Statement of Wilma B. Liebman,
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before the
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Committee on Health, Employment, Labor and Pensions
United States Senate
and the
Subcommittee on Health, Employment, Labor and Pensions,
Committee on Education and Labor
United States House of Representatives
on
"The National Labor Relations Board:
Recent Decisions and Their Impact on Workers' Rights"

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

Thank you for inviting me to testify today about the recent decisions of the National Labor Relations Board and their impact on workers' rights. It is my privilege to appear before you today.

I dissented from many of the Board's recent decisions -- and from many earlier decisions, as well. Unfortunately, their impact on workers' rights has been uniformly negative. As Member Dennis Walsh and I said in one dissent, the Board's recent decisions "will surely enhance already serious disenchantment with the [law's] ability to protect the right of employees to engage in collective bargaining."[1] While any one decision standing alone may not be cataclysmic in impact, viewed

[1] *Dana Corp.*, 351 NLRB No. 28, slip op. at 11 (Sept. 29, 2007) (dissent).

together, they represent a pattern of weakening the protections of the Act.

Today, fewer workers have fewer rights, and weaker remedies, under the National Labor Relations Act. Virtually every recent policy choice by the Board impedes collective bargaining, creates obstacles to union representation, or favors employer interests. It is inconceivable under this statute that the answer could always be the same. No wonder that there has been loss of faith in the Board. That development is regrettable. It exacerbates an already existing concern whether the Act is still effective in protecting the right to organize and in promoting collective bargaining -- the core purposes of federal labor law, alongside ensuring employee free choice in these matters.

A.

My perspective on the Board's decisions is shaped by my considerable experience there and by a career spent in labor law and labor policy, both in and out of government.

Now in my third term, I am the longest-serving Member of the current Board. I began my service a little more than ten years ago, on November 14, 1997, after being appointed by President Clinton and confirmed by the Senate. I was reappointed and confirmed in 2002 and again in 2006. My current

term expires in August 2011. By that time, I will be the third longest-serving Member in the history of the Board.

Before joining the Board, I served for several years at the Federal Mediation and Conciliation Service (FMCS), first as Special Assistant to the Director and then as Deputy Director. I came to the FMCS from a labor union, the Bricklayers and Allied Craftsmen, where I served as Labor Counsel. Previously, I had been legal counsel at the International Brotherhood of Teamsters for nine years. I began my legal career at the Board, where I served as a staff attorney from 1974 to 1980, after graduating from the George Washington University Law Center here in Washington. In short, my career has come full circle: from the Board, to the Board.

I understand that today's hearing was prompted by the flurry of decisions issued by the Board in September of this year, as its fiscal year drew to a close. I will address some of those decisions specifically, from a dissenter's perspective. But first, I would like to thank both Subcommittees for focusing attention on the Board and its work.

For too long, labor law and policy issues have been removed from public policy discourse. These are difficult issues, and consensus on resolving them may be hard to achieve -- which must explain why the National Labor Relations Act has not been significantly amended since 1947. But I would hope for a common

recognition that these issues are important, no matter how dry and legalistic they sometimes seem -- that they matter to working people, to businesses, and to our economy and our society as a whole. It is critical that these issues receive informed consideration from the public and from the Congress. If our industrial era law does not keep pace with the realities of today's economy and the evolving workplace, then the protections it seems to offer workers are illusory. Today social and economic pressures on the collective bargaining system are compounded by a legal regime that is making it harder for that system to work and by an administrative agency that, at bottom, lacks commitment to fixing the problem.[2]

B.

Let me turn to the Board's September decisions, and begin by putting them in context. First, the decisions attracted attention not only because of their holdings, but because they were issued more or less as a group. On that last score, I hesitate to fault my colleagues at the Board. The Board's goals for promptly deciding cases, under the Government Performance and Results Act (GPRA), are keyed to the fiscal year, which ends

[2] I have addressed this larger issue in an article that is forthcoming in the Berkeley Journal of Labor and Employment Law. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 Berkeley J. Employment & Labor L. 569 (2007). I have submitted the article for inclusion in the hearing record.

on September 30. It has become common in recent years for the Board to push hard during the final months of the fiscal year to issue decisions: in effect, to rush to meet the GPRA deadline. That practice may not be ideal, but it is not nefarious. The result, of course, may be that several major decisions issue virtually at once. And if those decisions all, or nearly all, cut the same way, their impact is felt more forcefully, and the perception of unfairness is more acute. That is what happened this year.

That said, there is something extraordinary about the Board's recent decisions. They are the climax of a trend that is now several years old. The Board is notorious for its see-sawing with every change of Administration. But something different is going on -- more "sea change" than "see-saw." The current Board, it seems to me, is divorced from the National Labor Relations Act, its values, and its goals. Its decisions have demonstrated as much. It was not surprising, perhaps, when the current Board reflexively overturned a series of decisions by the prior, Clinton Board. But the current Board has reached back decades, in some instances, to reverse long-established precedent, often going to the core values of this Act. And it has often reversed precedent on its own initiative, without seeking briefing or oral argument. Most important, when the

Board has decided to reverse precedent, its reasons for doing so have fallen short -- as dissenting opinions have pointed out.[3]

The result has been more than a change in the law, or discontent with the outcome of particular cases. It has been a loss of confidence in the Board and the legitimacy of the process, not only among persons and groups on the losing end of Board decisions, but also among neutral observers, including labor-law scholars.[4] The Board's case intake is down accordingly. Unions have turned away from the Board's election machinery, and employees and unions hesitate to file unfair labor practice charges, skeptical -- or even fearful -- of the result.[5] In an historic twist, unions are increasingly turning to state or local governments for help in protecting workers, with diminished hope that the federal government can be a guarantor of important rights. It is a troubling signal when

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[3] The current Board has been, and remains, deeply divided, in cases both large and small. The percentage of dissents may be unprecedented. In 1984, during what is generally regarded as the most contentious period in the Board's recent history - the tenure of Chairman Donald Dotson - there were dissents in about 17% of all cases, counting dissents by any Member of the Board. In comparison, during Fiscal Year 2007, Member Dennis Walsh and/or I dissented in about 34% of the cases.

