Testimony of

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INTRODUCTION

Chairwoman Murray, Ranking Member Isakson, Chairman Andrews and Ranking Member Kline, and Members of the Subcommittees:

My name is Robert Battista, and I am Chairman of the National Labor Relations Board. The NLRB is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, as amended, the primary law governing relations between unions and employers in the private sector. The statute guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activity with or without a union, or to refrain from all such activity. Under the Act, the NLRB has two principal functions:

- to conduct secret-ballot elections among employees to determine whether or not the employees wish to be represented by a union; and
- to prevent and remedy statutorily defined unfair labor practices by employers and unions.

Thank you for the opportunity to discuss recent decisions of the National Labor Relations Board and their impact on employee rights. I understand you are most interested in the decisions we issued in September 2007. Before addressing specific decisions, I would like to cite some of this Board's accomplishments and to offer some observations about the Agency and the National Labor Relations Act.

Notwithstanding the special interest group rhetoric you may be hearing about the NLRB, I want to assure Congress that the Agency is successfully carrying out its statutory mission to administer the Act as its has been written by Congress and interpreted by the reviewing courts.

AGENCY PERFORMANCE

In three days, I will have completed my five-year term as Chairman. I thought it would be appropriate to look back upon my term to see how the Board fared against the goals we established for the Agency when we first took office. In December of 2002, our goals as a Board were to become more productive, credible with the Court's, collegial, and transparent. As I will explain, we have substantially accomplished those goals.

1. Productivity

We certainly have become more productive. In fiscal year 2002, the last fiscal year before I became Chairman, the Board issued a total of 443 cases. Since I became Chairman in December 2002, the Board has issued almost 500 cases a year through the end of FY 2007 on September 30, 2007.

GPRA Case Initiative

In fiscal 2007, all Board Members made a determined effort to meet our goals pursuant to the Government Performance Results Act, which we refer to by the acronym "GPRA." Our internal GPRA goal for unfair labor practice ("C") cases was to issue by September 30, 2007, decisions in 90% of the 216 C cases pending as of May 1, 2006. Our internal GPRA goal for representation cases was to issue by September 30, 2007, decisions in 90% of the 59 representation ("R") cases pending as of October 1, 2006.

We were successful in issuing decisions in many of our oldest GPRA cases. Indeed, in fiscal 2007 we issued decisions in 48 of our oldest 50 cases. With regard to

R cases, we issued rulings in 98.3% of all the R cases we had on October 1, 2006 thus exceeding our GPRA goal. We issued decisions in 84.1% of our GPRA C cases we had on hand on May 1, 2006. Thus, while we did not quite meet our internal GPRA C case goal, we were able to issue decisions in the great bulk of the old cases, many of which had lengthy records and difficult issues that seemed to have been handed down from one Board to another. Another way to look at the success of our efforts is to compare median case pendency periods. At the end of fiscal 2006, the median number of days that a C case was pending with the Board was 809 days. After our GPRA effort in Fiscal 2007, the median number of days a C case remained at the Board was 181 days.

We achieved a similarly dramatic reduction in median time for R cases. At the end of fiscal 2006, the median number of days an R case was at the Board was 409 days. After our GPRA effort in fiscal 2007, the median number of days for our R case inventory was 88.

While we still have some old C cases that we intend to decide before the end of the year, the claim that cases are languishing at the Board is no longer true.

Case Backlog at Lowest Level in Over 30 Years

Furthermore, we have made real inroads on the backlog. Five years ago the case backlog at the Agency stood at 621 contested cases. Many of them had been at the Board for a number of years. At the end of FY 2007, we have reduced that backlog to 207 cases or a reduction of some 66.5%. Granted, a lower intake of cases helped us

in this effort, but we did well in bringing the caseload down to a respectable working inventory.

Board Issues Lead Case Decisions

During the same period, the Board has issued 28 major decisions. We had hoped to issue more. However, to decide a major issue, the Board must have at least a three-member majority who are willing to sign on to the opinion. That task was made doubly difficult because during my chairmanship, the Board had fewer than 5 members for 18 months or 30% of the time, including all of calendar year 2005. Of course, when a new member comes on to the Board, it takes a while for the new member to come up to speed, acclimate himself or herself with staff, and for the Board to develop the necessary chemistry to reach consensus or even a majority.

