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"WE'RE OFF TO SEE THE WIZARDS"
A PANEL DISCUSSION ON THE BUSH BOARD'S DECISIONS

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I. Myth and Reality

The subject of discussion for this panel of management and union labor lawyers is the "Bush Board" as comprised of its Republican Board Chairman Robert Battista and Members Peter Schaumber and Ronald Meisburg, and its two Democrat Members Wilma Liebman and Dennis Walsh. A number of important Board decisions will be discussed, and our views about them are likely to differ widely. At such meetings where Board decisions are discussed, and depending upon their sympathies, participants argue variously that decisions are well reasoned, consistent with statutory purposes and established precedent, and in accord with reality and sound labor policy, or that decisions are poorly reasoned, in conflict with statutory purposes and long-established precedent, and out of touch with sound policy and reality. I suspect that we may hear some of that today as management attorneys predictably will be more supportive of the Bush Board majority and union attorneys more supportive of the dissenters.

Preliminarily, though, there some common themes regarding Board decision-making about which there should be critical mention.

A. Reversal of "Precedent"

Let's be honest, neither Republican nor Democrat Board majorities have a monopoly on reversing precedent. In more than 40 years of practice inside and outside the Board, I have seen "well-established precedent" reversed often and sometimes

repeatedly by Boards of all persuasions. Many of the cases and issues to be discussed provide vivid examples.

Sometimes it is difficult, too, to determine just how "established" a precedent is. The Board has been in existence for 70 years. One of the most interesting features of Board law is that there seems to be "precedent" to support almost any argument one wishes to make. It is common for Board dissenters to assert that a Board majority is overruling "long-established" precedent, with the majority arguing that it is doing nothing of the sort. Those assertions seem to have little restraining effect. More important are the arguments about what makes sense and whether the majority or the dissenters have convincingly explained and justified their positions.

B. *Stare Decisis*

Stare decisis, though an important consideration, certainly does not apply strictly to Board decision-making. Board members are not Article III judges. They are political appointees who serve five-year terms on the board of an administrative agency. That is the statutory scheme. Board members bring their views to the Board, sometimes for better or worse, about what they perceive as a changing workplace and what makes sense to them during their terms as Board members. The Act allows for these differences of opinion and for change. A measure of consistency is desirable to be sure, but that consistency results more from self-restraint and commonsense than from any strict adherence to *stare decisis*.

C. Court Review

Neither Republican nor Democrat Boards have a monopoly either on judicial acceptance or rejection of their decision-making. Boards of all persuasions have had their difficulties and their successes in reviewing circuit courts and in the Supreme Court. Examples of judicial acceptance and rejection are so numerous it would be nearly impossible to list them. Most of the important court decisions involve issues and legal theories about which Board majorities and dissenters have registered their strong personal views. Courts are less interested in passion, however, and more interested in whether Board decisions are supported by the record, are in accord with the statute, and whether positions are consistent and adequately explained. It simply is not possible to argue, though, that views of Republican or Democrat Boards are more or less apt to receive court acceptance.

D. Stridency

Who is more strident, or more "collegial," the dissenters or the majority? The answer is, it depends, and there is plenty from both quarters. Stridence is more rooted in strongly held positions and philosophies than in disrespect. And, there is nothing wrong with a little passion about labor law.

E. Adequacy of Resources

The Board always needs more money. So, it seems, does every other government agency and department. If the Board and the General Counsel really put their minds to it, substantial resources might be saved for more meaningful reallocation.

For instance, a greater degree of discretion might be exercised by the General Counsel, and with direction by Regional Directors, to decline to issue complaints in cases that have little practical significance. General Counsel representatives, as I suggested back in 1976, could and should do more to assess credibility and the strength of objective evidence, as well as the inherent probabilities of what may have occurred. GC Memo, LABOR RELATIONS YEARBOOK, *NLRB General Counsel on Credibility Conflicts*, 1976.

There are other opportunities to better manage limited resources. One example could be "salting." Salting is a union strategy which tempts employers to refuse to hire "salts," who often are paid union operatives with less interest in employment than in organizing workers from inside the workplace. There is no reason why the Board has to play such an active role in this organizing strategy which requires allocation of substantial resources. It is argued that the Board has no choice because the Supreme Court determined that salts are "employees" within the meaning of the Act. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995). That argument is superficial. The Supreme Court determination that salts are statutory "employees" is a narrow one. The Court stated:

> We need not decide this matter. Nor do we express any view about any of the other matters Town & Country raised before the Court of Appeals, such as whether or not Town & Country's conduct (in refusing to interview, or to retain, "employees" who were on the union's payroll) amounted to an unfair labor practice. *See* 34 F.3d, at 629. We hold only that the Board's construction of the word "employee" is lawful; that term does not exclude paid union organizers.