[4] See references in 28 Berkeley J. Employment and Labor L. at 570-71.

[5] The Board has experienced a dramatic, and unprecedented, decline in case filings in the past decade. Between fiscal years 1997 and 2007, the number of representation petitions filed dropped from 6,179 to 3,324, a 46% decline. (From 2005 to 2006 alone, the representation case intake dropped by 26%.) For the same ten-year period, unfair labor practice charges dropped from 33,439 to 22,147, a 34% decline.

protesters converge on the Board and demand that the Board be closed for renovations. To dismiss this discontent as merely politics is a mistake, if not irresponsible. We all have an interest in preserving the legitimacy of the legal process.

C.

I will highlight only a few of the decisions issued by the Board in September 2007. Nearly all of the significant cases include a dissent, which hopefully speaks for itself.

Of the September cases, the most significant, and disturbing to me, is a decision creating new obstacles for employers and unions who wish to establish a collective-bargaining relationship by means of *voluntary recognition*. In recent years, unions have increasingly sought to bypass the Board's election machinery and to negotiate voluntary recognition arrangements. The Board's procedures are seen as taking too long, leaving employees vulnerable to coercion by employers, and generating campaign animosity that can taint a new bargaining relationship.

Under long-established law, an employer is free to recognize a union voluntarily -- rather than demanding that the Board conduct an election -- if the union is able to demonstrate that it has uncoerced majority support among employees,

typically by collecting signatures on authorization cards.[6] After voluntary recognition, the Board will not entertain an election petition, or permit an employer to withdraw recognition from the union unilaterally, until a reasonable period for collective bargaining has elapsed. This so-called "recognition bar" rule -- which encourages voluntary recognition and stabilizes collective bargaining -- has been in place, without challenge, for 40 years.[7]

No longer. In *Dana Corp.*, 351 NLRB No. 28 (Sept. 29, 2007), the Board overruled precedent and jettisoned the recognition bar, without solid factual support for its ruling. In dissenting from the Board's decision to consider the issue raised in *Dana,* Member Walsh and I observed that with respect to voluntary recognition, union "[s]uccess ... has prompted greater scrutiny" by the Board.[8]

Now, when an employer agrees to voluntarily recognize a union, after the union has demonstrated majority support, it must post a notice informing employees that it has done so and telling them how they can get rid of the union. That posting opens a 45-day window period, during which employees -- provided

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[6] Any person may file an unfair labor practice charge with the Board, attacking the union's majority support as unlawfully coerced. That procedure may lead the Board to require the employer to withdraw recognition from the union.

[7] See *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966); *Sound Contractors*, 162 NLRB 364 (1966).

[8] *Dana Corp.*, 341 NLRB 1283, 1284 (2004) (dissent).

they marshal 30 per cent support among their co-workers -- may petition the Board for an election to decertify the union.

In dissent, Member Walsh and I explained the serious flaws in the majority's decision. The majority failed to recognize that voluntary recognition is a "favored element of national labor policy," as at least one federal appellate court has put it.[9] By effectively putting voluntary recognition under a cloud, the majority's new scheme discourages employers from recognizing unions without an election. And if an employer does extend voluntary recognition, the parties' new collective-bargaining relationship cannot operate effectively until the window-period closes. Unions will be under great pressure to produce results for employees during that period, yet employers will have little incentive to bargain seriously, if they cannot be sure the relationship will continue. As the dissent put it, the decision in *Dana* "relegates voluntary recognition to disfavored status by allowing a minority of employees to hijack the bargaining process just as it is getting started."[10]

I should point out that the notice to employees required in *Dana* -- informing them that they may challenge the employer's voluntary recognition of a union -- is unprecedented.

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[9] *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).

[10] 351 NLRB No. 28, slip op. at 17.

Remarkably, more than 70 years after the National Labor Relations Act was passed, the Board does *not* require employers to post any notice informing employees of their rights under federal labor law, except three days before a scheduled election and as a remedy in cases where the employer has committed an unfair labor practice.[11] The Board has never acted on long-pending petitions for rulemaking requiring such a notice. It is high time we did.

This is not the only aspect of the *Dana* decision that at least suggests a double-standard. In *Dana*, one of the reasons offered by the majority for its new rule is the claim that Board elections are more reliable in determining employees' true wishes than are the signed cards typically collected by unions to establish majority support. In this respect, *Dana* can be contrasted with another September decision, *Wurtland Nursing & Rehabilitation Center*, 351 NLRB No. 50 (Sept. 29, 2007). There, a two-Member majority held that an employer had lawfully withdrawn recognition from a union -- without an election -- because the union had lost majority support. The majority relied on a petition signed by a majority of employees that stated: "We the employee's [sic] ... wish for a vote to remove

[11] Notably, the Board has required *unions* to provide employees with information related to the required payment of dues. See *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998).

the Union...." The employees, of course, did not get the vote they wanted; rather, their employer was permitted to decide for them whether they would continue to be represented by the union. In dissent, Member Walsh argued that the employer should have been required to seek a Board election.[12] The majority rejected that view, concluding that the petition -- despite its, at best, ambiguous wording -- was enough to establish that employees no longer wanted union representation.

In *Dana*, then, employee-signed cards are treated as suspect when they are used to establish union representation. But in *Wurtland*, the Board had no trouble in relying on an employee-signed petition to *end* union representation, without an election, even though employees seemed to be asking precisely *for* an election. That contrast understandably raised questions about the Board's fairness.[13] From all appearances, the current Board is much more protective of employees who wish to *reject* unionization than it is of employees who seek to unionize. Likewise, unilateral employer action to withdraw recognition from a union is apparently favored, but unilateral employer

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[12] *Wurtland* was decided by a three-Member panel of the Board; I did not participate in the decision. I agree with Member Walsh's dissenting view, however.