Representation Case Activity

With regard to representation case activity at our Regional Offices during FY 2007, 2,439 (RC and RM) petitions were filed, which resulted in holding 1,559 elections.

- Unions won 54.3% of those elections;

- The time from the filing of a petition to the holding of an election was 39 median days;

- 93% of the elections were held within 56 days;

- 78.9% of all R cases were closed by the Agency within 100 days from the filing of the petition.

- Only 13 cases involved a technical refusal to bargain to test the certification, which means employers challenged the certification of unions in court in only 1.1% of the elections that unions won.

Board Collects Over One-Half Billion Dollars in Backpay

In FY 2007, the NLRB collected $110,388,806 in backpay, and 2,456 employees were offered reinstatement. Over my tenure as Chairman, the NLRB recovered a total of $604 million on behalf of employees as backpay or reimbursement of fees, dues, and fines, with 13,279 employees offered reinstatement.

All and all, from a productivity standpoint, we have done a very credible job, of which I am proud. In the words of one longtime observer of this Agency, "the efficiency and productivity of the Board continues to serve as a role model for many Federal agencies." G. Roger King, *"We're Off to See the Wizards" A Panel Discussion on the Bush II Board's Decisions . . . And The Yellow Brick Road Back to the Record of the Clinton Board*, (paper presented at the American Bar Association, Section of Labor and Employment Law, 34th Annual Development of the Law Under the National Labor Relations Act Mid-Winter Committee Meeting on February 26 to March 1, 2006).

2. <u>Credibility in the Courts</u>

Building credibility with the U.S. Courts of Appeals was the second objective. In fiscal 2002, the prior Board had its decisions enforced in the courts in whole 60.4% and in whole or in part 70.8% of the time. From December 2002, when I took office, through September 30, 2007, the decisions of the Board have been enforced by the Courts in whole 78.1% and in whole or in part 87.7% of the time. Indeed, in fiscal 2007, our

decisions were enforced in whole 86.6% and, in whole or in part, 97% of the time. Both of these enforcement rates are the highest in the Agency's history.

3. Collegiality

Fostering collegiality and bipartisanship was a third goal, and despite strongly-worded dissents in some of the more important cases, in the main, the whole Board has been fairly collegial. Despite differences, which are not always predictable based upon political affiliation, we have tried to be guided by tolerance and respect for each other's strongly held views.

4. Transparency

The last of our goals has been to make the Agency more transparent to the public it serves by implementing the President's Management Agenda and E-Gov initiatives. We have renovated the Agency's Web site by greatly expanding its content, making it interactive, more user-friendly, and greatly enhancing its E-Filing capacity. We also are building an enterprise-wide electronic case management system designed to reduce reliance on paper-based processes, improve operational efficiency, and better serve the public.

CRITICISMS AND RESPONSES

Complexity of the Board's Responsibility

Some critics of the Board emphasize that the Act, as amended, retains the language from its original statement of purpose, found in the 1935 Wagner Act, calling for the encouragement of collective bargaining. These commentators invoke this language to fault the Board for not doing enough to promote unionism. In my opinion,

this is an anachronistic view that ignores the amendments to the 1935 Act and the complexity of the Board's responsibility.

The Board's responsibility is much more complex than the promotion of any institution's agenda because of the interplay of two essentially legal (as opposed to economic) forces. First, the Wagner Act was not Congress' last word. The Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 amended the original Wagner Act substantively and philosophically. Second, the courts have interpreted the Act and its amendments in a way that reflects the compromises underlying the legislation and leaves no room for the Board to construe and apply the amended Act as if it were the property of a single interest group.

Balancing Competing Interests

As defined by the sum total of the amendments and the court decisions, the Board's mission is to balance and accommodate competing interests, which typically conflict with one another. For example, although employees have the right to organize and engage in collective bargaining, employees also are assured of the right not to engage in union or concerted activity. Thus, the narrower goals of the original Act were tempered significantly by a broader notion of workplace democracy, voluntarism and neutrality, as expressed in the Taft-Hartley amendments. As one of our most eminent labor law and constitutional scholars, the late Archibald Cox, put it: The Taft-Hartley Act "represents a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining." Archibald Cox, Some aspects of the Labor Management Relations Act of 1947. 61 Harv. L. Rev. 1, 24 (1947).

