TESTIMONY
BEFORE THE COMMITTEE OF EDUCATION AND THE WORKFORCE
UNITED STATES HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2011

HEARING ON
"CULTURE OF UNION FAVORITISM: RECENT ACTION OF THE NATIONAL LABOR RELATIONS BOARD"

ARTHUR J. MARTIN
SCHUCHAT, COOK & WERNER
ST. LOUIS, MISSOURI

Chairman Klein, Ranking Member Miller, and members of the Committee, thank you for your invitation to appear before you today. My name is Arthur J. Martin and I am a partner in the St. Louis labor law firm of Schuchat, Cook & Werner. In my practice I represent labor unions and individual employees in their dealings with employers primarily in Missouri and Illinois. I have served as Chair of the Labor Law Section of the Bar Association of Metropolitan St. Louis and I have been an Adjunct Professor of the St. Louis University School of Law since 1994. During law school I worked as an Intern for Judge Theodore McMillian of the United States Court of Appeals for the Eighth Circuit and afterwards as a Clerk for United States District Court Judge William Hungate. I received my law degree from St. Louis University in 1984. From 1972 to 1981, I served as an Organizer, Business Agent, and District Manager for the International Ladies Garment Workers' Union, AFL-CIO.

The title of today's hearing is the "Culture of Union Favoritism for the National Labor Relations Board." I believe that this is a serious misnomer. In my testimony today I will address the claim that the National Labor Relations Board (NLRB or the Board) has radically changed the way the Act is administered in order to advance the

interests of labor at the expense of employers and individual employees. Let me assure you, as a labor lawyer for almost thirty years representing workers and labor unions, this is most definitely not the case. The NLRB has issued some decisions that labor has applauded and some that labor has criticized. It has taken modest steps to modernize and streamline its procedures. But it has by no means changed the landscape of labor relations.

1. **NLRB decisions have implemented policies traditionally shared by both Republican and Democratic administrations.**

Courts have long recognized that it is proper and desirable for independent adjudicatory agencies, such as the Board, to administer the Act through decisions within the scope of their expertise. The decisions issued by the Board in the past year and a half have been sometimes unanimous, sometimes along party lines – much as past Boards have done – and sometimes split but not along party lines. In some cases, the position adopted by employers has prevailed and in others the position advanced by labor unions has prevailed. It would be wildly inaccurate to claim that the Board's decisions have always favored labor unions. Recent Board decisions have been well within the bounds of the Board's authority and the parameters within which that authority has been exercised by past Boards.

Certain Board decisions have restored doctrines that existed prior to Bush era decisions which overturned decades of established precedent. For example, in *Lamons Gasket Co.* 357 NLRB No. 72 (2011), the Board reinstated its voluntary recognition doctrine which had existed for forty years prior to the Bush era Board's decision in *Dana Corp.*, 351 NLRB 434 (2007). That Bush era decision, by a sharply divided Board, had the effect of undermining the right of an employer to voluntarily recognize a union freely

selected by a majority of its employees to represent them. The result encouraged litigation, created uncertainties for employers and workers alike, destabilized the bargaining relationship, discouraged good faith efforts to mutually and successfully resolve collective bargaining issues, and added layers of regulation that did not exist before. The recent decision merely returned to the prior, established doctrine that had existed since 1966, and which had been uniformly sustained in the federal courts.

Similarly, in *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), the Board restored the successor bar doctrine which had been overruled by the Bush era Board's decision in *MV Transportation*, 337 NLRB 770 (2002). The Board returned to its prior practice of allowing a successor employer and union representing the employees of a company to bargain without interference for up to a year after the transition. The Board reasonably concluded that, consistent with the Act's primary goal of stabilizing labor-management relationships, the union and the employer should have an opportunity to work out the details of the transition without interference or litigation that would add to the uncertainty and confusion that occurs when an employer is sold or taken over. In connection with this decision, the Board modified its long-standing contract bar doctrine in order to ensure that represented workers have adequate and periodic access to the Board's election process to exercise their free choice.

