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AS THE PENDULUM SWINGS:
THE ROLE OF PRECEDENT IN
NATIONAL LABOR RELATIONS BOARD DECISIONS

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I. A Historical Look At The Board’s Treatment Of Precedent And The Role Of Stare Decisis In Board Decisionmaking

A. Introduction

Congress delegated to the National Labor Relations Board (“Board”), the authority to make rules to fill in the gaps in the National Labor Relations Act (“Act”). The Supreme Court has held that this authority can be exercised either through formal rulemaking proceedings or, as the Board prefers, by the common law method of rulemaking through adjudication. Over the years, the Board has chosen to rely on adjudication rather than formal rulemaking. Under this statutory scheme, the common law doctrine of stare decisis does not strictly apply to the Board’s decisionmaking process. Moreover, during the last several decades, it appears that precedent-shifting cases have become more the norm than the exception.

This issue may not be merely an academic concern. Both labor and management attorneys have complained that ideological voting by members of the Board “affects workers, employers, and unions living under and operating within the regulatory regime of the Act as construed and applied by the Board.” After all, how can an employer (or a union, for that matter) determine whether its decisions are legal under the Act when the rules keep changing depending on whether the political winds blow from the left or the right? Voting along ideological lines creates the impression that the members of the Board are simply “politicians carrying out their electoral mandate to favor labor or to favor management.” Moreover, repeated changes in the law create a level of uncertainty that requires one to “gaze into a crystal ball” to determine whether

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3 Unlike Article III judges, Board members are not restricted by the doctrine of stare decisis. See NLRB v. Kostel Corp., 440 F.2d 347 (7th Cir. 1971) (unlike Article III courts, the doctrine of stare decisis does not require that Board policies and standards be unchangeable since it must meet changing industrial conditions by corresponding changes in policies and standards).


5 Id. at 753.
particular precedent will remain good law or be cast aside when the composition of the Board changes with each new Administration. This apparent disregard for precedent poses problems and risks for employers, employees, and labor unions alike.\(^6\)

Recent Board members, however, have supported change, stating that change is not only proper under the Act when “prudently exercised,” but “was envisaged by Congress.”\(^7\) During the recent Bush administration, when many management-side lawyers willingly accepted the changes that were being made at the time, then-Chairman Robert J. Battista defended the shifting precedent by explaining to Congress the role of change in how the Board interprets the Act. Chairman Battista remarked:

> The genius of the Act is that it sets forth enduring fundamental principles, and yet allows for flexibility and change. It accomplishes the former by setting forth fundamental principles in clear and compelling language. It accomplishes the latter by using broad language that gives the administering agency, the Board, the freedom and responsibility to make policy judgments within the parameters of those principles. … [And, with such difficult policy judgments in mind, it is not surprising that Board law changes from time to time.\(^8\)]

Not entirely discounting the value of \textit{stare decisis} in Board law, Battista further commented:

> Of course, all responsible [Board] Members realize the value of \textit{stare decisis} – the value of having stability, predictability and certainty in the law. However, if a Member honestly believes that a prior precedent no longer makes sense, and that a change would be more in keeping with the fundamental principles described above, he/she can – and may feel obligated to – vote to change the law.\(^9\)

Thus, the stated rationale is that if a Board member disagrees with a prior precedent and believes that change would comport with the fundamental principles of the Act, the member is not bound by precedent and may (and in recent years, often \textit{has}) vote(d) to change the law.

As one management lawyer has aptly noted, “[o]ne of the most interesting features of Board law is that there seems to be ‘precedent’ to support almost any

\(^6\) See Andrew Kramer, \textit{The Clinton Board: Difficult Times for a Management Representative}, 16 The Labor Law 75, at 99 (Summer 2000).


\(^8\) \textit{Id.} at 13, 15.

\(^9\) \textit{Id.} at 16.
argument one wishes to make.”

This statement sums up quite nicely the Board’s recent historical adherence to the doctrine of stare decisis. The Board’s freedom to decide cases within the Act’s parameters has meant that over time different Boards have disagreed with one another and reversed precedent – sometimes in very rapid succession to one another. Yet, if done with careful thought and analysis and without simple “partisan” ruling, these changes generally should be considered the evolution of Board law. And, it is this evolution of policy that Congress intended when it gave the Board policymaking function. Thus, so long as the Board “does not stray from [the Act’s] fundamental principles,” and so long as the Board explains the reasons for its departure from past precedent, the Board “has the power to change.”

The Supreme Court, in fact, affirmed the ability of the Board to abruptly change precedent in *NLRB v. Weingarten* stating that the Board can reconsider past decisions “in light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question” and that the courts should defer to the Board’s “special competence” in the area of labor relations. As the Supreme Court further noted, the Board must retain a certain level of flexibility if it is to meet the responsibility to adapt Board law to these changes in industrial life. The Supreme Court stated:

The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board’s earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. “‘Cumulative experience’ begets understanding and insight by which judgments … are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.”