My own view is that Professor Cox was absolutely right insofar as he saw the Taft-Hartley amendments as adopting a posture of complete equipoise on the question of whether employees should choose union representation. In the words of the Supreme Court, "The Act is wholly neutral when it comes to that basic choice" (*NLRB v. Savair Manufacturing)*. Once employees have freely chosen union representation, however, I think that the policy of encouraging the collective bargaining process retains its vitality.

Even in the context of collective bargaining, the statute is neutral as to the outcome of negotiations. In this regard, Section 8(d) of the Act defines the obligations of the parties to engage in good faith bargaining, but specifically notes that "such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

Another example of the resolution of conflicts between competing interests occurs in the context of economic battles over terms of a collective bargaining agreement. Although employees are entitled to strike for better working conditions, the right of an employer to continue business operations has been recognized since the beginning of the Act's history. Thus, employers are allowed to hire replacement workers during the strike, who need not be displaced once the strike is over.

This balancing of competing interests also is illustrated in the frequently litigated question of whether a union has a right to engage in concerted activity – like picketing or handbilling – on the private property of an employer. Over 50 years ago the Supreme Court told the Board that when the Section 7 rights to engage in concerted

activity conflict with property rights, the Board must accommodate the two "with as little destruction of one as consistent with the maintenance of the other."

Criticisms are Politically Motivated and Without Foundation

The polemics of certain groups against recent decisions of the Board are nothing more than special-interest attacks designed to gain support for their position in the coming election cycle. The hue and cry is that the "Bush majority" rushed out 61 decisions in September in a "massive assault on workers" before the President's term ends. That is just not so. Anyone with a basic knowledge of Board case processing knows that September, the last month of the fiscal year, is the busiest case production time. The Board actually issued 70 decisions in September, after a bi-partisan effort by all five Members to issue the oldest cases. The equivalent numbers for September issuances in the prior four years are 119, 54, 114, and 105. As for the substance of what the Board held, the decisions speak for themselves. It should be noted, however, that in the majority of unfair labor practice decisions issued in September, the Board found one or more violations of the Act by the employer involved.

Should parties appeal the decisions, one of the 12 circuits of the U.S. Courts of Appeals will decide whether to affirm or reverse the Board. If a Board decision is balanced and well reasoned, generally it gets enforced. As I stated previously, in FY 2007, which ended on September 30, 2007, the Board's decisions were enforced by the courts at historically-high levels.

Our critics' prognostications that "the NLRB system is broken and has become a tool of corporate interest," are simply false. Unions are winning a majority of

representation elections, most of which are held within two months. The Board has averaged issuing almost 500 decisions a year during my tenure. The median number of days an unfair labor practice case has been pending at the Board is 181 days; for representation cases, the median is 88 days. This is not the record of a Board that is the captive of any group or institution.

Mission Is to Enforce Entire Statute

Our critics declare that the National Labor Relations Act was passed by Congress in 1935 "to encourage workers to have unions and to bargain collectively." However, they lose sight of the fact that the statute was amended in 1947 by the Taft-Hartley Act to give employees the equal right to refrain from union activities and representation, and to protect employees from not only employer interference but also union misconduct. Often critics fail to comprehend that the Board's mission is to enforce the entire law as enacted by Congress despite what any affected party may wish for – a return to 1935 or to some future legislative result.

NLRA Protects Employees

The statute was not intended to benefit unions or employers. Rather, the rights granted by the statute belong only to employees – whether unionized or not. Once again, the fundamental principle of the Act is to provide for employee free choice, allowing employees to decide for themselves whether or not to be represented by a union or otherwise to act concertedly in dealing with their employer.

If employees exercise their right of free choice in favor of union representation, the policy of the Act, and the responsibility of the Board, is to encourage collective

bargaining by making sure that unions as well as employers bargain in good faith, free from governmental interference. If employees exercise their right of free choice not to be represented, it is the Board's responsibility to respect that choice and ensure against union restraint or coercion. The law is neutral . . . and so is this Agency.