The Court did not determine that the Board is compelled to devote scarce public resources to what is essentially a union organizing scheme. Thus, the Board could determine that its resources are better directed to more urgent priorities. The budgetary stakes are high. A study of Board resources devoted to salting cases would disclose substantial expenditures on their investigation and litigation. These are not simple cases and frequently require lengthy and expensive fact-finding and trials. A Board that must plead its case for additional resources to the White House and Congress each year may have to explain convincingly at some point, if it can, why limited resources must be allocated to salting.

F. Declining Caseload

As the Agency's case intake declines (down 12% from 2001), it is said that unions have lost faith in the Board's processes. This may be so to some extent or due to their lack of success in winning elections, but there are other factors that account for Board caseload reduction. One is Board deferral policy which diverts large numbers of potential Board cases to private arbitral dispute resolution that is favored by the Act. This diversion has existed since the early 1970's with Board adoption and expansion of "*Collyer*" deferral policy. *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Another cause of caseload decline is that employers and unions, with assistance of capable counsel, have learned to navigate legal requirements and to achieve their lawful objectives without violating the Act.

Another program with which I am quite familiar continues to account for substantial reductions in Board case intake. This is the revised "Officer of the Day"

program that was initiated while I was Board General Counsel in 1978. That program emphasized **experience** at the Board's front door. Experienced Board agents are instructed to counsel with prospective charge-filers to determine if the Board is the most appropriate forum for consideration of their claims. If not, claimants are referred to other appropriate federal or state agencies. The program also avoids frustration when claimants' charges are dismissed quickly for obvious lack of merit. This screening process continues to reduce Board case intake in ways that have nothing to do with union frustrations.

* * * *

Hopefully, then, discussion of Bush Board decisions will not be about how this Board or Boards of some other political persuasion overrule precedent, about how the Board has no authority to do so, that Board members must honor *stare decisis*, that members are not entitled to bring their policy views to the Board, that particular precedents are so clear and well-established and so imbedded in the law that they must stand forever, that particular Boards or Board members are driven by some inappropriate motive, or that it is the Board that is the cause of union organizing difficulties. The discussion instead should focus on whether Board decisions make more sense than those they modify or overrule, and whether changes in direction constitute reasonable interpretations of the Act.

II. Particular Cases

A. Bath Iron Works: Contract Modification v. Unilateral Change

In *Bath Iron Works,* the NLRB General Counsel alleged that Bath violated Section 8(a)(5) by failing to bargain before merging its pension plan with the plan of its parent, General Dynamics. *Bath Iron Works*, 345 NLRB No. 33 (2005). The complaint alleged that Bath unlawfully modified its labor contract. The ALJ agreed, determining that there was no "clear and unmistakable waiver," contractual or otherwise, of the union's right to bargain over the change.

In a 2 to 1 split decision, the Board majority decided that the ALJ had applied the wrong test. Chairman Battista and Member Schaumber held that a "contract modification" test, not a "unilateral change" test, should have been applied by the ALJ, noting that the complaint pled only an unlawful contract modification. The test for contract modification is whether there is a "sound arguable basis" for the contract interpretation that would permit the pension merger here. The Board majority said that the ALJ incorrectly applied the unilateral change test which requires that a union "clearly and unmistakably" waive its right to bargain before a significant employment term is changed unilaterally. The Board majority held that Bath's interpretation of its contract and pension plan documents provided the requisite sound and arguable contract interpretation.

The practical significance is that it is much easier for an employer with a sound and arguable contract interpretation to defend against a claim of unlawful contract

modification, than to defend against a unilateral change claim that requires proof that a union has clearly and unmistakably waived its right to bargain before the change is made.

Dissenting Member Liebman argued that the majority failed to follow Board precedent and applied the wrong test, the ALJ correctly applied the "clear and unmistakable" waiver test, the union was denied the opportunity to bargain before implementation of the pension merger, and in any event, that Bath had no sound arguable contractual basis for its unilateral action. Member Liebman also chided the majority's narrow reading of the complaint and for missing the opportunity to clear up "competing analytical approaches, coupled with judicial disagreements [that] have made it difficult to determine when and how the Board will decide whether an employer's unilateral action violates the Act's duty to bargain." Member Liebman was referring to the long-standing disagreement between the Board and some courts, notably the D.C. Circuit, over the test to be applied in 8(a)(5) unilateral change cases in which a disputed employment term is "contained in" a contract. In such cases, the D.C. Circuit requires that the contract and the bargaining history be analyzed to determine the intent of the parties, not mere application of the "clear and unmistakable" waiver test which applies when a contract is silent. Member Liebman argues that the clear and unmistakable waiver test applies in both settings.

Member Liebman is correct that the Board should clear up this running Board/court dispute that has gone on for years. [Compare *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993) and *Exxon Research & Eng. Co.*, 317 NLRB 675 (1995)]

Uncertainty exists for employers and unions, and for the Board as well, as its "clear and unmistakable" waiver analyses are subject to review by the D.C. Circuit.

The clear and unmistakable analysis sets up difficult barriers for employers who have bargained for terms they believe in good faith apply to operational changes they wish to make. For example, Member Liebman quotes from *Trojan Yachts*:

> To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter. *Trojan Yachts*, 319 NLRB 741, 742 (1995).

