admission, because she circulated a petition and solicited employee signatures to protest certain working conditions.[27] Reclassifying the nurse as a supervisor, the Board thus withdrew her protection from the otherwise unlawful firing. On review, the Court of Appeals for the District of Columbia rejected the Board's decision, concluding that "the Board's judgment in this case rests on nothing."[28] Undeterred, the Board employed virtually the same theory in a case decided on September 26. It dismissed a union's election petition for nursing home LPNs on the grounds that **all of them** were supervisors because they completed "employee counseling forms," which the Board claimed were a precursor to disciplinary action.[29]

Restricting and Narrowing Already Inadequate NLRB Remedies

The decisions of this Board have undermined the Act's already meager remedies for employer abuse and interference with protected rights. Coupled with the substantial delays in Board proceedings that in many instances are aggravated by employers' procedural maneuvering, these rulings will eliminate any deterrent effect and in practice will further encourage employers to violate workers' rights.

NLRB remedies are notoriously weak and ineffective. An employer who has engaged in misconduct during a union organizing campaign, such as threatening and spying on workers, is typically required merely to post an NLRB Notice to Employees promising not to engage in further violations. Workers who are illegally discharged are entitled to reinstatement and back pay, but to no other form of damages. Most employees never return to their jobs and none receive compensation for the economic or psychological devastation that they and their families typically have to endure.[30]

Moreover, the employer is rarely held accountable for the damage done to the organizing campaign, itself. In some cases, if the employer's misconduct has affected the results of the election, the Board may order a rerun election. But delays often make even these

remedies wholly ineffectual as the "remedy" generally comes long after the workers have tried to organize their union and the campaign has been thwarted. By then, the damage has been done: the workers have seen how weak their so-called protections really are. Illustratively, one of the Board's September cases involves back pay determinations for 202 workers who were denied reinstatement in 1990; 17 years later, none have received any back pay.[31]

Human Rights Watch has concluded that "many employers have come to view remedies [under the NLRA] … as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts."[32] Professor Cynthia Estlund echoed this pessimistic view in observing that the Act is "widely flouted by employers who perceive" the discharge of union adherents as an "easy and cheap [] response" to an organizing campaign.[33] These recent decisions will not only further embolden labor law-breakers, they vividly demonstrate to workers that the NLRB can do little to protect their rights and that their employer can act with impunity.

For example, the Board has now made radical changes in long-standing rules regarding back pay eligibility. On September 30, the Board rewarded employers who violate the law, by making it yet more difficult for workers ever to collect back pay for unlawful discrimination. Reversing 45 years of established precedent,[34] it held that the General Counsel and illegally terminated workers will now carry the burden, in a proceeding to determine back pay following a finding of illegal conduct, to come forward with evidence that the illegally terminated workers took reasonable steps to look for work after being fired.[35] If a worker does not present evidence of an adequate search for work, the employer will have no back pay obligation.

In another decision issued on September 11, 2007, the Board had already undercut the likelihood of back pay by announcing a new rule that employees who wait more than two weeks before seeking interim work, what the Board characterizes as "an unreasonably long time," will be denied back pay for that period because to do otherwise would "reward idleness."[36] In this case, workers were denied back pay even for the time that they were picketing the employer to try to get their jobs back and for the period between the time they were advised they had been hired for interim employment and the time they actually started their new, interim jobs.[37]

Another new rule announced in September shifts the burden to the General Counsel and workers to prove that applicants who were denied employment had a "genuine interest" in working for the employer who illegally refused to hire them.[38] This builds on a prior burden shifting case in which the Board created a second class of discriminatees – those illegally denied employment because the employer suspected they were union organizers, seeking work to organize its workforce.[39] Despite the historical presumption, still applicable to all other discriminatees, that an applicant would have continued working indefinitely if not for the employer's illegal conduct in denying them employment, this new subclass of discriminatees is now required to present affirmative evidence to prove that, if hired, they would have worked for the employer for the entire backpay period. According to the dissent, in promulgating this new rule, the Board rejected "precedent

endorsed by two appellate courts and rejected by none, without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis." The dissent points out that the rule being changed by the Board was established "in the Board's first reported case" in1935.[40]

These recent decisions will not only reduce the back pay obligations of adjudicated labor law violators, they will have a profound effect on how cases involving back pay are investigated and litigated. Not only has it become cheaper for employers to violate the law as a result of these new decisions, but the Agency, itself, is now required to help the wrongdoer determine how it can lessen the back pay it is required to pay its victims. Workers who file unfair labor practice charges will now spend less time with Board Agents on the circumstances of the unlawful termination, and correspondingly more time, what they did or did not do regarding a bona fide application for interim employment and subsequent mitigation of damages. These radical changes divert the Board's resources away from enforcing the Act and, instead, toward saving money for law-breakers, who on average have paid back pay awards amounting only to $3,500 even before these burden-shifting new rules took effect.[41] The end result of these new rules is that this Board is making it cheaper for employers to violate the law and using Agency resources to do so.