New York, New York Hotel & Casino, 356 NLRB No. 119 (2011), raised the right of employees to protest against their employer when their employer happens to be located inside a casino owned by another employer. In this case, off-duty restaurant workers, who were regularly employed at a restaurant on casino property, handbilled restaurant and casino customers in nonworking areas of the casino which were open to

the public. The Board sought to accommodate the statutory rights of the workers with the property and managerial rights of the casino. In a ruling it described as very narrow, it concluded that the casino could lawfully exclude the off-duty restaurant employees upon a demonstration that the employees' activity significantly interfered with the casino's use of the property or where the exclusion was justified by another legitimate business reason, such as the need to maintain production and discipline.

A Board ruling in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011), clarified the criteria for determining appropriate units in health care facilities other than acute care hospitals, which are covered by the Board's Health Care Rule. The Board rejected a prior special test which had been used for determining bargaining units in nursing homes and returned to its traditional community-of-interest standard, long-used in other workplaces. Contrary to concerns raised when the Board requested briefs in this case, the Board did *not* create new criteria for determining appropriate bargaining units outside of health care facilities.

Some have criticized the Board's recent bannering decisions. In *Carpenters Local 1506 (Eliason and Kanuth of Arizona, Inc.)* 355 NLRB No. 159 (2010), the Board held that a union's peaceful display of a banner in front of a secondary employer's place of business – without obstruction or coerciveness – does not constitute picketing prohibited by Section 8 (b)(4) of the Act. It should not be a surprise to anyone that when a union is not engaged in picketing, it is entitled to engage in the same First Amendment free speech activity as any other organization or group of people. Hardly a day goes by that I don't drive by a sign or a banner criticizing some conduct or entity from Planned Parenthood to, in my area of the country, eminent domain. Even if it so

desired, the Board may not infringe upon free speech rights. Indeed, several federal district courts and the Ninth Circuit Court of Appeals had already rejected previous Board petitions to enjoin these peaceful informational displays on just such grounds. A contrary decision by the Board would have faced a very hostile reception by these federal courts when it attempted to enforce its decision.

It is important to note that most Board decisions are unanimous. For example, a unanimous Board held, in *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010), that back pay awards would be computed using interest compounded on a daily basis, as is done with damage awards in other areas of the law. In another unanimous decision, [Liebman, Pearce and Hayes], in *Garden Grove Hospital & Medical Center*, 357 NLRB No. 65 (August 26, 2011), the Board ruled that an employer violated the Act by unilaterally discontinuing employees' reserve sick leave benefit without bargaining with the workers' union and it ordered the change be rescinded.

Other Board decisions have been divided, but not always along party lines. For example, in *Los Angeles Times Communications, LLC*, 357 NLRB No. 66 (August 25, 2011), former Chairman Liebman and Members Becker and Hayes agreed to overrule a Regional Director and reinstate a petition for a vote to rescind a union-security provision – a ruling contrary to the union's interest; then-Member Pearce dissented and would have dismissed the petition. And in *Continental Auto Parts*, 357 NLRB No. 78 (August 26, 2011), former Chairman Liebman and Member Hayes overturned an Administrative Law Judge and held that an employer did NOT unlawfully terminate a worker for union activities – another ruling contrary to the union's position; while Member Becker dissented.

Even as some argue that the Board is in the pocket of organized labor, the Board continues to issue decisions with which unions vehemently disagree. For example, in *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47 (August 9, 2011), the Board held that backpay may not be awarded to undocumented workers discharged in violation of the Act even where the employer employed the workers with knowledge that they lacked work authorization. The U.S. Supreme Court decided in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 US 137 (2002), that the NLRB could not award backpay to undocumented workers in a case in which the workers had presented fraudulent work-authorization documents to obtain employment, in violation of federal immigration laws. The court arguably left open the question of whether the NLRB could award backpay to undocumented workers where the employer knowingly employed them in violation of immigration laws. Nevertheless, the Board concluded that the Supreme Court's decision in *Hoffman Plastics* closed the door on backpay for undocumented workers regardless of whether the workers or their employer had violated immigration law. The Board concluded that "awarding backpay to undocumented workers lies beyond the scope of our remedial authority, regardless of whether the employee or employer violated the IRCA."