This requirement has become a nearly insurmountable barrier and short-circuits examination of the parties' intent, which is the focus of the D.C. Circuit's analysis. For the Board, it also avoids contract interpretation which is the province of the courts.

These unresolved issues are extremely important and deserve prompt Board attention and resolution. The Board majority's carefully circumscribed *Bath* analysis is of little practical assistance. *Bath* is likely to prompt creative pleading by the General Counsel, with complaints that will raise both contract modification and unilateral change issues. Contracting parties will continue to be left with uncertain outcomes, at least until review by the D.C. Circuit. The Board will have to decide whether to stay with its clear and unmistakable analysis, and risk almost certain court reversal, or begin to examine the intent of contracting parties. Of course, the Board could force the issue to the Supreme Court, but has chosen not to do so.

Proponents of the "clear and unmistakable" waiver test argue, as the Supreme Court stated in 1983: "[T]o waive a statutory right the duty must be established

clearly and unmistakably." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 709 (1983). Metropolitan argued that it could discipline union officers more harshly for engaging in an illegal strike because, in effect, the union had contractually waived statutory protections. *Metropolitan,* however, involved discriminatory treatment of union officials. The Court agreed with the Board that the claimed waiver was not sufficiently clear. In reaching that conclusion though, even in this discrimination setting, the Court explored the intent of the contracting parties, including background arbitration decisions: "Assessing the clarity with which a party's duties have been defined of course will require consideration of the specific circumstances of each case." 460 U.S. at 709.

Opponents of the unmistakable waiver test will argue that where a "contract covers" a particular subject, the clear and unmistakable waiver test and *Metropolitan Edison* are not obstacles:

> This principle is the root of the "contract coverage" doctrine. When an "employer acts pursuant to a claim of right under the parties' agreement, the resolution of the refusal to bargain charge rests on an interpretation of the contract at issue." *NLRB v. United States Postal Serv.,* 8 F.3d 832, 837 (D.C. Cir. 1993).

Honeywell International, Inc. v. NLRB, 253 F.3d 119, 124 (2001). *Metropolitan Edison* has not been an obstacle for the D.C. Circuit. As recently as December 23, 2005, in *Enloe Medical Center v. NLRB* ____ F.3d ___, the D.C. Circuit once again invited the Board to adopt its contract coverage analysis or seek Supreme Court review.

What is important is that the Board must deal with this uncertainty. *Bath Iron Works* is a step in that direction, but only a step. And, for an agency with limited

resources, the "contract coverage" standard also is likely to present additional opportunities for deferral of contractual interpretation disputes to arbitration.

B. Brevard Achievement Center

In *Brevard Achievement Center, Inc.*, 342 NLRB No. 101 (2004), the Board majority -- Battista, Schaumber and Meisburg -- held that disabled individuals, most with severe mental disabilities and employed by a non-profit corporation, were not "employees" within the meaning of Section 2(3) of the Act. It did so because the relationship with their employer was primarily rehabilitation and not primarily guided by economic and business considerations. There was no "typically industrial" relationship. The majority cited a long series of Board and court cases recognizing this "typically industrial -- primarily rehabilitative" standard and noted that it has never been successfully challenged in court.

The dissenters, Members Liebman and Walsh, viewed this case as a "perfect opportunity to revisit longstanding precedent governing disabled workers in light of a legal and policy landscape that has evolved dramatically in the past 15 years." 342 NLRB No. 101 at *12. They criticized "the majority's rigid adherence to the Board's 'typically industrial -- primarily rehabilitative' analysis, a policy-based approach that the Board has used to rewrite the plain language of the Act . . .," relegating the disabled custodial employees here "and many others like them into second-class status." *Id.* at *12 (citing *Alexandria Clinic*, 339 NLRB No. 162 (2003)). The "plain language of the Act," they say, "requires a finding that the disabled janitors here are 'employees'." Their displeasure is not subtle: "The majority's decision ignores the plain language of the Act,

invades the legislative arena, and contravenes contemporary Federal policy." 342 NLRB No. 101 at *13.

The mission of non-profit Brevard Achievement Center was to assist adults with severe disabilities to become independent members of the community by providing them with training, education, and rehabilitation services. Brevard provided work and rehabilitation opportunities for disabled "clients," here custodial services, under contract with the Federal government requiring at least 75 percent of "man-hours of direct labor" be performed by individuals with "severe disabilities." "Clients" were taught on location by trainers and counseled by a mental health counselor. They performed custodial work along with a lesser number of non-disabled employees, but worked at their own pace and were not disciplined for conduct related to their disabilities. If they progressed sufficiently to work in a competitive employment environment, the program goal, they no long qualified for "severely disabled" status.