[13] Curiously, the *Dana* majority contrasted union authorization cards used to win voluntary recognition with an anti-union employee petition, asserting that the petition would lead to an election. 351 NLRB No. 28, slip op. at 6 fn. 19. That assertion is simply wrong, as *Wurtland* demonstrates.

action – without a Board election -- to recognize a union is not.[14]

Another troubling September decision was *Toering Electric Co.*, 351 NLRB No. 18 (Sept. 29, 2007). There, the Board cut back on the protections granted to union salts: union members who apply for work with non-union employers in order to uncover anti-union discrimination and, if hired, to engage in organizing activity. Salting is an important organizing tool for many unions, especially in the construction industry. The Supreme Court has held, unanimously, that salts are statutory employees

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[14] For another example of this orientation, see the Board's August 2007 decision in *Shaw's Supermarkets, Inc.,* 350 NLRB No. 55 (2007). There the Board permitted an employer to withdraw recognition from the union after the third year of a five-year agreement, even though the employer would not be permitted to file a petition for an election at that point, and even though a petition for a decertification election filed by employees was pending at the Board. In response to my dissent, the majority stated:

> [T]his is a case where the employer is responding to an unsolicited and uncoerced expression of a loss of majority support for the union as a bargaining representative. Our dissenting colleague states that we do not seem to believe that that a Board election, based on the employee-filed petition, will vindicate employee freedom of choice. This is untrue. Rather, our concern is that, in the time it takes to ultimately resolve the representation case, employees *will be forced to endure representation* that they have unquestionably rejected. Id., slip op. at 4-5 (emphasis added).

The alarm about Board election delays that justified withdrawals of recognition in *Shaw's* and *Wurtland* is expressly minimized in *Dana*. 351 NLRB No. 28, slip op. at 6-7.

under the National Labor Relations Act and thus are entitled to the protection of the law, including when they seek work.[15]

In cases involving salts, the Board's framework for finding unlawful hiring discrimination was carefully crafted in a bipartisan 2000 decision, *FES*, 331 NLRB 9 (2000). The current Board, however, has moved farther and farther away from *FES*, taking an approach to salting that is at odds with Supreme Court doctrine and that makes it easier for employers to engage in anti-union discrimination.

To begin, in a May 2007 decision, *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (May 31, 2007), a Board majority -- without being asked to and without inviting briefs -- adopted new rules for determining the length of the backpay period and entitlement to other remedies when a union salt has been discriminated against. Reversing Board precedent that had been approved by the federal courts, the majority said that it would no longer presume that a salt would have worked from the date he was unlawfully denied employment until the date the employer made a valid job offer to him -- the general presumption that applies to all victims of unlawful discrimination. This rule is an example of the well-established principle in Board law (and in our legal system generally) that uncertainties are to be resolved against the wrongdoer: here, the employer who engaged

[15] *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

in unlawful discrimination. Rather than adhere to this principle, the majority adopted a new rule, effectively requiring the salt to prove how long he would have worked -- despite the fact that he had never been hired in the first place and that there is no practical way to establish how long an organizing drive might have lasted, or how it would have turned out, if the salt *had* been hired. Failure to meet this evidentiary burden not only cuts off backpay, but also precludes being instated on the job, as a remedy. As Member Walsh and I pointed out in our dissent, that approach is fundamentally unfair. We said that the Board was treating salts as "a uniquely disfavored class of discriminatees." 349 NLRB No. 118, slip op. at 10.

In September, the Board went farther, again acting on its own initiative, without briefing, oral argument, or even a request to reconsider precedent. The *Toering* decision held, in effect, that employers were free to discriminate against union salts, unless it could be proved that the salts were genuinely interested in employment (as the Board only vaguely defined it). Of course, one purpose of salting is to uncover anti-union discrimination, just as civil rights groups employ testers to seek housing or employment.[16]

[16] The courts have held, notably, that job-applicant testers have standing to sue under Title VII of the Civil Rights Act, as

That decision marked a fundamental shift away from the traditional analysis in labor-law discrimination cases. Historically, discrimination cases have turned on the motive of the *employer*, not on the motive of the applicant for employment. Under the Board's new approach, an employer who categorically refused to hire union members would commit no violation of the law, unless a salt could prove that he would have accepted the job, if offered. Let me be clear. The Board did not simply limit the remedies for salts who failed to meet their evidentiary burden. Rather, it held that there could be no violation of the Act, without satisfactory proof of a genuine interest in employment -- even if the employer's refusal to hire the salt was not motivated, in the least, by the salt's level of interest in the job.

In dissent, Member Walsh and I quoted the Supreme Court's words in a historic 1941 decision, holding that job applicants (and not merely current employees) were protected by the National Labor Relations Act:

> Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization.

Member Walsh and I pointed out in our *Toering* dissent. 351 NLRB No. 18, slip op. at 16 & fn. 12, citing *Kyles v. J.K. Guardian Security Services*, 222 F.3d 289, 300 (7th Cir. 2000).

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185 (1941). We said that the *Toering* decision "creates a legalized form of hiring discrimination." 351 NLRB No. 18, slip op. at 21.

Other September decisions also eroded the Board's ability to enforce the law effectively, by cutting back on the remedies available to workers who have been victimized by unfair labor practices. These decisions continue the trend of recent years. Let me offer two examples.