The concern, of course, arises for both the management and labor side whenever their respective party is in the minority and the Board makes a significant number of rulings that appear to be purely along party lines. The most recent incident of this was in September 2007 when a number of decisions was issued that labor

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10 John S. Irving, “‘We’re Off to See the Wizards’ A Panel Discussion on the Bush Board’s Decisions,” ABA Section of Labor and Employment Law’s Development of the Law Under the NLRA Committee’s 34th Annual Mid-Winter Committee Meeting (Feb. 27, 2006) at 2.

11 See Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. Pa. J. Lab. & Emp. L. 707, 754-55 (Spring 2006); Remarks of Robert J. Battista, Chairman, National Labor Relations Board, 58th NYU Annual Conference on Labor (May 20, 2005); see also *NLRB v. Viola Industries, Inc.*, 979 F.2d 1384 (10th Cir. 1992) (as an administrative agency, the Board “is not disqualified from changing its mind”).


13 *Id.* at 255-56.

14 *Id.* at 266 (1975) (*citing NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)).
dubbed the “September Massacre.” It should come as no surprise that many on the management side now anticipate a similar number of changes, favoring labor, once the Obama Board is in place. It will be interesting to observe, at that point in time, whether the pro-labor constituents become less concerned with the role of *stare decisis* and more concerned with making their party’s perceived necessary changes to adapt Board law to the changing American workplace.15

B. The Possible Role of Rulemaking at the Board

As stated previously, the National Labor Relations Act also gives the Board the authority to promulgate rules under the Administrative Procedures Act.16 The Supreme Court affirmed this authority in *American Hospital Ass’n v. NLRB*17 where the Court upheld the Board’s health care bargaining unit rule.18 Significantly, however, the Board possesses the discretion to choose whether to exercise its rulemaking authority or to rely exclusively on adjudication.19

The question then becomes, “Why has the Board relied almost exclusively on adjudication rather than exercise its rulemaking authority?” There is some sense that the traditional rulemaking process is time consuming and therefore can interfere with the Board’s ability to promptly adapt and respond to what the majority, at the time, perceives to be changing industrial conditions and practices that warrant changes in federal labor law. It also, however, may be more difficult for the Board to reverse course following the implementation of formal rulemaking. Addressing the reluctance of

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15 See Testimony of Jonathan P. Hiatt, Senate Committee on Health, Education, Labor and Pensions, Subcommittee on Health, Education, Labor and Pensions of the House Committee on Education and Labor and the Subcommittee on Employment and Workplace Safety, “The National Labor Relations Board: Recent Decisions and Their Impact on Workers’ Rights” (Dec. 2007). Like Chairman Battista, Mr. Hiatt, General Counsel to the AFL-CIO, also testified before Congress on the subject of the September Massacre decisions. Hiatt remarked in his testimony that by “overruling precedent, changing the rules, and misapplying existing precedent,” the Board had attacked and stripped away fundamental aspects of workers’ rights. Id. at 3.

16 29 U.S.C. § 156 states that, “the Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the [Administrative Procedures Act], such rules and regulations as may be necessary to carry out the provisions of this subchapter.” The Administrative Procedures Act, 5 U.S.C. § 553, sets forth certain requirements for informal agency rulemaking, including notice through publication of the proposed rule in the Federal Register, giving parties the opportunity to submit written comments, and submitting a short statement of the justification and purpose of the rule.


18 After struggling to create a general conceptual test for health care bargaining units, the Board successfully adopted a rule on April 21, 1989 that mandated the recognition of eight different appropriate bargaining units in acute-care hospitals. See “Collective-Bargaining Units in the Health Care Industry,” 54 Fed. Reg. 16,336 (Apr. 21, 1989). This remains the first and only successful substantive rulemaking by the Board.

the Board to exercise its rulemaking authority, one commentator noted that “there is far more at stake when a rule is rejected by a federal court than when an adjudicated decision is reversed. The Board may prefer the incremental adjudication-based approach to policymaking because it minimizes the risks associated with judicial review.”

This flexibility that Congress built into the Act may, therefore, be the best explanation, or at least justification, for the Board’s continued reliance on an incremental adjudication-based approach to policymaking. Congress entrusted to the Board the responsibility to adapt the Act to changing patterns in industrial life. Consequently, there is some sense that, while perhaps creating more consistency and predictability for practitioners on both sides of the coin, reliance by the Board on traditional rulemaking might hamstring the flexibility the Board has grown accustomed to exercising to adapt quickly to changing workplace dynamics.