Most Cases Resolved Quickly

Another criticism leveled at the Board focuses on the delay in processing cases to final conclusion. The overall case processing times, however, reveal the criticism's delay premise to be exaggerated. In FY 2007 the NLRB received 25,471 cases, 22,147 of which were unfair labor practice cases, and the remaining 3,324 were representation cases. After the General Counsel investigates the unfair labor practice cases, typically about one third of the cases are determined to have merit. In FY 2007, 36.6% of the cases were found to have merit. These investigations usually are completed in about two months.

Only 1-2% of Cases are Appealed to Board

Of the cases found to be meritorious, some 90% are settled prior to the issuance of a complaint. Complaints that Regional Directors do issue in meritorious cases are considered by NLRB Administrative Law Judges, and judges' decisions can be appealed to the Board here in Washington, D.C. In FY 2007, the median time to issue complaints was 98 days. Since 1990, the cases pending before the Board in Washington have represented only 1% to 2% of cases filed with the Agency nationwide. These cases tend to present the most difficult and complex issues in labor law. By focusing only on this small percentage of cases, some critics give the impression that delay inherent in a fully-litigated case is the norm. This is not true. Although,

admittedly, some of these fully litigated cases take too long to resolve, such delays are not typical. Overall the NLRB's case processing record is impressive.

The vast majority of these cases are resolved without the necessity of litigation. Historically, the Board's settlement rate has been very high; in FY 2007, 97% of all unfair labor practice cases filed in the field offices were settled.

Board Decisions Speak for Themselves

The decisions this Board has issued are correctly decided, soundly reasoned, and speak for themselves. In many instances, the decisions are unanimous. True, some of the more important decisions have not been, but dissent is healthy for many reasons, including the assurance dissent provides that the members in the majority have considered carefully opposing views and arguments.

Evolution of Labor Policy under the Act

The genius of the Act is that it sets forth enduring fundamental principles, and yet allows for flexibility and change. It accomplishes the former by setting forth fundamental principles in clear and compelling language. It accomplishes the latter by using broad language that gives the administering agency, the Board, the freedom and responsibility to make policy judgments within the parameters of those principles.

More specifically, the enduring fundamental principles include: the employee freedom to choose to be represented or not; the guarantee of good-faith bargaining free from governmental interference if employees choose representation; an electoral mechanism to insure that employees are appropriately grouped together, and can vote

in secret; the duty to sign and honor contracts that are freely agreed to; and the protection of employers from labor disputes in which they are not involved.

Within these principles, there is considerable discretion vested in the Board. Congress chose broad language, and then left it to the Agency to act in its discretion, so long as it does not depart from the principles. A few examples will suffice:

1. Congress said that an employer shall not "interfere with" Section 7 rights. Is it "interference" to prohibit persons who are not employees of the property owner from engaging in union solicitation on company property? If the persons are truly outsiders, the Supreme Court has told us that the answer almost always is "no." But what happens if the persons are employees of a tenant of the property owner who come to work on that property every day? This is an issue on which the Board held oral argument about a month ago.

2. Should employees have the right to oust or change a representative? The simple answer is "yes," but the Board has the power to limit this right in the interest of bargaining stability through contract-bar rules, certification year rules, and "reasonable time" insulated periods. In its recent decision in *Dana Corp.*, 351 NLRB No. 28 (2007), the Board adjusted the balance between freedom of choice and bargaining stability.

3. Should the duty to bargain include the duty to supply information? The simple answer is "yes," but the Board has the discretion to determine such matters as relevance and confidentiality. The Board historically has distinguished between information that pertains to employees within the bargaining unit the union represents and information that pertains to employees or entities outside the bargaining unit. In the

former case, the information is presumptively relevant and the union is entitled to the information without any further showing. In the later case, the information is not presumptively relevant, and the union is not entitled to the information unless it can show that it is relevant to the union's duties as the collective bargaining representative. The Board currently is considering when and to whom the union must demonstrate that such requested information is relevant.

Reversal of Precedent

With such difficult policy judgments in mind, it is not surprising that Board law changes from time to time. The Board's freedom to act within parameters means that over time different Boards will act in different ways.