In *St. George Warehouse*, 351 NLRB No. 42 (Sept. 30, 2007), the Board reversed more than 45 years of precedent to hold, for the first time, that the General Counsel was required to present evidence that an unlawfully-discharged employee took reasonable steps to find a new job after being fired, at the risk of being denied remedial backpay. Traditionally, it has been the *employer's* burden -- as the wrongdoer -- to establish that jobs were available and that the employee did not try hard enough to find one. In dissent, Member Walsh and I explained why the Board's traditional approach was fair and reasonable. Writing separately, I also made a more general point: that the majority was weakening a remedy that "has long been widely recognized as terribly weak to begin with." 351 NLRB No. 42, slip op. at 11. Labor-law scholars seem to be in unanimous agreement that the Board's backpay awards, because they require employees to

mitigate their losses, are simply too small to deter employers from breaking the law.[17]

A second, unfortunate backpay case issued in September was the panel decision in *Grosvenor Resort*, 350 NLRB No. 86 (Sept. 11, 2007). There, a two-Member majority held, among other things, that certain employees, who had been unlawfully permanently replaced for striking, forfeited the right to full backpay, because they waited too long -- more than two weeks -- before seeking new work. To hold otherwise, the majority said, would "reward idleness." 350 NLRB No. 86, slip op. at 3. Member Walsh dissented, pointing out that the employees "did not sit idly by; they were engaged in concerted action [an unfair labor practice strike] to get their jobs back" and "[o]nce it became clear that that was not going to happen, ... they all sought and obtained work." Id. at 11.[18] Member Walsh dissented as well from another, troubling holding of the majority: that certain employees who found interim work should have looked for additional work, instead of waiting for those jobs to begin. As Member Walsh pointed out, there is no good policy reason for demanding that employees look for "'interim interim' work." Id.

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[17] See, for example, Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769, 1789 (1983).

[18] The case was decided by a three-Member panel. I did not participate in the decision, but I agree with Member Walsh's dissent.

at 13. In its parsimonious dissection of backpay claims, *Grosvenor Resort* suggests that the current Board is not committed to providing adequate remedies to victims of unfair labor practices. Reading *Grosvenor Resort*, one almost wonders who the wrongdoer really was: the employer or the employees. What reasonable employee will risk exercising her labor law rights, if she is uncertain about her chances at the Board, but can count on a long delay before a violation *might* be found, more delay before a remedy is awarded, and a meager remedy in the end.

For some apparent violations of the Act, finally, the Board will no longer grant any remedies. Among the September decisions was *BE & K Construction Co.*, 351 NLRB No. 29 (Sept. 29, 2007), a case on remand from the Supreme Court. There, the majority held that a lawsuit that interferes with activity protected by the Act is lawful, even if it was filed with a retaliatory motive, so long as there is a reasonable basis for bringing the suit. In other words, even if an employer's sole motive in bringing the suit is to punish employees financially for daring to exercise their labor-law rights, and even if the suit itself is part of a coordinated series of unfair labor practices, the employer has not committed an unfair labor practice by pursuing litigation. It is certainly true that in this area, the Board must proceed carefully, in light of an

employer's constitutional right to petition the government, including by filing a lawsuit against employees and their union. But the majority's position in *BE & K* that its sweeping protection of employer lawsuits was somehow dictated by the Supreme Court is simply incorrect, as Member Walsh and I pointed out in dissent.

D.

I have touched on only some of the Board's September decisions. But rather than discuss all of them, I would point out that none of these decisions should have surprised a careful observer of the current Board. They represent the crest of a wave set in motion five years ago, when the labor-law tide turned.

Where decisional choices are available to the Board, the choice too often selected narrows statutory coverage or protection. Fewer workers have been afforded fewer rights; employee rights are subordinated to countervailing business interests; meaningful remedies are denied; and recent decisions that tried to update the law have been overruled. Increasingly, the Board has adopted a formalistic approach to interpreting the

law, turning away from the real world and the challenges it poses for labor policy.[19]

To begin, the 2001-present Bush Board (in its various incarnations) has almost reflexively overruled many of the key decisions issued by the prior Clinton Board, which had endeavored to update the law by affording greater protections to workers in an evolving economy. For example, modest efforts were made to give more workers coverage under the Act's protections,[20] to enhance the ability of contingent workers to engage in collective bargaining,[21] to preserve representational rights after a corporate merger or consolidation,[22] and to provide non-union workers (more than 90 percent of today's private sector workforce) with an important protection against unfair discipline.[23]

Simultaneously, the present Board majority has undermined long-established doctrines that promote collective bargaining by allowing employers and unions to enter into voluntary

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19 *See, e.g.*, *Bath Iron Works Corp.*, 345 NLRB No. 33 (2005); *Boghosian Raisin Packing Co.*, 342 NLRB 333 (2004); *Alexandria Clinic*, 339 NLRB 1262 (2003).
20 *New York Univ. Medical Ctr*, 332 NLRB 1205 (2000), *overruled by Brown Univ.*, 342 NLRB 483 (2004).
21 *Sturgis*, 331 NLRB 1298 (2000), *overruled by Oakwood Care Ctr*, 343 NLRB 659 (2004).
22 *St. Elizabeth Manor*, 329 NLRB 321 (1999), *overruled by MV Transp.*, 337 NLRB 770 (2002).
23 *Epilepsy Found.*, 331 NLRB 676 (2000), *overruled by IBM Corp.* 341 NLRB No. 148 (2004).

recognition arrangements.[24] The Board has demonstrated a corresponding reluctance to revisit doctrines that hinder collective bargaining by allowing employers to unilaterally terminate collective bargaining relationships,[25] making it more difficult to bring the "necessary party" into the collective bargaining process,[26] facilitating employer pressure on employees to reject unionization,[27] placing artificial barriers in front of voluntary recognition of unions by employers,[28] and

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24 *See, e.g.*, *Dana Corp.*, 351 NLRB No. 28 (2007) (establishing window period for filing decertification petition, following employer's voluntary recognition of union); *Shaw's Supermarkets*, 343 NLRB 963 (2004) (granting review to consider whether employer waived right to Board election, and whether to permit such waiver with respect to after-acquired stores where union demonstrates majority support). *See also Supervalu, Inc.*, 351 NLRB No. 41 (2007) (holding that contract provision requiring employer to recognize union at newly-organized stores was not mandatory subject of bargaining, absent proof that stores would be included in existing bargaining unit); *Marriott Hartford*, 347 NLRB No. 87 (2006) (granting review to consider whether union had demanded voluntary recognition, permitting employer to file election petition with Board, where union sought agreement for card-check recognition).

25 *Nott Co.*, 345 NLRB No. 23 (2005) (permitting employer to withdraw recognition from union and repudiate collective-bargaining agreement, following employer's acquisition of non-union business and consolidation of union and non-union workforces of equal size).