Recent decisions have also created an extremely restrictive and narrow view of what constitutes remedial action and the necessity for such relief. Broad cease-and-desist orders have been abandoned,[42] only mass discharges qualify for a bargaining order remedy,[43] the so-called extraordinary remedies in cases involving brutal tactics by employers to crush union organizing activities have all but disappeared,[44] and Section 10(j) injunction action has "fallen into virtual disuse."[45]

Past efforts by the NLRB to craft effective remedies have focused on alternative means to mitigate the impact of an employer's unlawful anti-union campaign, such as ordering a high ranking company official and/or an NLRB agent to read aloud the Notice to Employees to workers and/or mail it to workers' homes, rather than simply burying it on the company bulletin board or simultaneously making it clear to employees that it does not agree with the information it was forced to post. In the past, the Board has also ordered that unions be allowed to address workers at the workplace, something that the supremacy of the employer's property rights typically precludes. Other remedial initiatives have included access by the union to a list of employee names and addresses in order to contact workers to educate them about the benefits of collective bargaining; and awarding the union its organizing, negotiating or litigation costs.[46] Such special remedies, even in cases of egregious violations of law, have virtually disappeared under the Bush Board.[47] In fact, the Board has rejected requests for far more modest remedial steps. In a case involving virtually all Chinese speaking workers with limited proficiency reading English, the Board rejected as "not warranted" a request that management read aloud its Notice to Employees at an assembly and even a request to translate into Chinese the final decision in the case.[48]

The Board has also virtually eliminated the bargaining order as a remedial tool.[49] In cases where an employer's illegal conduct has destroyed the union's majority support, the

Board has the authority to issue what is known as a *Gissel* bargaining order, which directs the employer to bargain with the union on the basis of its earlier, actual and demonstrated majority support.[50] Yet this Board has refused bargaining order remedies despite recommendations from its own Administrative Law Judges who hear these cases.[51] The Board apparently believes that employees' rights can be restored by a promise not to violate their rights again and that a notice posted on a bulletin board will erase fear and intimidation and allow a fair and free election.[52] This approach to the NLRA's remedial scheme demonstrates not only a disconnect with what workers face when they try to form a union but a profound ignorance of workplace realities. What remains of the bargaining order remedy? Apparently, the Board has restricted its application to mass discharges[53] where the unit size is small[54] and the employer's highest-ranking officers are involved.[55] Absent such decimation of the workforce in the most limited of circumstances, the Board has turned its back on yet another of its very few available, effective remedies.

Similarly, Section 10(j) injunctive relief has all but disappeared under the Bush Labor Board.[56] This remedial tool exists to empower the NLRB to petition a U.S. district court for immediate, temporary injunctive relief pending final disposition of the underlying unfair labor practice case by the Board. Congress enacted this provision in recognition of the harm caused by delay. Section 10(j) relief "is designed to fill the considerable time gap between the filing of a complaint by the Board and issuance of its final decision, in those cases in which considerable harm may occur in the interim."[57] If granted, a 10(j) injunction can force an employer to rehire unlawfully terminated workers or to bargain with a union that it has unlawfully refused to recognize.

However, seeking 10(j) relief lies within the discretion of the Board. The NLRB General Counsel receives 10(j) requests from its regional offices, decides in which of these cases it will seek authorization from the Board, and must then be granted authorization by majority vote of the Board.[58] The past five years has witnessed a precipitous decline in the Board's use of this important and highly effective remedy. The yearly average of 40-50 Board authorizations during the 1990's has plummeted to an average of 17.4 since 2002.[59]

Workers Have Fewer Protected Rights, Especially Pro-Union Workers

Recent Board rulings have overruled precedent, announced new rules, and applied existing law in ways that significantly alter prior policy and strip workers of their rights. Seemingly in concert with increased employer resistance,[60] this Board's decisions have diminished employees' rights. During organizing campaigns, employers are permitted greater leeway to intimidate and coerce workers through threats and surveillance of workers' union activities.[61] Employers are allowed to institute and maintain onerous and ambiguous workplace rules that discourage union support and chill employees' exercise of their legal rights to support a union.[62] Significantly, a Board decision upholding a work rule that prohibited workers from "fraterniz[ing] on duty or off duty … with … co-employees" was denied enforcement by the Court of Appeals for the District of Columbia, which characterized the Board's view as "unreasonable," and observed that "employees could hardly engage in protected activity *without* fraternizing with each

other."[63] Even non-coercive pro-union conduct by a low level supervisor, which the Board acknowledged was not objectionable under the law as it existed at the time the election was conducted, was used to invalidate workers' votes to form a union despite the vigorous and openly aggressive anti-union campaign conducted by the employer.[64] These decisions condone anti-union intimidation and interference by employers and further strip workers of the Act's protections.