In *Stericycle, Inc.*, 357 NLRB No. 61 (August 23, 2011), the Board held that a union engages in objectionable election misconduct when it finances a lawsuit on behalf of unit employees during the critical period between the filing of an election petition and the date of the election. In adopting this new rule, the Board overruled its existing precedent and overturned the union's 23-12 election victory. Member Hayes concurred

in this result and in overruling existing precedent, but dissented from the remainder of the decision.

Unlawful conduct by a union was found in *SEIU Nurse Alliance Local 121RN (Pomona Valley Hospital Med. Ctr.)*, 355 NLRB No. 40 (June 8, 2010). The Board reversed an administrative law judge and found that the union had unlawfully coerced employees by circulating a flyer that implied they would be fired or demoted if they stopped paying union dues where the union security clause had expired.

The rights of non-member dues objectors under *CWA v. Beck*, 487 U.S. 735 (1988), were addressed in *Machinists Lodge 2777 (L-3 Communications)*, 355 NLRB No. 174 (Aug. 27, 2010). The Board ruled that a union could not require a non-member objector, who had informed the union of his continuing objection, to renew his objection annually unless the union demonstrated a legitimate justification or otherwise minimized the burden imposed. A similar decision was reached in *IBEW Local 34,* 357 NLRB No. 45 (Aug. 10, 2011).

As these decisions illustrate, the Board has hardly pandered to the interests of labor unions. Instead, this range of outcomes is strong evidence that it has engaged in a thoughtful, reasoned, effort to apply the Act's provisions fairly.

2. The Board has engaged in rule-making regarding notifications of employee rights and its election procedures in order to better inform, streamline its processes, take advantage of efficiencies and cost-savings from modern communications technology, and ensure that workers who want to vote to form a union have a chance to do so.

In late August, the Board issued a Final Rule requiring employers to post a notice of Employee Rights under the NLRA. The notice is similar to one required to be posted by federal contractors pursuant to an Executive Order issued in 2009. One major

change was made to the NLRB's final notice – specific language was added to inform workers that they have the right "to refrain from engaging in any" union or other protected activities under the Act. The notice lists examples of illegal conduct by employers and by unions and advises workers of their rights under the Act, including their right to "choose not to do any of these activities, including joining or remaining a member of a union." The Board's notice is in line with and little different from those required by various state and federal employment agencies. In our office, like any other employer, the notice is posted among Missouri state–required notices regarding the minimum wage, unemployment benefits, workers' compensation, and discrimination in employment; and federal notices regarding equal employment opportunity, OSHA, polygraph protection, military family leave, and the Family Medical Leave Act. I believe that complaints about this posting requirement reveal that criticism of the Board on this matter is a political attack rather than an objective view that the Board should not inform employees of their federally protected rights.

In my practice, I hear from employees who are disciplined or retaliated against because their employers are simply unaware of the Section 7 NLRA rights. We recently had cases where employers disciplined employees, independent of any labor union, because they had protested overtime scheduling or inquired about employee benefits. The notice posting will serve the very important and very necessary purpose of informing all parties in the workplace of conduct that may be inappropriate.

In June of this year, the Board issued a Notice of Proposed Rule-making regarding its election procedures. These proposed changes are necessary, commonsense proposals to ensure a fair process for workers who want to vote on

whether to form a union. The proposed rules will update and modernize a process that has remained relatively unchanged for decades and are consistent with modern standards of administrative and judicial procedure. The current election process incentivizes frivolous and irrelevant litigation and rewards pointless and duplicative appeals with delays, delays, and more delays, both before and after an election.