26 *Airborne Freight Co.*, 338 NLRB 597 (2002) (declining to revisit current standard for determining joint-employer status, which requires direct and immediate control over matters relating to employment relationship).

27 *Frito-Lay*, 341 NLRB 515 (2004) (following precedent that permits employer "ride-alongs" in which employer officials accompany truck drivers for up to 12 hours in order to campaign against union).

28 *Elmhurst Care Ctr.*, 345 NLRB No. 98 (2005) (continuing to prohibit employer from voluntarily recognizing union where

permitting employers to retaliate against employees for engaging in statutorily-protected conduct.[29]

Perhaps the best illustration of the Board's current decisionmaking is its 2006 decision in *Oakwood Healthcare, Inc.*,[30] interpreting key terms in the Act's definition of a "supervisor." This decision came in the wake of the Supreme Court's decision in *Kentucky River*,[31] which had rejected the Clinton Board's attempt at a limiting interpretation with respect to professionals. In *Oakwood*, the Board majority -- relying on dictionary definitions of ambiguous statutory terms, without explaining the choice among definitions -- selected a more-expansive-than-necessary reading of the supervisory exclusion. The majority expressed its indifference to the impact of its decision, rejecting what it called the dissenters' "results-driven approach" in looking to the potential real-world consequences of the majority's interpretation.[32] The Board thus issued a decision that potentially swept many professional employees outside of the Act's protection, while failing to

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employer has hired core group of employees, but is not yet engaged in normal business operations).

29 *Reynolds Electric, Inc.*, 342 NLRB 156 (2004) (continuing to apply rule that discharge of employee for engaging in concerted protected activity is lawful, absent showing that employer was aware of concerted nature of activity).

30 348 NLRB No. 37 (2006).

31 532 U.S. at 706.

32 348 NLRB No. 37, slip op. at 3.

engage in the sort of reasoned decision making that Congress expected from the Board.

Unfortunately, *Oakwood* reflects a trend to limit the coverage of the Act itself. [33] When non-traditional (or non-traditionally employed) workers have sought to organize themselves into a union, the Board majority has denied them statutory "employee" status: graduate teaching assistants,[34] disabled workers,[35] artists' models,[36] and newspaper carriers.[37] The Board has also limited the ability of contingent employees – workers supplied by one employer to another -- to engage in collective bargaining.[38]

In these cases, the majority justified its decisions on dubious policy grounds, giving little weight to the plain language of the Act (which is perhaps surprising, given the

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33 There are two notable exceptions to this trend: the decision to extend the Act's coverage to casinos on tribal reservations, *San Manuel Indian Bingo & Casino*, 341 NLRB 1288 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007), and the decision rejecting the creation of a novel national-security exemption for private airport security screeners, *Firstline Transp. Security, Inc.*, 347 NLRB No. 40 (2006).
34 *Brown Univ.*, 342 NLRB 483 (2004) (holding that educational relationship is not employment).
35 *Brevard Achievement Cnt.*, 342 NLRB 982 (2004) (holding that rehabilitative relationship was not employment).
36 *Pa. Acad.*, 343 NLRB 846 (2004) (holding that models were independent contractors).
37 *St. Joseph News-Press*, 345 NLRB No. 341 (2005) (holding that carriers were independent contractors).
38 *Oakwood Care Ctr.*, 343 NLRB 659 (2004).

majority's adherence to a narrow textualism in *Oakwood*).[39] The Board largely ignored the economic realities of the employment relationships in question, and declined to exercise its discretion to afford a broader group of workers a right to collective representation.

What is the result? Fewer workers have fewer rights under the Act. In several recent decisions, the Board majority has chosen a very confined view of "concerted" activity for the purpose of "mutual aid or protection," as protected by section 7 of the Act.[40] All private sector workers covered by the Act, union-represented or not, have the right to engage in these activities. Yet, in *IBM Corp.*,[41] the Board held that, unlike unionized workers, employees in the non-union sector have no right to a witness at an investigatory interview that might lead to discipline. *IBM* reversed the recent *Epilepsy Foundation*[42] decision, which was significant not just for its specific holding, but also for its reminder that the statute's

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39 348 NLRB No. 37.
40 *See, e.g.*, *Waters of Orchard Park*, 341 NLRB No. 93 (2004) (two nurses who phoned a state hotline to report excessively hot conditions in a nursing home were not engaged in protected activity because their call was made in the interest of patient care, not their own terms and conditions of employment); *Holling Press*, 343 NLRB 301 (2004) (one female worker who sought the assistance of another in her sexual harassment charge against a male supervisor was looking out only for herself and not engaged in activity for mutual aid or protection).
41 341 NLRB 1288 (2004).
42 331 NLRB 676 (2000), *enfd. in relevant part*, 268 F.2d 1095 (D.C. Cir. 2001).

protections apply to unrepresented workers, whether they know it or not.[43] With *IBM*, the Board signaled that it was not prepared to treat non-union workers as fully within the Act's protection. Because so few private sector employees are unionized, statutory protections for non-union workers have never been more important. Such workers do, in fact, spontaneously act together to seek better working conditions,[44] and thus the Act might well matter to them.

The Board majority regularly has found that employee statutory rights must yield to countervailing business interests. These interests are far-ranging. They include private property rights (including an employer's property interest in a piece of scrap paper used to post a union-meeting

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43 The majority justified its action by citing changes in the workplace, and, among other things, "the events of September 11, 2001, and their aftermath." 341 NLRB at 1291. In response, the *New York City Bar Association* issued a highly-critical position paper, which observed that "[t]o rely on such events in determining the rights of employees under the National Labor Relations Act distorts the legitimate decision making process and injects political considerations into a matter of statutory construction." *See New York City Bar Association*, Media Advisory, *The New York City Bar Association Opposes NLRB Decision To Rely on the Terrorism Threat as a Reason to Deny Non-Union Employees The Right to Have A Representative Present During Disciplinary Interviews* (Oct. 20, 2004); *available at* http://www.abcny.org/PressRoom/PressRelease/2004_10_20.htm.