In case after case, workers' rights are forced to yield – to employer property interests however miniscule,[65] to employer discretion,[66] to national security,[67] to deferral to arbitration,[68] and to other statutes.[69] As Board decisions continue to shrink workers' rights both the "protectedness" and the "concertedness" of employee conduct are viewed more narrowly. Examples include this Board's rulings that nursing home workers were not engaged in protected conduct when they called a state patient care hotline to report excessive heat;[70] that an employee's solicitation of a coworker to testify before a state agency in support of her sexual harassment complaint was not protected because she was advancing only her own cause;[71] and, in explicitly overruling precedent, that non-union workers had no right to be accompanied by a fellow worker when they were called into an employer meeting that could lead to their discipline.[72]

Employer property interests, however tenuous, have been more valued and far more aggressively protected than workers' rights. Workers must engage in concerted activity at their peril despite the supposed protections of the Act. An employer's property rights in its parking lot were more important than the rights of workers who waited there in hopes of bringing their work complaints to their company president's attention.[73] In another case involving an employee who used company scrap paper to write a union notice to replace one that a supervisor had unlawfully torn down from a bulletin board, the Board ruled that that single piece of scrap paper constituted a property interest more deserving of the Act's protection than an employee's federal labor law rights.[74]

Workers have also lost ground on evidentiary rulings. Although the Board was willing to infer that statements made by a pro-union supervisor to three employees were likely repeated other employees so as to require setting aside an election in the union's favor,[75] it refused a similar inference where objectionable pre-election conduct by an employer was at issue.[76] Indeed, five decades of precedent were swept aside in a Board ruling that an employer's threats to close its workplace if employees voted for union representation would no longer be presumed to have been disseminated throughout the workforce.[77] The prior rule, which this Board overturned, was based on the logic that discussion of this most serious of threats among employees was "all but inevitabl[e]" and that to think otherwise was "totally unrealistic" and "the ultimate in naiveté."[78] Yet that is exactly what this Board did.

Workers' Rights to Bargain Collectively and to Strike Are Under Attack

In a pair of cases involving partial lockouts, the Bush Board seriously undermined the fundamental right to strike by sanctioning lockouts in which the employers discriminated among their workers solely on the basis of union membership and union support. In one, the Board allowed an employer to lock out strikers who had offered to return to work while it continued to employ those who had crossed the picket lines and abandoned the strike. The Court of Appeals for the Seventh Circuit, in a unanimous decision, denied enforcement, harshly chastising the Board that its decision was "in derogation of nearly four decades of employee protection."[79]

Relying on this earlier decision (and prior to the Seventh Circuit's refusal to enforce it), the Board upheld another employer's decision to lock out only its non-probationary employees, "all of whom were union members," while allowing its probationary employees, "all of whom the . . . [employer] believed were not union members," to continue working.[80] The majority justified the employer's selective lockout on the basis that non-probationary employees had a more 'vital interest' in the outcome of the contract negotiations than probationary employees. As in the prior case, these were rationales that even the employer had not proffered during the litigation of the case.[81] The partial lockout caused the union to lose support and provided the employer with an opportunity to stop bargaining and withdraw recognition from the union. In an unpublished decision, the U.S. Court of Appeals for the District of Columbia similarly refused to enforce the Board's decision.[82]

As part of this September massacre, the Board made it even easier for employers to deny employment to returning strikers.[83] It has been well-settled that, in order to be considered "permanent replacements" who will be allowed to continue working in the place of returning strikers after the strike has ended, the replacement workers must have "a mutual understanding with the [employer] that they are permanent." The Board nonetheless held that at-will employees who had signed agreements stating that their employment could "be terminated by myself or by [the employer] at any time, with or without cause" could still be considered "permanent" replacements if the employer elected to deny reinstatement to its workforce at the end of the strike.

Recent Board decisions evince a willingness to relieve employers of their collective bargaining obligations and allow them greater discretion to make unilateral changes. When employers make changes in employees' working conditions in violation of their legal obligations to bargain with the workers' union representative, the traditional remedy has been to order the employer to restore the status quo, bargain with the union, and rescind any actions taken as a result of the illegal unilateral changes, including disciplinary actions. Long-standing Board precedent has recognized that even if workers are fired, "[n]o otherwise valid reasons asserted to justify discharging the employee can repair the damage suffered by the bargaining representative as a result of the application of the changed term or condition."[84] With a decision on September 29, the Board eliminated this critical remedy and overruled almost two decades of Board precedent.[85]

The Board had originally upheld the lawfulness of the discharges in 2004, then reinstated this same decision following a remand from the Court of Appeals for the District of Columbia, relying on an interpretation of the Act which the court had specifically and tellingly refused to endorse.[86]

Conclusion:

Instead of shrinking the Act's coverage, protections and remedies, this Board should be addressing the reality that virulent anti-union campaigns are still the norm, that workers face extreme forms of intimidation when they try to form a union, and that the rights guaranteed by the Act are still outside the grasp of inordinate numbers and categories of American workers.