Nevertheless, in pressing for abandonment of the "primarily rehabilitative/primarily economic standard," the dissenters argued for expansion of the Act's coverage for disabled workers and for expanded coverage in the "modern" workplace, as they favor for teaching assistants, illegal aliens, temporary employees, and "salts." The majority saw no reason to reverse Board policy which declines Board jurisdiction over sheltered workshops and rehabilitative vocational programs.

C. Bunting Bearings

In *Bunting Bearings Corp.*, 343 NLRB No. 64 (2004) the employer after a bargaining impasse locked out non-probationary employees but not probationary

employees. Both groups were members of the bargaining unit, but non-probationary employees were union members and probationary employees were not. Non-probationary employees voted to reject the employer's final offer; probationary employees were not permitted to vote. The expired contract denied probationary employees seniority rights and disciplinary protections during the first 90 days of their employment, giving the employer greater flexibility regarding layoffs, recalls, vacancies and shift preferences.

The Board majority, Battista and Schaumber, held that the partial lockout was lawful, and given the differences between the two groups of employees, that the General Counsel failed to demonstrate that the partial lockout of non-probationary employees was based upon their union membership. The majority pointed to contractual differences between the two groups giving the employer greater flexibility and "the difference in their economic interests:"

> The non-probationary employees were the target of the lockout. They, not the probationary employees, were the ones who rejected the Respondent's bargaining proposals. Allowing them to work would have defeated the lockout's objective of pressuring them to accept the Respondent's bargaining proposals. 343 NLRB No. 64 at *6.

In her dissent Member Liebman concluded that the lockout was unlawful because she believed it was based on union membership and therefore was "inherently destructive" of Section 7 rights. Beyond Bunting's claims that it needed probationary employees to operate its plant, which she doubted, Member Liebman rejected the argument that probationers were chosen because they had fewer contract rights and therefore had a less "vital interest" in the contract. Her dissent cites *American Ship*

Building which sanctioned lockouts designed to apply economic pressure, but condemned lockouts intended to "discourage union membership or otherwise discriminate against union members as such," 343 NLRB No. 64 at *10 (citing *American Ship Building Co. v. NLRB*, 380 U.S. 300, 308 (1965)).

A reviewing court may have less of a problem with the first justification for the lockout than the second. That is, had the majority relied solely on the employer's business reasons for not locking out probationary employees, i.e., flexibility needed to run its business, it would have been on firmer ground. The employer was permitted to operate during the lockout. Probationary employees had considerably fewer seniority and other rights under the expired CBA and under the employer's final offer, and thus greater flexibility would be a lawful consideration. Also, since the union did not permit probationary employees to vote on the employer's offer, it is difficult to argue that they were chosen because of their views on the employer's offer.

Less clear as a legitimate business consideration is that probationary employees had a less "vital interest" in the contract. The quoted Supreme Court language complicates matters for the majority. Even reliance on "business reasons" in the alternative may be problematic if one of the motivating reasons, vital contract interest, was discriminatory and unlawful.

D. Midwest Generation, EME, LLC

Midwest Generation, EME, LLC, 343 NLRB No. 12 (2004) is another lockout case. The Board majority, Battista and Schaumber, determined that the employer did not violate 8(a)(1) and (3) by locking out returning strikers but not "crossover"

non-strikers. Relying on *American Shipbuilding v. NLRB*, 380 U.S. 300 (1965), the majority concluded that the legitimate business reason for the partial lockout was the exertion of economic pressure for acceptance of the employer's bargaining demands. Because partial lockouts are permitted and because the employer was motivated by legitimate considerations, the majority concluded that there was no conduct that was "inherently destructive" of Section 7 rights.

The dissenters on the other hand, guided by *Great Dane*, 388 U.S. 26 (1967), found the business considerations to be insufficient and the partial lockout to be "inherently destructive" of Section 7 rights and unlawfully discriminatory..

The Seventh Circuit recently sided with the dissenters. *Local 15, Int'l. Bhd. of Elec. Workers, AFL-CIO v. N.L.R.B.* 429 F.3d 651 (7th Cir. 2005). The court found that no reasonable basis existed to justify a partial lock out based on either operational need or a legitimate or substantial business justification. Moreover, by acting "only against those who had exercised their section 7 right to strike," the court held that the employer demonstrated an anti-union animus.

It will be interesting to see if the Board will seek Supreme Court review of this clash between *American Shipbuilding* lawful economic pressure and *Great Dane* "inherently destructive" conduct. It is doubtful that the Court would take this case given that there is no apparent conflict in the circuits. It may also be some time before a similar case arises in another circuit as long as the General Counsel, as is normally the case, is guided by the Board's view and refuses to issue complaints. It may also be that

employers will be less apt to risk this bargaining strategy given the hostile reception of the only circuit court to consider it.

E. Crown Bolt

In *Crown Bolt*, 343 NLRB No. 86 (2004), the Board reconsidered the extent to which there must be evidence of dissemination of a pre-election threat of plant closure before a Board election will be set aside. The Board majority, Battista, Schaumber, and Meisburg, overruled *Springs Industries*, 332 NLRB 40 (2000), itself a reversal of precedent, and returned to the requirement that there must be evidence that pre-election threats were disseminated. *Spring Industries* presumed dissemination. Agreeing with earlier precedent, the *Crown* Bolt majority concluded that a party seeking to overturn an election based on the dissemination of a threat throughout the plant must prove it.