44 *See, e.g.*, *Phoenix Processor*, 348 NLRB No. 4 (2006) (unrepresented workers on fish-processing ship engaged in walk-out to protest 16 ½- hour day; discharge upheld relying on anti-mutiny statute); *Quietflex Mfg. Co.*, 344 NLRB No. 130 (2005) (unrepresented workers engaged in 12-hour protest in employer's parking lot, but did not interfere with access or operations; discharge upheld).

notice),[45] various managerial prerogatives,[46] business justifications,[47] notions of workplace decorum and civility,[48] and employer free speech rights.[49] In cases involving unionized

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45 *Johnson Tech., Inc.*, 345 NLRB No. 47 (2005) (finding lawful employer's warning to employee who used scrap paper to replace union-meeting notice that probably had been removed by management official).

46 Deference to such prerogatives is illustrated by a series of decisions upholding the refusal of employers to provide unions with requested information. *See, e.g.*, *Raley's Supermarkets*, 349 NLRB No. 7 (2007) (dismissing allegation that employer unlawfully refused to provide union with requested information related to grievance involving employer investigation of alleged supervisory harassment); *Northern Indiana Public Serv. Co.*, 347 NLRB No. 17 (dismissing allegation that employer unlawfully refused to provide union with investigatory interview notes involving alleged threat of violence by supervisor); *Borgess Med. Ctr*, 342 NLRB 1105 (2004) (refusing to order employer's disclosure of hospital incident reports, despite finding that refusal to provide reports to union was unlawful).

47 *See, e.g.*, *Bunting Bearings Corp.*, 343 NLRB 479 (2004) (finding business justification for partial lockout limited to union members in bargaining unit), *petition for review granted*, 179 Fed. App'x. 61 (D.C. Cir. 2006); *Midwest Generation, EME, LLC*, 343 NLRB 12 (2004) (finding business justification for partial lockout based on extent of employees' participation in strike), *petition for review granted*, 429 F.3d 651 (7th Cir. 2005).

48 *See, e.g.*, *American Steel Erectors, Inc.*, 339 NLRB 1315 (2003) (finding that employer lawfully refused to hire former union employee who had criticized employer's job-safety record before state agency); *PPG Industries, Inc.*, 337 NLRB 1247 (2002) (finding that employer lawfully disciplined employee who used vulgarity in characterizing employer's conduct toward co-worker being solicited to sign union card). *See also Fineberg Packing Co.*, 349 NLRB No. 29 (2007) (finding that employer did not condone unlawful walkout by employees, despite manager's statement to employees that he was not firing anyone and that employees should "come back tomorrow").

49 *See, e.g.*, Al*addin Gaming, LLC*, 345 NLRB No. 41 (2005) (finding lawful a management official's interruption of off-duty employees' conversation about signing union authorization cards); *Werthan Packaging, Inc.*, 345 NLRB No. 30 (2005) (finding

workers, the decisions signify a *laissez-faire* approach to bargaining, giving employers free rein to operate without meaningful bargaining.[50] Where non-unionized workers were involved, these cases signal that their right to join together to improve working conditions is largely illusory. In several cases, intimidating employer statements made during an organizing campaign were found to be lawful expressions of employer free speech.[51] But where employees make statements or engage in conduct seen as exceeding rules of civility, decorum,

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no objectionable election conduct where manager interrogated employee and stated that voting for union was not in best interests of employee and her family).

50 *See, e.g.*, *Garden Ridge Mgmt., Inc.*, 347 NLRB No. 13 (2006) (dismissing allegation of surface-bargaining by employer and permitting withdrawal of union recognition), *on motion for reconsideration*, 349 NLRB No. 103 (2007) (denying General Counsel's motion for reconsideration); *Richmond Times-Dispatch*, 345 NLRB No. 11 (2005) (finding that employer did not claim inability to pay bonus and so lawfully refused to provide financial information to union, following employer's claim that it was "unable to pay" annual bonus and had "no choice" but to cancel bonus); *Sea Mar Cmty. Health Ctrs.*, 345 NLRB No. 69 (2005) (finding no violation in employer's refusal to bargain over closure of operation that was established by official without approval by upper management).

51 *See, e.g.*, *Medieval Knights, LLC*, 350 NLRB No. 17 (2007) (finding that consultant's statement that hypothetical employer could lawfully "stall out" contract negotiations was not threat that electing union would be futile); *TNT Logistics No. Am., Inc.*, 345 NLRB No. 21 (2005) (finding that supervisor's unsupported statement that employer would lose only customer if employees unionized was lawful expression of personal opinion); *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 NLRB 619 (2004) (finding that employer's statement recounting mass discharge of recently-unionized employees at another employer's hotels was not threat of reprisal); *Curwood, Inc.*, 339 NLRB 1137 (2003) (finding that employer's letter stating that customers viewed unionization negatively was lawful).

or loyalty, the employees have been held to have lost the protection of the Act.[52] These decisions suggest an underlying discomfort with government regulation of business, the notion of collective action, and the zeal that may accompany those efforts: the fundamental premises of this statute.

Although truly meaningful and effective remedies for unfair labor practices are limited under the Act, the Board nonetheless has refused to exercise the full remedial discretion it does have. For example, the Board has been reluctant to pierce the corporate veil to impose liability for unfair labor practices.[53]

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52 *See, e.g.*, *Five Star Transportation, Inc.*, 349 NLRB No. 8 (2007) (upholding employer's refusal to hire school bus drivers, employed by prior contractor, who had criticized employer in letters to school board).

53 *See, e.g.*, *Flat Dog Productions, Inc.*, 347 NLRB No. 104 (2006). In one recent glaring example, the Board majority refused to pierce the corporate veil to hold corporate co-owners personally liable for backpay obligations to employees who suffered financial consequences of flagrant unfair labor practices. By the time of the backpay proceedings, the co-owners had distributed all of the company's funds to themselves. The Board majority held, however, that because the distributions occurred before the unfair labor practice charges were filed, the distributions did not constitute an evasion of the company's legal obligations. *A.J. Mechanical, Inc.*, 345 NLRB No. 22 (2005). The United States Court of Appeals for the District of Columbia Circuit disagreed, stating bluntly:

> Surely, it is reasonable to infer that a thief who robs a bank in broad daylight knows well before the date of his indictment that he may one day face criminal liability. The corporate conduct at issue here is the labor-law equivalent of a daylight robbery. It was neither subtle nor close to the line of legality.