Instead, workers are losing fundamental rights and protections through thinly-veiled result-oriented split decisions. These decisions illustrate how the Bush Administration Labor Board has completely abdicated its statutory responsibilities, and why legislative change is so critically needed. Workers deserve a Board that will uphold the statutory mandate of the National Labor Relations Act and protect their rights to organize and bargain for a better life. They deserve a pathway to collective bargaining that brings workers into the middle class and allows them to stay there, a statute that provides meaningful remedies for violations of their rights, and a statute that deters labor law violators and precludes their viewing such violations as a mere "cost of doing business."

The AFL-CIO calls for the Labor Board to be returned to its role as protector of the rights set forth in the National Labor Relations Act and for this Congress to enact legislative change that will insure that all workers who wish to be represented by a union to negotiate for their future have that opportunity. We ask Congress to safeguard workers against a Labor Board that is attacking their rights instead of protecting them and we call on Congress to strengthen those rights by passing the Employee Free Choice Act.[87]

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[1] *After 70 Years of the NLRB: Warm Congratulations – and a Few Reservations*, 48 Law Quadrangle Notes 98, 101 (2005).

[2] James J. Brudney, "Isolated and Politicized: The NLRB's Uncertain Future," 26 *Comp. Labor Law & Pol'y* 221, 224 (2005). *See also*, Steven Greenhouse, *Labor Board's Critics See a Bias Against Workers*, NY Times, Jan. 2, 2005, at A-20, http://www.theocracywatch.org/gov_labor_times_jan2_05.htm.

[3] Lance Compa, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (Human Rights Watch 2000) at 10.

[4] Chirag Mehta and Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, American Rights at Work, (2005),available at http://www.americanrightsatwork.org/docUploads/UROCUEDcompressedfullreport%2Epdf; *see also* Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobilization on Workers, Wages and Union Organizing*, Cornell University (Sept. 6, 2000).

[5] Gordon Lafer, "Free and Fair: How Labor Law Fails U.S. Democratic Standards," American Rights at Work (2005) available at http://araw.org/docUploads/FreeandFair%20FINAL%2Epdf; http://www.americanrightsatwork.org/docUploads/UROCUEDcompressedfullreport%2Epdf.

[6] The Board granted review in a series of cases which challenge various aspects of voluntary recognition, including *Dana Corp. and Metaldyne Corp*., 341 NLRB 1283 (2004) (*Dana I*) (re-considering the voluntary recognition bar policy of *Keller Plastics Co.*, 157 NLRB 583 (1966) that a decertification petition may not be filed for a reasonable period of time following voluntary recognition); *Dana and UAW*, Case Nos. 7-CA-46965 and 7-CB-14083, JD-24-05 (2005) (Dana II) (considering whether and to what extent a union and employer may engage in pre-recognition bargaining); *Shaw's Supermarket*, 343 NLRB 963 (2004) (challenging the continuing validity and application of the after acquired stores doctrine set forth in *Kroger Co*., 2l9 NLRB 388 (1975). Of these, *Dana I* was decided on September 29, 2007, 351 NLRB No. 28; *Dana II* is still pending and *Shaw's Supermarket* settled.

[7] The National Labor Relations Act requires employers to recognize and bargain with unions "designated or selected" by a majority of their employees; the Act does not specify the method by which employees are to select their representatives. Section 9 of the Act provides that employees can petition for an election only if "their employer declines to recognize their representative." *See, General Box Co.*, 82 NLRB 678, 683 (1949); *United Mine Workers v. Arkansas Flooring Co*., 351 U.S. 62, 72, n. 8 (1956).

[8] *Dana Corp.*, 351 NLRB No. 28 (2007).

[9] Slip op. 14. "Today's decision . . . undercuts the process of voluntary recognition as a legitimate mechanism for implementing employee free choice and promoting the practice of collective bargaining. It does so at a critical time in the history of our Act, when labor unions have increasingly turned away from the Board's election process – frustrated with its delays and opportunities it provides for employer coercion – and have instead sought alternative mechanisms for establishing the right to represent employees . . . . If disillusionment with the Board's election process continues, while new obstacles to voluntary recognition are created, the prospects for industrial peace seem cloudy, at best." *Id*., slip op. 12.

[10] Executive Order 13201, issued by President Bush on February 17, 2001 available at http://www.dol.gov/esa/regs/statutes/olms/eo13201.htm.