The dissenters, Members Liebman and Walsh, argue that dissemination of such serious pre-election threats as plant closure should be presumed and cite references in certain earlier Board cases that dissemination of plant-closure threats is "all but inevitable." *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972), *enf. denied* 472 F.2d 170 (2d Cir. 1972).

This is an evidentiary debate that is likely to go on for some time and *Crown Bolt* probably is not the last chapter. Certainly pre-election threats, such as threats to close the plant, are serious and may be pervasive. On the other hand, nullification of the results of a Board election is serious, too, particularly one that is decided by a substantial margin. Because this is essentially a debate among Board members over the

strength of necessary evidence, courts, even if they disagree, may be inclined to defer to the Board's policy determinations, assuming the balance struck by the Board is not an unreasonable interpretation of the Act.

F. *Harborside Healthcare*

Prompted by the Sixth Circuit, the Board majority rejected a test requiring an explicit promise of benefits or threat of reprisal when determining whether pro-union supervisory conduct is a basis for setting aside a Board election. *See Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206 (2000) and *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004). Instead, the majority stated that it was returning to earlier established precedent and also held supervisory card solicitation to be inherently coercive absent mitigating circumstances. The majority applied a two-factor standard for determining if an election should be set aside due to supervisors pro-union conduct:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct. 343 NLRB No. 100 at *6.

Dissenting Members Liebman and Walsh argued that Board precedent required an explicit supervisory threat or promise to void an election, while conceding that "the language used by the Board in some decisions is open to misinterpretation."

343 NLRB No. 100 at *16. Noting that supervisors at the direction of an employer may urge their subordinates to vote against unionization, the dissenters argue, "so long as a supervisor is engaged in persuasion, as opposed to coercion, his conduct remains proper." In their view this is particularly so if the employer has taken an anti-union position. 343 NLRB No. 100 at *17.

Whether overt supervisory threats or promises are required is reminiscent of a dispute years ago between the Board and courts over whether threats of violence were protected if unaccompanied by overt acts. The Board held that threats to burn down employee homes (*A. Duie Pyle*, 263 NLRB 744 (1982)) and to "take care of" non-strikers (*Georgia Kraft*, 258 NLRB 908 (1981)) were not coercive and unlawful unless accompanied by overt acts. The Third Circuit reversed the Board in *A. Duie Pyle Inc.* and the Supreme Court granted certiorari in *Georgia Kraft,* whereupon the Board reconsidered, reversed its position (*Clear Pine Moldings*, 268 NLRB 1044 (1984)), determined that overt acts in furtherance of verbal threats are not required, and mooted Supreme Court review in *Georgia Kraft*. *See A. Duie Pyle Inc.*, 730 F.2d 119 (3d Cir. 1984) and *Georgia Kraft Co.*, 275 NLRB 636 (1985).

It is not unreasonable for the Board to conclude that supervisor card solicitation of subordinates is inherently coercive. It is no coincidence that supervisor union solicitation is a remarkably effective union organizing tool. In any event, the Board majority's *Harborside* determination, that supervisory pro-union activities may be coercive without overt threats or promises and that card solicitation by supervisors is

inherently coercive, is defensible on legal and policy grounds whether or not it conforms with Board precedent.

G. IBM Corporation

IBM, 341 NLRB No. 148 (2004), is the latest chapter in a decades old philosophical debate between Board majorities and dissenters over whether nonunion-represented employees, like union-represented employees, should be permitted to have a witness when management conducts an investigatory interview that reasonably could be expected to result in discipline. Until *NLRB v J. Weingarten*, 420 U.S. 251 (1975), there was no such right for union-represented employees. Until *Materials Research Corp*., 262 NLRB 1010 (1982), there was no such right for non-represented employees. In *Sears, Roebuck & Co.*, 274 NLRB 230 (1985) and *E.I. Dupont & Co*., 289 NLRB 627 (1988), a Board majority abandoned *Materials Research* and reverted to the view that non-represented employees had no protected right to be accompanied by a witness at an investigatory interview. In 2000, a new Board majority in *Epilepsy Foundation*, 289 NLRB 627 (2000), returned to the view that employee representation, when requested, is required if the interview is to go forward.

In 2004, a divided Board, citing workplace changes and the need for a freer management hand to investigate to deter workplace violence and terrorism, determined in *IBM Corp.*, that *Epilepsy Foundation* should be overruled. Taking their cue from earlier court and Board decisions, the *IBM* majority based its conclusion on policy grounds, while conceding that the contrary result also is supportable. Only Member Schaumber added that proper interpretation of the Act provides no such right.