Carpenters and Millwrights, Local Union 2471 v. NLRB, 481 F.3d 804 (D.C. Cir. 2007). See also *US Reinforcing, Inc.*, 350

The regular refusal to issue *Gissel* bargaining orders (which require an employer to recognize a union with majority support, where the employer's unfair labor practices have frustrated the election process) is another such example.[54] So too is the continuing rejection of the "minority" bargaining order, where an employer's egregiously unlawful conduct has prevented a union from establishing majority support.[55] The Board has also shown no interest in adopting new modest monetary remedies for victims of discrimination.[56] Indeed, the Board's rulings have created new obstacles to backpay awards.[57] Decisions about other minor remedial innovations, such as the electronic posting of required

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N.L.R.B. No. 41 (2007) (refusing to find that two companies were alter egos, where principals co-habited but were not married).

54 *See, e.g.*, *Hialeah Hospital*, 343 NLRB 391 (2004).

55 *First Legal Support Services*, 342 NLRB 350 (2004).

56 *Hotel Employees, Local 26*, 344 NLRB No. 70 (2005) (declining to order "tax compensation" remedy for victim of discrimination who incurs heightened tax burden as result of receiving lump sum backpay award).

57 *St. George Warehouse*, 351 NLRB No. 42 (2007) (reversing precedent and placing burden on General Counsel to produce evidence concerning discriminatee's job search, when employer demonstrates availability of jobs), and *Grosvenor Resort*, 350 NLRB No. 86 (2007) (denying backpay to discriminatees for not seeking work quickly enough and for not seeking interim employment while waiting for previously secured interim employment to commence), discussed more fully above. See also *Anheuser-Busch, Inc.*, 351 NLRB No. 40 (2007) (reversing precedent and holding that employees discharged based on information from unlawfully-installed security cameras are not entitled to remedy); *Aluminum Casting & Engineering Co.*, 349 NLRB No. 18 (2007) (denying employees full backpay for unlawfully withheld wage increase); *Georgia Power Co.*, 341 NLRB 576 (2004) (denying employee unlawfully withheld promotion because General Counsel failed to prove that employee "certainly" would have been promoted).

notices to employees, have been deferred for no compelling reason.[58]

Some of the Board's recent decisions have failed to survive judicial scrutiny.[59] Other decisions have navigated the layers of precedent by ignoring precedent entirely or by distinguishing earlier cases on abstract, questionable grounds.[60] And too many

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58 *Nordstrom, Inc.*, 347 NLRB No. 28 (2006).

59 *See Jochims* v. *NLRB*, 480 F.3d 1161, 1164 (D.C. Cir. 2007) (reversing Board's finding of supervisory status, observing that "the Board completely deviated from its own precedent and issued a judgment that is devoid of substantial evidence"); *Guardsmark, LLC* v. *NLRB*, 475 F.3d 369 (D.C. Cir. 2007) (reversing Board's finding that employer's anti-fraternization rule was lawful); *United Steel Workers* v. *NLRB*, 179 Fed. Appx. 61 (D.C. Cir. 2006) (remanding, as inconsistent with precedent, Board's finding that partial lockout was non-discriminatory, and observing that it was "not appropriate" for Board to "speculate" as to employer's motive for lockout, given employer's burden of proof); New *England Health Care Employees Union* v. *NLRB*, 448 F.3d 189, 193 (1st Cir. 2006) (reversing Board's "arbitrary and capricious" determination that employer lawfully refused to reinstate economic strikers, based on secret hiring of permanent replacements); *International Chemical Workers Union Council v. NLRB*, 447 F.3d 1153 (9th Cir. 2006) (reversing, based on lack of substantial evidence, Board's determination that employer did not plead inability to pay and thus lawfully refused to provide financial information to union during bargaining); *Slusher* v. *NLRB*, 432 F.3d 715 (7th Cir. 2005) (reversing Board's determination that employer lawfully discharged union steward for purportedly harassing anti-union employee); *Local 15, Int'l Bhd. of Electrical Workers* v. *NLRB*, 429 F.3d 651 (7th Cir. 2005) (reversing Board's determination that partial lockout was non-discriminatory and remanding with instructions to find lockout unlawful); *Brewers & Maltsters, Local Union No. 6* v. *NLRB*, 414 F.3d 36 (D.C. Cir. 2005) (reversing, based on conflict with precedent, Board's refusal to grant make-whole remedy to employees disciplined as result of employer's unlawful installation of surveillance cameras).

60 *See, e.g.*, *Bath Iron Works*, 345 NLRB No. 33 (2005), *enf'd.*, 475 F.3d 14 (1st Cir. 2006) (dissenting opinion) (implicating

decisions have cast doubt on precedent unnecessarily, or have applied it reluctantly, suggesting that the law may soon change, and sowing confusion.[61] This kind of decisionmaking is of little use to parties struggling to make sense of their statutory rights and duties. While it may dispose of particular cases, it is ultimately unhelpful in shaping a coherent national labor policy.

Meanwhile, the Board's approach to exercising and preserving its own authority is contradictory. It has jealously guarded its representation-case functions (discouraging union attempts to organize outside the Board's procedures),[62] while eagerly deferring to dubious arbitration decisions in unfair labor practice cases (sometimes frustrating the vindication of statutory rights).[63]

"competing analytical approaches where an employer claims the right to act unilaterally with respect to a mandatory subject of bargaining, based on language in a collective-bargaining agreement").