[11] NLRB notices to employees may be posted as a remedy for illegal conduct pursuant to a settlement agreement or NLRB or Court order (NLRB Compliance Manual §10518); and must be posted for 3 days prior to an NLRB-conducted election since it notifies employees of balloting details (NLRB Representation Casehandling Manual §11314).

[12] Charles J. Morris, *In the Matter of Rulemaking*, February 9, 1993.

[13] *Wurtland Nursing & Rehabilitation Center*, 351 NLRB No. 50 (2007).

[14] *Id*., slip op. 2.

[15] *Dana Corp.*, slip op. 6-7.

[16] *Wurtland*, slip op. 3.

[17] *Shaw's Supermarkets*, 350 NLRB No. 55 (2007).

[18] *Brown University*, 342 NLRB 483 (2004) (reversing a four-year-old decision in *New York University*, 332 NLRB 1205 (2000) and eliminating from the Act's protections thousands of graduate student workers who have been actively seeking union representation during the pendency of the *Brown* case, including those at Columbia University, Yale University, Tufts University, Pratt Institute and the University of Pennsylvania, among others.

[19] *Oakwood Care Center*, 343 NLRB 659 (2004), overruling Sturgis .

[20] *Brevard Achievement Center*, 342 NLRB 982 (2004).

[21] *LeMoyne-Owen College*, 345 NLRB No. 93 (2005), following a remand from the Court of Appeals for the District of Columbia Circuit of the Board's initial decision reported at 338 NLRB No. 92 (2003); faculty are excluded from the Act's protection because they "play a major and effective role in the formulation and effectuation of management policies." Slip op. 11.

[22] *Pa. Acad. of Fine Arts*, 343 NLRB 846 (2004).

[23] *St. Joseph News-Press*, 345 NLRB No. 31 (2005).

[24] *Oakwood Healthcare, Inc*., 348 NLRB No. 37 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); *and Croft Metals, Inc.*, 348 NLRB No. 38 (2006).

[25] RNs are the largest occupational group in the healthcare industry, holding 2.2 million jobs in 2000. Almost 1.3 million of these RNs are employed in hospitals, representing fully one quarter of all hospital employees. *See* 2002-2003 BLS Occupational Outlook Handbook, Registered Nurses, Health Industry, available at http://www.bls.gov/oco/cg/cgs035.htm. In addition, there are approximately 420,000 LPNs currently employed in both hospitals and nursing homes. And the impact of these decisions will not be

limited to nurses or to the health care industry; they potentially affect all professional employees, who number 27 million. *See* BLS, 2000-2010 Employment Projections, Table 2.

[26] Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act (HR 1644; S 969).

[27] *Wilshire at Lakewood*, 345 NLRB No. 80 (2005).

[28] *Jochims v. NLRB*, 480 F.3d 1161, 1174 (D.C. Cir. 2007), *reversing and remanding Wilshire at Lakewood*, 345 NLRB No. 80 (2005).

[29] *Oak Park Nursing Care Center*, 351 NLRB No. 9 (2007).

[30] *See* Brent Garren, "When the Solution is the Problem: NLRB Remedies and Organizing Drives," 51 *Labor L J.* 76, 78 (2000).

[31] *Domsey Trading Corp.*, 351 NLRB No. 33 (2007) (reinstatement denied in 1990; original Board decision finding the employer's conduct unlawful reported at 310 NLRB 777 (1993); enf'd 16 F.3d 517 (2d Cir. 1994); Administrative Law Judge Decision on backpay issued October 4, 1999).

[32] UNFAIR ADVANTAGE , supra, note 3 at 10.

[33] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. at 1527, 1554 (2002).

[34] *Mastro Plastics Corp*., 136 NLRB 1342, 1346 (1962); *see also* NLRB Compliance Manual §10550.1: "In the event of a dispute concerning interim earnings, it is the respondent's legal burden to prove interim earnings and other facts that may mitigate the loss resulting from its unlawful action;" and Compliance Manual §10558.1: "It is the respondent's burden to establish that the discriminatee [illegally terminated worker] failed to make a reasonable effort to seek interim employment."

[35] *St. George Warehouse*, 351 NLRB No. 42 (2007) (the illegal discharges occurred in 1999; the decision of the NLRB Administration Law Judge finding wrong-doing issued in 2002).

[36] *The Grosvenor Resort*, 350 NLRB No. 86 (2007) (employees were denied backpay for the period of time that they were engaged in picketing to get their jobs back).

[37] This new rule contradicts instructions in the existing NLRB Compliance Manual, §10558.3 which advises that "the Board has found that a brief period during which the discriminate undertook no activities to seek employment did not constitute a failure to mitigate, citing *Saginaw Aggregates*, 198 NLRB 598 (1972) *and Retail Delivery Systems*, 292 NLRB 121, 125 (1988).