C. Reversal of Precedent by the Clinton and Bush II Boards

Despite the Act’s flexibility, critics have noted that recent appointees to the Board are more partisan and one-sided in their voting than the Board Members of several decades ago. The common view is that management and union lawyers serving on the Board have “voted in a decidedly more one-sided fashion than their colleagues from nonpartisan backgrounds.” Discussing changes during the period of the Clinton Board, Andrew Kramer noted:

"[I]t has been very difficult to understand the views of individual Board members and the general counsel with respect to the doctrine of stare decisis. In this period, a majority of the Board has demonstrated a willingness to change direction without any serious explication of a compelling reason to change course. The fact that many of these rulings are 3-2 or 2-1 votes offers up a scenario that these cases will become either ping-pong matches for future Board members or otherwise ripe for judicial reversal."

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23 Id. at 1365. There is some feeling that Board members coming from private practice who may only serve a short term on the Board and then re-enter private practice cannot alienate their respective constituencies by ruling against their interests or they will face extreme difficulty re-entering those former practices.

24 Andrew Kramer, The Clinton Board: Difficult Times for a Management Representative, 16 The Labor Law 75, 80 (Summer 2000).
The apparent split between pro-labor and pro-management members of the Board has led to a debate over which group is more inclined to reverse precedent. According to statistics compiled by G. Roger King25 and Chairman Robert Battista,26 the Clinton Board issued 60 decisions that overruled precedent during the period March 1994 to December 2001. The statistics show the Bush II Board issued 21 decisions that overruled precedent during the period December 2002 to December 2007. “The bottom line,” Chairman Battista commented “is that [the Bush II] Board reversed precedent only one-third as many times as the [Clinton] Board.” This may prove a hollow victory, however, since it appears likely that an Obama Board will overrule many of the most controversial and significant decisions issued by the Bush Board.

II. The Clinton Board

What follows is a sampling of Clinton Board decisions that reversed established precedent in favor of organized labor. These cases were later either reversed or limited in favor of employers by the Bush II Board.

A. Contingent Workers

In one of the most publicized decisions by the Clinton Board, M.B. Sturgis, Inc.,27 the Board addressed the issue of whether workers who are jointly employed by a “user” employer and a “supplier” employer can be included in a bargaining unit with workers who are solely employed by the “user” employer. Decades earlier, the Board, in Greenhoot, Inc.28 and Lee Hospital29 had held that such a multi-employer unit could not be established unless the two employers consented to the establishment of such a unit.

In Sturgis, the Clinton Board abandoned these settled principles and held that a combined unit may be appropriate even without the consent of both employers, provided that the user and supplier employers qualify as “joint employers” of the contingent employees, and that the two groups of employees share a “community of interest.” The Clinton Board noted that such a community of interest could be found where the two sets of employees worked together at the same facility, under similar conditions and identical supervision – a common situation in the modern workplace.

25 See G. Roger King, ABA Section of Labor and Employment Law’s Development of the Law Under the NLRA Committee’s 34th Annual Mid-Winter Committee Meeting (Feb. 26 to Mar. 1, 2006).
27 331 NLRB 1298 (2000).
28 205 NLRB 250 (1973).
29 300 NLRB 947 (1990).
The majority’s decision to overrule longstanding precedent seemed primarily motivated by the desire to restore representational rights to the growing number of contingent workers in American businesses. The decision to allow temporary workers to be included in units with regular employees without the consent of the temporary agency and the regular employer was not unanimous, however. Member Brame authored a lengthy dissent, stating that the majority acted “in the interest of facilitating union organizing in the modern workplace” and had no basis for overturning Lee Hospital. Brame further remarked that the unit the Board majority envisioned, which would include both temporary employees and regular employees, effectively required multi-employer bargaining that was both impractical and unlawful under the Act.

B. Expanded Coverage of the Act

In Boston Medical Center Corp., the Clinton Board held that house staff, interns, and residents in medical institutions were “employees” within the meaning of the Act, and therefore had a statutory right to organize. In so holding, the Clinton Board overruled Cedars-Sinai Medical Center and St. Clare’s Hosp. & Health Ctr., cases that over 20 years earlier had held that medical interns and residents were primarily students and therefore not covered by the Act. According to the Clinton Board, the fact that an employee may have more than one status (e.g., a student and an employee) does not preclude the person from coverage under the Act, as long as the person satisfies the Act’s definition of “employee.” Summing up its holding, the majority wrote, “we accord individuals who clearly are employees within the meaning of the Act the rights that are afforded all such employees.”