The dissenters, Liebman and Walsh, claim that "the overwhelming majority of employees are stripped of a right integral to workplace democracy" due to the reversal of *Epilepsy*. 341 NLRB No. 148 at *28. They dispute the majority's concerns that the interview process will be slowed or compromised, and argue both that *Epilepsy Foundation* "is in perfect step with the times" and for a case-by-case approach. 341 NLRB No. 148 at *35. They urge maintenance of the Board's four-year-old *Epilepsy* policy, which in the meantime was affirmed by the D.C. Circuit. *See Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001).

What is obvious is that this policy disagreement over co-worker representation is likely to go on for some time and as Board composition changes. What is less obvious is why unions favor co-worker representation in nonunion settings which may tend to undermine the need for union representation. A personal observation, too, is that employers complained about *Epilepsy*, but questions concerning its application were rare.

H. Martin Luther Memorial Home

Martin Luther Memorial Home, 343 NLRB No. 75 (2004), deals with employer rules designed to maintain order and civility in the workplace. Obviously, rules which specifically prohibit or restrain Section 7 rights are unlawful, such as broad bans on solicitation and distribution of literature. Others, such as those banning harassment, profanity and abusive language may affect the expression of Section 7 rights, but also have the legitimate objectives of promoting workplace civility and insulation of

employers against federal and state law claims for failing to maintain workplaces free of racial, sexual, and other harassment.

The majority, Battista, Schaumber and Meisburg, followed the lead of the D.C. Circuit in *Adtranz ABB Daimler-Benz Transportation, R.A. Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), concluding that rules such as those prohibiting abusive language are not unlawful on their face. The majority will look to the circumstances of each case, including the nature of the behavior and how the rule is enforced, and will not presume that the rule is unlawful. Neither will the majority invalidate a rule simply because it *could* be interpreted to restrict Section 7 rights. They also would assume that employees will read rules in a "reasonable" way to maintain a civil and decent workplace, and not conclude that the rule was designed to curtail their Section 7 rights.

The dissenters, Members Liebman and Walsh, on the other hand, argue that a rule that is ambiguous may be unlawful if it contains prohibitions so broad that it reasonably may be understood as prohibiting protected conduct. The dissenters would reject the D.C. Circuit's *Adtranz* analysis. Member Liebman suggests, and the majority rejects, that employers should supplement general rules of conduct with a statement that a prohibition does not apply to conduct that is protected under the Act.

This disagreement among Board members reflects policy differences that are not likely to go away and which are likely to be revisited by new Boards with different philosophical balances. As with unilateral changes and waivers, however, the problem for the dissenters here is the availability of review by the D.C. Circuit which supports the majority view. It also is possible that the view of the D.C. Circuit, too, could

change with time or on a case-by-case basis. At some point, Supreme Curt review may be possible, although it is most likely that the Court would defer to policies of the Board that prevail at the time. Neither is the *Memorial Home* view so inconsistent with the Act or such an unreasonable interpretation that the Court would not defer.

I. IHS Care

The majority in *IHS Care*, 343 NLRB No. 76 (2004), reversed a four-year-old Board precedent which, depending upon union wishes, permitted temporary workers, jointly-employed by suppliers of temporary workers and their employer customers, to be included, even accreted, into bargaining units comprised solely of the customer employer's employees. Overruling the Board's divided holding in *M.B. Sturgis*, 331 NLRB 1298 (2000), Chairman Battista and Members Schaumber and Meisburg held that *Sturgis* forced non-consensual multi-employer bargaining, redefinition of the term "employer" as used in the Act, and caused anomalous and unworkable bargaining relationships and consequences at odds with sound public policy. The majority pointed to the impractical effect of forcing bargaining by employers that control some aspects of the employment relationship and those that control other aspects of that relationship. *Sturgis* may have been intended to adjust bargaining relationships to current trends in employment and, to be sure, expanded union organizing opportunities among temporary employers, but for the *IHS* majority it impermissibly sacrificed other important statutory mandates and commonsense, not the least of which was to impermissibly compel non-consensual multi-employer bargaining.

The *IHS* dissenters, Members Liebman and Walsh, dueled with the majority over whether *Sturgis* was a departure from precedent and argued that it is the Board's role to adjust to changing workplace trends: "The majority is mistaken in every critical respect . . . . It's approach, moreover, will hasten obsolescence of this statute." 343 NLRB No. 76 at *12. Even more broadly, the minority charges:

> If the majority were correct, then the National Labor Relations Act itself could not guarantee an important, and growing, segment of American workers the right to collective bargaining. The problem here, however, is not the statute, but the agency that administers it.

For the majority, too, the overriding consideration is for the Board to assure employees the fullest freedom to organize and to exercise their Section 7 rights. The problem, though, is that those freedoms sometime conflict with the legitimate and important rights of others, including employers. The minority even argues, inaccurately, that *IHS Care* inhibits temporary employees from seeking to bargain in an employer-wide unit with their own employer.