[38] *Toering Electric Co*., 351 NLRB No. 18 (2007) (backpay proceeding in which refusal to hire occurred in 1995-96; NLRB Administrative Law Judge decisions finding illegal conduct issued in 1997 and 2000).

[39] *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007) (carving our less favorable rules when employers unlawfully refuse to hire workers intent on organizing the workforce by applying a new evidentiary requirement that in order to be entitled to continuing backpay, the General Counsel and worker have the burden of proving by affirmative evidence that the worker would have continued to work for the employer but for the employer's unlawful discrimination).

[40] *Id*., slip op. 10, referencing *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 347 (1953), citing *Pennsylvania Greyhound Lines*, 1 NLRB 1, 51 (1935)

[41] Historically, it has been the responsibility of the General Counsel to calculate the amount of backpay owed and the obligation of the adjudicated wrong-doer to present evidence to reduce that amount. *See* n. 33, *supra*.

[42] *Intermet Stevensville*, 350 NLRB No. 93 (2007*) (Intermet II*)(refusing a broad order where the employer unlawfully laid off four workers because of their union support despite prior case, *Intermet Stevensville*, 350 NLRB No. 94 (2007)(*Intermet I*), which found numerous violations by the employer during its anti-union campaign, including threats of plant closure and job losses; demotion, reassignment and reduction in wages for a suspected union supporters, the confiscation of union literature; and other worker abuses.

[43] *Compare National Steel Supply, Inc.*, 344 NLRB 973 (2005) (bargaining remedy granted) *with Desert Toyota*, 346 NLRB No. 3 (2005), *Abramson, LLC*, 345 NLRB No. 8 (2005) and *The Register Guard*, 344 NLRB 1143 (2005) (bargaining order remedies denied).

[44] *Albertson's Inc.*, 351 NLRB No. 21 (2007) (rejecting its Administrative Law Judge's recommendation for a broad order and special remedies despite numerous violations for failure to furnish information, unilaterally changing terms and conditions of employment, bypassing the union, maintaining unlawful rules and unlawfully disciplining workers).

[45] Rick Valliere, *Organized Labor Would Fare Better Under State Labor Laws, Professor Says*, Daily Lab. Rep. (BNA) at A-7(Jan. 11, 2006) (quoting former NLRB Chairman William B. Gould).

[46] *Fieldcrest Cannon, Inc. v. NLRB* 97 F.3d 65 (4th Cir. 1996), *enf'ing in rel. part* 318 NLRB 470 (1995); *Dynatron/Bondo Corp*., 324 NLRB 572 (1997); *Three Sisters Sportswear Co*., 312 NLRB 853 (1993), *enf'd*, 55 F.3d 684 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996); *Monfort of Colorado, Inc*., 298 NLRB 73 (1990), *enf'd*, 965 F.2d 1538 (10th Cir. 1992); *S.E. Nichols, Inc*., 284 NLRB 556 (1987), *enf'd*, 862 F.2d 952 (2d Cir. 1988); *Avondale Industries, Inc*., 329 NLRB 1064 (1999); *Unbelievable, Inc., d/b/a Frontier Hotel & Casino*, 318 NLRB 857 (1995), *enf'd. sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

[47] *First Legal Support Services*, 342 NLRB 350 (2004) (illegal terminations, threats of discharge in retaliation for their union activities or those of their family members, being required to sign agreements that they were independent contractors and not employees and bribes offered in return for giving up their union support did not justify special remedies such as allowing the union access to the employer bulletin board, an opportunity to address workers on-site, and a list of employees' names so the union could contact them to talk about the campaign).

[48] *Chinese Daily News*, 346 NLRB No. 81 (2006); John Logan, *The Long, Slow Death of Workplace Democracy at the Chinese Daily News*, available at http://www.americanrightsatwork.org/docUploads/burke%20report.pdf .

[49] Brudney, *Neutrality Agreements and Chard Check Recognition*, 90 Iowa L. Rev. at 871-872 (footnotes omitted; quoting *Gissel*, 395 U.S. at 612). *See id.* n. 262 ("stunning decline of 85% . . . substantially exceeded the 50% decline in election activity over the same period;" increased number of unfair labor practices charges filed belies any inference of "heightened levels of law-abiding conduct by the employer community.").

[50] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969).

[51] *Desert Toyota*, 346 NLRB No. 3 (2004) (the employer discharged the principal employee organizer and made statements to another employee linking the discharge to the worker's union support; maintained an unlawful no-solicitation rule, created the impression of surveillance, interrogated non-bargaining unit employees and solicited them to report union activities by others); *Abramson, LLC*, 345 NLRB No. 8 (2005) (a co-owner made repeated threats of plant closure, threatened employees with loss of jobs and benefits, and unlawfully denied recall to the leading union supporter following a post-election layoff); *The Register Guard*, 344 NLRB 1143 (2005) (employer unlawfully granted a unit-wide wage increase during the union campaign, conducted meetings in which it solicited and addressed employees' grievances and sent workers a letter with a form addressed to the union withdrawing their union authorization cards); *Hialeah Hospital*, 343 NLRB 391 (2004) (high level officers of the employer embarked on a course of discharge, threats of discharge, spying, and other illegal conduct within hours of learning of a union's organizing effort in a small unit of twelve employees; the employer warned the entire workforce that it would discover the identities and get rid of those employees who had contacted the union and told them that it would "not allow" a union).