I have witnessed employers manipulate the Board's election process to create delays where no real dispute exists. There have been occasions where I have actually had to litigate the existence of my client before we could proceed to an election. The proposed rules will, in most cases, allow the election to go forward and leave the parties free to litigate afterward. In addition, the proposed rules will streamline the process by incorporating the use of electronic transmittals and modern evidentiary procedures to achieve substantial savings to the parties and the Board in time, costs and resources. It is apparent that the Board like other government agencies will be expected to continue to do more with less. Rules that streamline agency processes and avoid duplicative litigation by consolidating review serve everybody's interests. For example, in the event the union is not successful in the election, resources will be saved that would otherwise have been expended litigating in advance of the election.

We were recently involved in a case where the employer refused to give the Region its position as to any issues prior to the representation hearing, forcing the union to guess as to what the employer would argue. At the hearing, the employer contended that its project supervisors and project managers (involving less than 20% of the unit) were employees and not supervisors. Notwithstanding the positions it took in the election case, the employer subsequently argued at the related unfair labor practice trial

that various crew leaders that worked under these project supervisors and managers, and which the employer had fired for their union activity, were statutory supervisors. That is, the employer took the exact opposite position as to the status of the same individuals in two, virtually contemporaneous NLRB proceedings. *ADB Utility Contractors*, 355 NLRB No. 172 (2010) - (subsequently settled on appeal). The proposed election rules would avoid this useless waste of resources and minimize such duplicitous litigation strategies.

The argument that post-election rules somehow take away the employer's voice is a political talking point without any basis in fact. We all know that employees in a workplace without a union serve purely at the pleasure of their employer; they are "at will" employees. The employer has unfettered access to the employees at any and all times at the employer's sole discretion. Employers may and do routinely require their employees to listen and be attentive to their position under pain of discipline – whether workers are trying to form a union or not. If there is a genuine interest that all parties are properly informed prior to an election, one could require that a representative of the union – which otherwise is barred from workplace opportunities to communicate with employees – be allowed to participate in the employer's captive audience meetings. In my experience, employers have ample opportunities to provide information to employees, from day one when an employee is hired and through the entire effort by workers to form a union.

3. **The NLRB Acting General Counsel has acted to remedy violations of the Act; preserve the Act's jurisdiction; and provide guidelines for the Board's constituencies.**

This spring the Acting General Counsel of the Board filed a complaint against the Boeing Company related to Boeing's plan to transfer airplane assembly jobs, allegedly in retaliation for its workers' exercise of their federally protected rights. I believe that efforts to thwart this case are premature and inappropriate. Premature because the case is currently being heard by an Administrative Law Judge in a trial that started on June 14; and inappropriate because this is an on-going prosecution being conducted in accordance with due process protections.

I will tell you that one of my brothers, Tony, works on an aircraft assembly line at Boeing's facility in St. Louis County. I spoke to him and his wife before coming out here this week and they are well aware of statements made by Boeing executives that the assembly work from Seattle was transferred to South Carolina because the workers in Washington state exercised their federally protected rights. If that is proven to be the case and there is no remedy, the message is loud and clear: You may have rights under the law but if you exercise them, you risk losing your job.

The complaint filed by the Acting General Counsel against Boeing seeks a remedy no different than the remedy the Board routinely seeks in similar cases for similar violations of employee rights. It is a long-standing and well-established remedy that has been endorsed and approved by the U.S. Supreme Court. To argue that the Board is somehow out of control by seeking such a remedy distorts the facts and ignores decades of Board precedent. Even though Boeing is a huge company, it should be obligated to abide by the same rules and be required to follow the same process and

be subject the same penalties that everyone else is: Let the process work, make your case at a hearing on the facts and if you're guilty take your medicine.