Sturgis may have provided enhanced organizing opportunities for unions, but it also created nightmares for employers. Later cases demonstrated that the *Sturgis* majority intended to permit unions to decide whether jointly-employed temporary employees should be included in the customer employer's bargaining unit. Bargaining and contract administration posed impossible tangles with respective joint and single-employers obligated to bargain only on matters over which they had authority or responsibility. Contracts, too, would be administered in the same confused way, with joint or the single-employers responsible for administering only some aspects of the

agreement and resolving and presumably arbitrating only those grievances over which that employer had authority or responsibility. The whole *Sturgis* scheme was so tangled and impractical that, ironically, it also presented new creative litigation opportunities for employers to delay Board elections and frustrate other *Sturgis* objectives.

J. Brown University

In *Brown University*, 342 NLRB No. 42 (2004), the Board addressed the issue of "whether graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development, must be treated as employees for purposes of collective bargaining under Section 2(3)" of the NLRA. The Board, in a 3 to 2 decision, overturned its decision in *New York University*, 332 NLRB 1205 (2000), and held that graduate student assistants are not employees for purposes of the NLRA.

This case is another example of the Board changing course -- without regard to *stare decisis*. In 1972, the Board first addressed the issue in *Adelphi University*, 195 NLRB 639 (1972) when it held that graduate student assistants should not be included in a bargaining unit of regular faculty. Two years, later, in *Leland Stanford Junior University*, 214 NLRB 621 (1974), the Board went one step further. In *Leland Stanford*, the Board opined that graduate students were primarily students, and thus, not employees under the Act. The relationship between graduate student assistants and their universities was more an "academic" and not an "economic" relationship.

Nearly twenty-five years later, however, the Board changed its mind. In *New York University*, the Board reversed *Leland Stanford* and held that graduate student

assistants at New York University met the test "establishing a conventional master-servant relationship with a university." 32 NLRB at 1209. With this unequal status between the students and the university, the graduate students here were found to be employees covered by the NLRA and thus had a statutory right to "organize and bargain with their employer." *Id.*

In 2004, the Board again changed course when it re-examined its decision in *New York University* and returned to its pre-*NYU* precedent. Simply put, the Board's decision "turn[ed] on [its] fundamental belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act." 342 NLRB No. 42 at *15.

In its analysis, the Board first reiterated that the Supreme Court has acknowledged that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" 342 NLRB No. 42 at *7. Further, in the Board's view, graduate student assistants are students first and foremost and have an "educational, not economic, relationship with their university." *Id.* Specifically, in Section 1 of the NLRA, Congress "found that the strikes, industrial strife and unrest that preceded the Act were caused by the 'inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership.'" As such, the NLRA was "premised on the view that there is a fundamental conflict between the interests of the employers and employees engaged in collective-bargaining under its

auspices and that '[t]he parties…proceed from the contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *Id.* at *8.

Next, the policies which underlie the Act must be considered when determining who is to be covered under the Act. Just as managers are not statutory employees -- as the Wagner Act's goal was to protect laborers and workers, not those in the "managerial hierarchy"-- graduate student assistants too do not fit the purpose behind the Act. The Act protects unequal economic relationships -- not relationships that are primarily educational. Graduate student positions are "directly related to the core elements of the Ph.D. degree and the educational reasons that students attend" university. The financial assistance given to the graduate students is directly correlated to the fact that they are students. Moreover, because graduate students are at their respective universities to be students, not to be employees, their exists a "significant risk" and a "strong likelihood" that the collective bargaining process "will be detrimental to the educational process." The educational process "particularly at the graduate and professional levels" is "an intensely personal one." The collective bargaining process, in contrast, is "predicated on the collective or group treatment of represented individuals." In fact, "collective treatment is 'the very antithesis of personal individualized education.'" The primary goal of collective bargaining is "designed to promote equality of bargaining power" -- a concept "that is largely foreign to higher education." *Id.* at **7-8.

In their strongly worded dissent, Members Liebman and Walsh considered the majority's decision to be "woefully out of touch with contemporary academic

reality." In their view it wrongly applies the Act and "disregards the plain language of the statute," and "errs in seeing the academic world as somehow removed from the economic realm that labor law addresses -- as if there was no room in the ivory tower for a sweatshop." In contrast, the dissenters argue that the Regional Director's application of *NYU* was correct, as was its conclusion that teaching assistants, research assistants, and proctors are covered under the Act as they "performed services under the direction and control of Brown, and were compensated for those services by the university." In their view, not only is the academy a forum where work-related issues are common, but also that collective bargaining is a suitable vehicle for both parties to come to terms with pressing issues such as stipends, job postings, pay periods, discipline and discharge, health insurance, etc. *Id.* at *15-16.

The majority and dissenting opinions in *Brown University* are blueprints for opposing views and suggest that this student assistant issue will be back and, as before, is a policy choice that is subject to changes in Board composition.