[52]This, of course, assumes that the discharged worker will ever return to work, or be able to do so prior to a second election.

[53] *California Gas Transport, Inc.*, 347 NLRB No. 118 (2006); *National Steel Supply, Inc*., 344 NLRB 973 (2005) (the employer unlawfully refused to reinstate 27 of its 32 workers).

[54] *California Gas Transport, Inc.*, 347 NLRB No. 118 (2006); *Center Construction Co., Inc., d/b/a Center Service System Division*, 345 NLRB No. 45 (2005).

[55] *Evergreen America Corp*., 348 NLRB No. 12 (2006); *see also California Gas Transport*, 347 NLRB No. 118 (2006); *Center Construction*, 345 NLRB No. 45 (2006); *Smoke House Restaurant*, 347 NLRB No. 16 (2006); Concrete *Form Walls, Inc.*, 346 NLRB No. 80 (2006).

[56] 29 U.S.C. § 160(j).

[57] S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947).

[58] Although Section 10(l) requires the Board to seek injunctive relief for certain illegal conduct by unions, NO provision of the Act *requires* the Board to seek immediate, injunctive relief for violations by employers of workers' rights.

[59] These figures are based on NLRB documents obtained pursuant to a request under the Freedom of Information Act, NLRB Annual Reports, and General Counsel *Summary of Operations* Memoranda GC 08-01, 07-03, 06-01, 05-01, and 04-01..

[60] John Logan, "Consultants, Lawyers and the 'Union Free' Movement in the USA Since the 1970s," 33 *Industrial Relations Journal* 197 (August 2002).

[61] *Crown Bolt, Inc*., 343 NLRB 776 (2004) (announcing a new rule that threats that the employer will close its facility if employees choose to unionize are no longer presumed to be disseminated throughout the bargaining unit); *Alladin Gaming, LLC*, 345 NLRB No. 41 (2005) (permitting managers to closely observe and monitor employees' union discussions and then interrupt their conversations to deliver pro-employer lectures); *Airport 2000 Concessions, LLC*, 346 NLRB No. 86 (2006) (interrupting a break time conversation between an employee and a union organizer, watching them until they completed their conversation and immediately instructing employees not to speak with organizers did not constitute illegal surveillance).

[62] *Delta Brands, Inc*., 344 NLRB 252 (2005) (announcing a new policy that maintenance of an unlawful overly broad no-solicitation rule during an anti-union campaign is no longer sufficient to set aside an election); *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004) (expanding permissible employer work rules to include those that prohibit "abusive and profane language," "harassment of other employees … in any way" and "verbally, mentally, or physically abusing" a fellow employee or supervisor as such employer rules are not unlawful and do not discourage lawful, protected employee organizing activities); *Stanadyne Automotive Corp*., 345 NLRB No. 6 (2005) (upholding as lawful a ban on "harassment," despite lack of any clarification limiting it to unprotected, harassing conduct or improper behavior and even though the rule was expressly announced in direct response to union activity); *Palms Hotel and Casino*, 344 NLRB 351 (2005)(a rule forbidding "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members" was ruled to be lawful over the dissent's assertion that it would chill Section 7 rights); see also *River's Bend Health & Rehabilitation Services*, 350 NLRB No. 16 (2007)..

[63] *Guardsmark, LLC*, 344 NLRB 809 (2005), enf'd denied, *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 379 (D. C. Cir. 2007), *emphasis in original*.

[64] *Harborside Healthcare Inc*., 343 NLRB 906 (2004) (supervisors' attempts to solicit employees to support the union constitute unlawful coercive conduct requiring that the union's election win be set aside even though the employer conducted an openly aggressive and vicious anti-union campaign); *Chinese Daily News*, 344 NLRB 1071 (2005) (a supervisor's distribution of union authorization cards and attendance at a union meeting was "inherently coercive" such that the union's election victory must be set aside even though only one supervisor engaged in such conduct and the employer conducted a virulently hostile, open and aggressive anti-union campaign.).

[65]*Quietflex Mfg., L.P.*, 344 NLRB 10555 (2005) (the employer's property interest in a single piece of scrap paper is protected over the lawful union activity of a worker who used the scrap paper to make a notice of a union meeting after the employer *unlawfully* removed a prior notice).