Our Board, indeed, has reversed precedent but not as frequently as the Board did during the years 1994 to 2001. Having compiled the statistics for a paper delivered at the American Bar Association, Section of Labor and Employment Law, 34th Annual Development of the Law Under the National Labor Relations Act Mid-Winter Committee Meeting on February 26 to March 1, 2006, G. Roger King reported:

> From March 1994 until December 2001 the Clinton Board issued 60 decisions . . . which reversed Board precedent.
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> * * *
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> In these 60 decisions 1,181 years of precedent were overturned, or "lost."
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> * * *
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> During this timeframe [December 2002 to February 2006] the Bush II Board issued 9 decisions . . . which reversed precedent.
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> * * *
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> When all cases decided by the Bush II Board which reversed precedent are included 146 years of precedent was "lost."

From February 2006 until present, our Board issued an additional 12 decisions that overruled precedent, and the number of years of precedent "lost" was 197. In total, the prior Board issued 60 decisions that overruled 1181 years of precedent and our Board has issued only 21 decisions that overruled 343 years of precedent. The bottom line is that our Board reversed precedent only one-third as many times as the prior Board. Moreover, in many of these cases we restored the precedent that had been overruled by the prior Board.

This evolution of policy is precisely what Congress intended when it gave the Board policy-making function. So long as the Board does not stray from the Act's fundamental principles, and so long as the Board explains the reasons that impel it to disagree with a prior decision, the Board has the power to change. The Act envisions the federal judiciary as the arbiter of the Board's statutory faithfulness. Where the Board has strayed too far from the Act's fundamental principles or has not explained its reasons, the Courts will decline to enforce the Board's decisions. As noted earlier, our enforcement record in the Courts of Appeals is at a historic high, which is strong proof that our decisions have been faithful to the statute.

Of course, all responsible Members realize the value of *stare decisis* –. the value of having stability, predictability and certainty in the law. However, if a Member honestly believes that a prior precedent no longer makes sense, and that a change would be more in keeping with the fundamental principles described above, he/she can – and may feel obligated to – vote to change the law. To be sure, the values of *stare decisis* counsel against an onslaught of changes. But prudently exercised, change is proper and, indeed, was envisaged by Congress.

Similarly, because of the limited terms of Members, and the evolving composition of the Board, it is not surprising that some Boards will be viewed as being more liberal and other Boards as being more conservative. Although such characterizations grossly oversimplify the decisional process and do not account for each Board member's personal and usually nuanced policy orientations, the characterizations may well describe public perceptions. In view of the structure set up by Congress, this should not be seen as startling. But again, prudence requires that a given Board not swing radically to the left or right.

Overall, the Board has not had radical swings to the left or right. Most of the law is well-settled, and the parties litigate the facts under those principles. In a few areas, the law has gone through periods of flux, but ultimately it has settled down. For example, the Board flip-flopped for years on whether misrepresentations are objectionable conduct in an election context. But, in *Midland*, 263 NLRB 127 (1982), the Board ultimately held that such conduct would not ordinarily be objectionable. The law has been thus for 23 years. Similarly, the Board wrestled for years as to the burdens of proof in 8(a)(3) cases. Finally, the Board articulated a clear test in *Wright Line*, 251 NLRB 1083 (1980). The law has been thus for 25 years. In addition, the Board held for a time that interrogation about Section 7 activity was *per se* coercive. After judicial criticism, the Board abandoned this approach in *Rossmore House* 269 NLRB 1176 (1984). The law has been thus for over 20 years. Finally, the Board once held the view that plant relocations were contract modifications, even if the contract contained no clause proscribing relocations. *Milwaukee Spring*, 235 NLRB 720 (1978). The Board later abandoned that view, *Milwaukee Spring*, 268 NLRB 601.(1984), and

then held that relocations were bargainable only in limited circumstances. *Dubuque Packing*, 303 NLRB 368 (1991). The law has been thus for over 16 years.

Protecting Workplace Democracy

These are examples of Board fluctuations which ultimately resulted in stability. I submit that the ultimate stable point was true to the Act's fundamental principles. By being true to its principles, and yet flexible enough to change, the Board has continued to serve the national interest in protecting workplace democracy.

Throughout the years, the NLRB has been a bastion protecting the right of workers to choose union representation or no representation, and if they choose union representation, to make sure that the Act's twin objectives for the collective bargaining process are carried out – that the parties bargain in good faith and that they do so free from governmental interference. We continue to vigorously uphold workers' rights and the Act's bargaining process objectives in a fair and balanced manner.

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