61 *See, e.g.*, *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB No. 33 n. 21 (2006); *Construction Products, Inc.*, 346 NLRB No. 60 n. 1 (2006); *Siemens Building Tech.*, 345 NLRB No. 91 n. 5 (2005); *Vanguard Fire & Supply Co., Inc.*, 345 NLRB No. 77 n. 9 (2005); *Daimler-Chrysler Corp.*, 344 NLRB No. 154 fn. 1 (2005); *Contract Flooring Systems, Inc.*, 344 NLRB No. 117 at 1 (2005); *Meijer, Inc.*, 344 NLRB No. 115 n. 7 (2005).

62 *See, e.g.*, *Boeing Co.*, 349 NLRB No. 91 (2007); *Advanced Architectural Metals, Inc.*, 347 NLRB No. 111 (2006); *United States Postal Serv.*, 383 NLRB. No. 3 (2006).

63 *See, e.g.*, *Kvaerner Phila. Shipyard, Inc.*, 347 NLRB No. 36 (2006); *Smurfit-Stone Container Corp.*, 344 NLRB No. 82 (2005); *Aramark Services, Inc.*, 344 NLRB No. 68 (2005).

Perhaps this contradiction can be explained by the Board's orientation toward protecting employee free choice in the narrow sense: taking special care to ensure that employees are free to refrain from union activity and to reject union representation, while showing little concern about the rights of employees to engage in concerted activity, to choose (and keep) a union, and to be free from anti-union discrimination. Several Board decisions have made it more difficult for unions to organize workers.[64] As discussed above, the Board has rolled back protections for "salts," union members who seek employment to engage in organizing activity.[65] Other decisions have shown a disappointing reluctance to confront what clearly seemed to be

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64 *Teamsters Local 75* (*Schreiber Foods*), 349 NLRB No. 14 (2007) (finding that union unlawfully charged objecting non-members for organizing expenses, where union failed to prove that organizing within same industry leads to increased union wage rates); *Randell Warehouse, Inc.*, 347 NLRB No. 56 (2006) (reversing Clinton Board precedent and finding that union's videotaping of campaign-literature distribution was objectionable); *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) (reversing precedent and liberalizing standard for finding pro-union supervisory conduct objectionable in context of representation elections). *See also Correctional Medical Services, Inc.*, 349 NLRB No. 111 (2007) (upholding discharge of unrepresented employees who picketed health-care employer, based on union's failure to provide statutorily-required advance notice).

65 See *Toering Electric Co.*, 351 NLRB No. 18 (2007) (requiring General Counsel to prove that salt is genuinely interested in employment with employer, to establish violation in hiring-discrimination case); *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007) (reversing judicially-approved precedent and requiring General Counsel to establish duration of remedial period for salts).

whole-scale employer discrimination in hiring.[66] Tellingly, the Board has stated expressly, for the first time, that the exercise of employee free choice is superior in the statutory scheme to the stability of collective bargaining.[67] This elevation of one of two competing ideals in the Act undoes the delicate balance long established in Board doctrine, and signals a devaluing of what is unique about this statute: the protection of collective rights.

E.

My testimony today has largely been a reprise of my disagreements with the Board's majority. Regrettably, the Board is deeply divided. I wish that the Board were moving the law in a better direction, in harmony with the goals of the statute. But let me end my testimony by echoing the remarks that I made at my last swearing-in and by explaining why -- even being in

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66 *Zurn/N.E.P.C.O.*, 345 NLRB No. 1 (2005), *petition for rev. denied*, *Northern Michigan Bldg. & Const. Trades Council* v. *NLRB*, 2007 WL 1805667 (6th Cir. June 20, 2007).

67 *Nott Co.*, 345 NLRB No. 23 (2005) ("[A]lthough industrial stability is an important policy goal, it can be trumped by the statutory policy of employee free choice. That policy is expressly in the Act, and indeed lies at the heart of the Act."). For illustration of the consequences of this orientation, see *Dana Corp*, supra; *Shaw's Supermarkets, Inc.*, 350 NLRB No. 55 (2007)(permitting employer to withdraw recognition from union after third year of five-year agreement, even though petition for election could not be filed); *Badlands Golf Course*, 350 NLRB No. 28 (2007) (permitting employer to withdraw recognition from union less than three weeks after minimum six-month period of insulated bargaining, following earlier unlawful withdrawal of recognition).

the minority, and even at a difficult historical moment -- I feel honored to serve on the Board and to pursue the values embodied in our labor law.

Every day, I read cases involving working people who, despite the odds and the obstacles, join together to improve life on the job. They work on assembly lines and in cardiac wards, on construction sites and in mega-stores. They slaughter hogs and drive trucks, clean hotel rooms and care for the disabled. Sometimes they have unions to help them, but other times they act spontaneously to help each other -- a reminder that solidarity is part of who we are. As long as that is the case, then the values embodied in the Act are living values, even after 71 years.

Whatever its flaws and anachronisms, and whatever the lapses made by the Board in applying it, the National Labor Relations Act is a remarkable piece of legislation. At its heart, the Act is a human rights law. No one in 1935 would have labeled the statute that way, but the label is accurate. The concept of fundamental rights at work is now part of the international legal order. Freedom of association and the freedom to engage in collective bargaining are recognized as core principles of a democracy. The National Labor Relations Act is the foundation of our commitment to values now recognized around the world.

Today's labor laws were the product of tremendous struggle. We honor that struggle when we take the Act seriously, when we enforce it fairly and thoughtfully, and even when we point out its shortcomings. Certainly, the Board operates under significant constraints: a judicial, political and economic climate indifferent or even hostile to collective bargaining; an arguably antique statute, and a lack of administrative will. Yet I would suggest that the Board, even under the current statutory scheme, can play a modest but meaningful role in preserving the values of this Act and in furthering its aims. Its failure to do even that is an unfortunate lost opportunity. At a time when union membership is at a historic low point, and the earnings gap growing, recent Board decisions are reinforcing trends that imperil collective bargaining as a national policy goal and that threaten to undo Congressional assumptions about collective action as a means to redress economic inequality. Restoring federal labor law to its intended purposes is obviously no panacea. But it would be a step in the right direction.

Thank you again for the opportunity to participate in this hearing.