[66] *Guardsmark, LLC*, 344 NLRB 809 (2005); *Stanadyne Automotive Corp*., 345 NLRB No. 6 (2005); *Palms Hotel and Casino*, 344 NLRB 351 (2005) (employer workrules do not chill Section 7 rights).

[67] *IBM Corp.*, 341 NLRB 1288 (2004) ("because of the events of September 11, 2001 and their aftermath, we must now take into account the presence of both real and threatened terrorist attacks"); *ITT Industries, Inc*., 341 NLRB 937, 942 (2004) (dissenting from the majority's decision that off-site employees of the employer had Section 7 rights to handbill in the parking lot at a sister facility, Chairman Battista warned that "our nation now faces significant security risks" such that "[e]mployers … must be particularly vigilant at this time of our nation's history."

[68]*Smurfit-Stone Container Corp*., 344 NLRB 658 (2005) (deferral to arbitration award even though the arbitrator upheld the discipline of an employee who was engaged in protected, concerted activities); *Aramark Services, Inc*., 344 NLRB 549 (2005) (deferral to arbitrator's decision even though the arbitrator's decision "is not a model of clarity," but is "at least susceptible" to an appropriate interpretation).

[69] *Krystal Enterprises, Inc*., 345 NLRB No. 15 (2005) (employee was lawfully discharged for violation of employer's sexual harassment policy even though his union activity was "a motivating factor" and rampant sexual horseplay and misconduct, the purported reason for his discharge, was generally tolerated); *IBM Corp*., 341 NLRB 1288 (2004) (the potential for workplace discrimination and sexual harassment are articulated as a factor in denying nonunion workers the opportunity for representation during disciplinary interviews).

[70] *Waters of Orchard Park*, 341 NLRB 642 (2004).

[71] *Holling Press, Inc.*, 343 NLRB 301 (2004).

[72] *IBM Corp.*, 341 NLRB 1288 (2004), overruling *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).

[73] *Quietflex Mfg. Co*., 344 NLRB 1055 (2005); *Johnson Technology, Inc*., 345 NLRB No. 47 (2005).
[74] *Johnson Technology, Inc*., 345 NLRB No. 47 (2005).
[75] *Harborside Healthcare, Inc*., 343 NLRB 906 (2004).
[76] *Werthan Packaging, Inc*., 345 NLRB No. 30 (2005) (no inference that a manager had similarly and systematically interrogated 25 employees where, on the day before the election, the manager approached a short tenure employee wearing a union button and asked if she had filled out a union card, then wrote something down on a clipboard and was then observed walking up to other employees, talking to them and writing on the clipboard; a process repeated with about 25 employees).
[77] *Crown Bolt, Inc*., 343 NLRB 776 (2004) (announcing a new rule that threats that the employer will close its facility if employees choose to unionize are no longer presumed to be disseminated throughout the bargaining unit); overruling *Springs Industries*, 332 NLRB 40 (2000); *General Stencils, Inc.*, 195 NLRB 1109 (1972), enf. denied 472 F.2d 170 (2d Cir. 1972); *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977).
[78] *Crown Bolt, Inc*., supra, note 77 at 780 and cases cited therein.
[79] *Midwest Generation*, 343 NLRB 69 (2004), *rev'd and remanded sub nom. Local 15, IBEW v. NLRB* 429 F.3d 651, 662 (7th Cir. 2005).
[80] *Bunting Bearings Corp*., 343 NLRB 479 (2004).
[81] *Id*. at 481.
[82] *United Steelworkers* v. *NLRB*, 179 Fed. Appx. 61 (D.C. Cir. 2006).
[83] *Jones Plastic & Engineering Co.*, 351 NLRB No. 11 (2007).
[84] *Great Western Produce, Inc*., 299 NLRB 1004, 1005 (1990), citing *Boland Marine & Mfg. Co*., 225 NLRB 824 (1976), *enf'd* 562 F.2d 1259 (5th Cir. 1977); see also *Tocco, Inc*., 323 NLRB 480 (1997).
[85] *Anheuser-Busch, Inc*., 351 NLRB No. 40 (2007) (workers discharged based on evidence from illegal video surveillance not entitled to reinstatement, overruling *Great Western* and *Tocco, supra.).*
[86] *Anheuser-Busch, Inc*., 342 NLRB 560 (2004); *rev'd and remanded sub nom. Brewers & Maltsters Local 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005).
[87] The House of Representatives passed the Employee Free Choice Act (HR 800), on March 1, 2007, by a 241 – 185 vote; the Senate supported the Employee Free Choice Act (S 1041), on June 26, 2007, with a 51-48 vote which was not sufficient to invoke cloture; President Bush promised to veto the bill. The Employee Free Choice Act requires certification of unions supported by a majority of the workforce, interest arbitration for first contracts, and increased remedies for violations of the NLRA.