Eliminating the only effective remedy that the Board can impose when an employer violates workers' rights by illegally transferring or relocating work, whether to a subcontractor, independent contractor, or off-shore company, will gut the National Labor Relations Act. The Board's remedies are very circumscribed; it has no authority to impose fines or penalties and no other meaningful remedy for such illegal conduct. We recently had a case where the employer unilaterally increased its hiring of lower paid, non-unit temporary staff instead of hiring better paid full-time employees during bargaining for a first contract. The employer then transferred work to non-unit temporary employees, taking it away from bargaining unit employees. The Board found merit to the charge filed by the Union and the parties then worked out a settlement by agreeing to a first contract. Boeing is likewise free to defend its conduct or work out a settlement. A requirement to restore work which has been illegally transferred is simple justice.

Since the courts have instructed that, as a federal statute, the NLRA preempts conflicting state and local governmental action, one of the important roles of the NLRB is to protect the Act from such encroachments. Republican and Democratic-appointees alike have done this throughout the Agency's history. The Bush era Board successfully argued that a state statute in North Dakota requiring non-union members to pay for the cost of processing their grievances conflicted with federal law. *NLRB v. State of North Dakota*, 504 F.Supp.2nd 750 (D.N.D. 2007). The Board has taken similar positions in support of other state actions as well, including a challenge brought by the Chamber of

Commerce arguing that a California statute was pre-empted by the NLRA and should be declared void, *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008); against an ordinance in Milwaukee which had been supported by labor unions, *Ass'n of Commerce v. Milwaukee County,* 431 F.3d 277 (7th Cir. 2005); and in opposition to other statutes the Board believed impaired employees' rights, *Livadas v. Bradshaw*, 512 U.S. 107 (1994); *NLRB v. State of Illinois Dep't of Emp't Sec.*, 988 F.2d 735 (7th Cir. 1993).

Despite this extensive history of taking such action in similar circumstances, the Board's recent decision to authorize the Acting General Counsel to file lawsuits to protect employees' federal rights has come under attack. Four states, Arizona, South Carolina, South Dakota and Utah, have approved constitutional amendments which directly conflict with the NLRA by changing the way that workers can choose union representation. To date, one lawsuit has been filed; it seeks to enjoin enforcement of the state constitutional amendment in Arizona insofar as it conflicts with the federal statutory rights of private-sector employees to designate a union to represent them. The U.S. Supreme Court has upheld the Board's authority to seek federal court injunctions against state actions that conflict with federal rights. *NLRB v Nash – Finch Co.*, 404 U.S. 138, 144-147 (1971).

Another important function of the Office of the General Counsel is to provide guidance in new and unsettled areas of the law. The current Acting General Counsel has undertaken to do just that. In August 2011, he issued a report summarizing recent case developments arising in the context of today's social media. The report provides helpful guidance that serves to put parties on notice of the position of the Office of the General Counsel regarding what is and what is not protected in the context of various

social media, such as Facebook, blogs, etc. The Acting General Counsel is to be complimented for adapting the Board's traditional policies to electronic media in the 21st century workplace, and most importantly, for his transparency and diligence in making this information available for use by the Board's stakeholders. Employers, workers and labor unions need the predictability and stability that this guidance provides.

4. **As a practical matter, employees, the unions that represent them, and employers are doing their best to work together through difficult times; the Board is playing a critical role in facilitating that process and helping it to be successful.**

The claim that somehow the Board is engaging in conduct that hamstrings business and costs jobs has no basis in fact. This Board – as the Boards before it - simply administers a process, which is ultimately completely voluntary. There is no requirement that employers enter collective bargaining agreements; nor does the Board attempt to dictate what must be included in a collective bargaining agreement. The parties are free to choose the terms that suit them.

I would like to make sure you understand that in the world in which I live, and in communities like mine all across the country, unions have worked hand in hand with their employers since the economic collapse in 2008 to save jobs and preserve work. I have been involved in many negotiations where unions and employers have routinely and successfully dealt with extremely difficult issues involving employee benefits, retirement security, work jurisdiction, wage freezes, involuntary employee furloughs, wage cuts, and so on. At the heart of this process, all parties understand that their rights are secure and protected by the Board. It is within this framework and because of this framework that they have the freedom to work out their differences as they see fit.

And the process works – it works because the Board supports it and in that way, facilitates all of our efforts.

449627.docx