K. San Manuel Indian Bingo & Casino

In *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), the Board was asked to reconsider whether it should reassert jurisdiction over a commercial enterprise that is wholly owned and operated by an Indian tribe on the tribe's reservation. A majority comprised of Chairman Battista, and Members Liebman and Schaumber, overruled the Board's prior precedent of *Fort Apache*, 226 NLRB 503 (1976), and *Southern Indian*, 290 NLRB 436 (1988), and asserted jurisdiction in the case. The Board also formulated a new standard to govern the circumstances under which the Board will

assert jurisdiction over enterprises that are owned and operated by Indians on reservations.

For more than thirty years, the Board grappled with the issue of whether the employment practices of Indian tribes are subject to the NLRA. In the majority's view, the Board's jurisprudence "in this area has been inadequate in striking a satisfactory balance between the competing goals of Federal labor policy and the special status of Indian tribes in our society and legal culture." 341 NLRB No. 138 at *3. To that end, the Board in *San Manuel* established a new approach to provide guidance in weighing the competing interests:

> [S]tatutes of general applicability should not be applied to the conduct of Indian tribes if: (1) the law 'touches exclusive rights of self-government in purely intramural matters;' (2) the application of the law would abrogate treaty rights; or (3) there is 'proof' in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes. 341 NLRB No. 138 at *8 citing *Coeur d'Alene*, 751 F.2d 1113, 1115 (9th Cir. 1985).

Thus, in applying its new analysis, the Board found the Respondent tribe to be an employer pursuant to Section 2(2) of the Act. Not only would the application of the NLRA not adversely affect Federal Indian policy, according to the majority, the application did not curb any treaty rights and nothing in the Act or its legislative history demonstrates that Congress intended to exclude Indians from the Board's jurisdiction.

In dissent, Member Schaumber viewed the issue through a different lens: "[T]he issue presented in this case is not whether the Board should assert jurisdiction over a commercial enterprise wholly owned and operated by an Indian tribe located on that tribe's reservation, but whether Congress has authorized us to do so." 341 NLRB

No. 138 at *17. In his view, the Board's change in its policy in recognizing jurisdiction over such tribes is a "task for Congress to undertake." Although there are multiple policy considerations for NLRA coverage of businesses within sovereign boundaries without express permission from Congress, Member Schaumber believed the exercise of such jurisdiction was inappropriate here. Perhaps Member Schaumber's most compelling argument was his analysis of how asserting jurisdiction under these facts impairs the sovereign rights of the Tribe.

III. Unfinished Business

A. Should the Board overrule *Levitz Furniture,* which permits withdrawal of recognition only if the employer correctly determines that union majority status in fact has been lost, and should the Board clarify whether an employer with a good faith doubt may poll employees to determine actual loss of union majority status? *See Levitz Furniture Co.*, 333 NLRB 717 (2001).

B. Should secondary boycotts be permitted to enforce Board certifications even when those certifications are being tested in court in accordance with the scheme of the Act? *See United Food and Commercial Workers, Local 1996 (Visiting Nurses Health System),* 336 NLRB 421 (2001).

C. Should the D.C. Circuit "contained in the contract" standard or the Board's "clear and unmistakable" waiver standard prevail for disputes over unilateral employer actions during the term of a collective bargaining agreement? See *Exxon Research & Eng. Co.*, 317 NLRB 645 (1995).

D. Are "neutrality" clauses or certain variations of them permissive bargaining subjects or mandatory subjects over which unions may strike?

E. To what extent may employers restrict e-mail systems from union organizing?

F. Is there no difference between unions and the Girl Scouts when it comes to access to employer premises?

G. When can guidance be expected with respect to supervisory status and the application of Section 2(11)? *See Kentucky River Cmty Care, Inc.*, 532 U.S. 706 (2001).

H. In determining independent contractor status, are all factors of equal weight or should greater weight again be given to control over labor relations and details of work? *Roadway Packaging System, Inc.*, 326 NLRB 842 (1998).

I. When will the Board provide guidance on the application of BE&K requirements that instigation of litigation can violate the Act when it is both baseless and retaliatory? *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002)

J. Will the Board take a more realistic view on the existence of impasse and recognize the games played to avoid it, such as the "gaming" of information demands? And, should the Board defer certain information disputes to arbitration?

* * * *

To be sure, the "Bush Board" has put its stamp on labor law and predictably that process is likely to continue to some degree. It's stewardship, of course, has been hampered by Board understaffing due to political squabbles in the Senate where Democrats have blocked the President's Board and General Counsel nominations for many months. Unions instigate and support these blocking tactics, while at the same time complaining about Board ineffectiveness and delays and blaming the Board for flat or declining union membership percentages every year since 1984. In 2005, only 7.8 percent of private industry wage earners belonged to unions. Apparently, postponement of Bush Board reconsideration of Clinton Board precedents takes precedence over providing the Board with a full five-member complement. Even with staffing interruptions, though, the Bush Board has managed to stay ahead in its casehandling. At the end of 2005 there were 497 cases pending before the Board, down from 621 in

December 2002. Now that the Board has a full complement it will be interesting to see what significant issues it will address. It is safe to say that there will be more divided opinion, and more grumbling at the Board and at the Bar.