Subsequently, the Clinton Board extended this reasoning in New York University, finding that graduate students working as teaching and research assistants likewise were employees under the Act, even while they were simultaneously students. According to the Board, the graduate assistants were compensated for their services through the University’s payroll system and spent fifteen percent of their time performing graduate assistant duties. The assistants’ relationship with the University, the majority concluded, was “indistinguishable from a traditional master-servant relationship” and, therefore, the assistants “plainly and literally fall within the meaning of ‘employee’ as defined in Section 2(3).”

The Clinton Board also expanded coverage of the Act by limiting the scope of the exclusion of those employees working in supervisory positions. In Mississippi Power & Light Co., the Clinton Board held that company dispatchers, who controlled and directed other workers in the switching sequences involved in the transmission of power, were not employees, because they were integral to the operation of the enterprise. The majority’s rationale was that dispatchers were not merely incidental to the production process and did not spend a significant portion of their time performing non-management duties. The Board therefore concluded that dispatchers did not fall within the Act’s definition of “employee.”

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31 223 NLRB 251 (1976).
32 229 NLRB 1000 (1977).
33 332 NLRB 1205 (2000).
34 328 NLRB 965 (1999).
electricity, were not supervisors under the Act. The Board found that these employees did not exercise sufficient independent judgment to render their responsibilities supervisory in nature. Rather, departing from an earlier ruling in *Rivers Elec. Corp.*, which had held that similar dispatchers were supervisors, the Clinton Board found that the dispatchers’ exercise of discretion was a necessary part of their technical duties.

C. Expanded Rights of Employees and Unions

The Clinton Board not only expanded coverage of the Act, it also expanded the statutory rights of employees under the Act, even in the context of a non-union workplace. In *Epilepsy Foundation*, the Clinton Board extended certain rights previously held only by union employees to all employees. In *NLRB v. Weingarten*, the Supreme Court held that a union-represented employee is entitled to have a union representative present at an investigatory interview if the employee reasonably believes that the interview may result in disciplinary action. In *Epilepsy*, the Clinton Board reasoned that the underlying rationale of *Weingarten* – the need to balance the inequality between employees and management in situations such as the imposition of discipline – applied equally in the context of non-union employees. The Clinton Board concluded that granting non-union employees the right to have a co-worker present during a disciplinary interview greatly enhanced the employees' ability to engage in concerted activity to prevent an employer from imposing punishment unfairly.

Significantly, some rights of unions were expanded during the Clinton years, without affording parallel rights to employers. Notably, in *Randell Warehouse*, the Clinton Board held that a union may photograph its organizational activity with employees unless such surveillance could be reasonably seen by employees as coercive. In so holding, the Board overruled *Pepsi-Cola Bottling Co.* which had held that such videotaping or photography by the union during an organizational campaign was impermissible unless the union had a legitimate reason for the activity. Significantly, however, the Clinton Board refused to extend its holding in *Randell* to employers. Relying on an employer's substantial control over the terms and conditions of employment, the Clinton Board instead reaffirmed the rule that an employer must provide a legitimate explanation for engaging in similar employee surveillance during an organizing campaign.

In *Springs Industries, Inc.*, the Clinton Board held that plant-closure threats would be presumed disseminated throughout the plant absent evidence to the contrary.

35 266 NLRB 380 (1983).
36 331 NLRB 676 (2000).
37 420 U.S. 251 (1975).
38 328 NLRB 1034 (1999).
40 332 NLRB 40 (2000).
This expressly overruled *Kokomo Tube Co.*,\(^1\) where the Board had found a threat of plant closure made to a single employee insufficient to overturn an election in the absence of evidence of dissemination. The holding in *Spring Industries* relieved the objecting union of this burden.

**D. Expansion in Labor's Ability to Organize and Retain Members**

The Clinton Board also strengthened organized labor's ability to organize and retain members, arguably to the detriment of employees' statutorily guaranteed right *not* to be represented by a union, in the area of union decertification and employer withdrawal of recognition. For example, in *St. Elizabeth's Manor, Inc.*,\(^2\) a divided Clinton Board overruled *Southern Moldings*\(^3\) and held that an employer that purchases a unionized company and becomes a "successor" employer obligated to recognize and bargain with the existing union is barred from filing a decertification petition for a "reasonable" period of time. Twenty-five years earlier, in *Southern Moldings*, the Board had held that the voluntary recognition bar rule applied only to the initial organization of an employer's employees and was not applicable when a successor employer voluntarily recognized the union that represented the predecessor's employees.\(^4\) In a companion case to *St. Elizabeth's Manor*, *MGM Grand Hotel*,\(^5\) the Clinton Board held that an employer's voluntary recognition of a union also created a bar to filing a decertification petition for a reasonable period of time. The effect of these decisions was to make it more difficult for employees who in fact no longer supported their union to free themselves from the union.

In *Douglas-Randell, Inc.*,\(^6\) the Clinton Board overruled *Passavant Health Care*\(^7\) and held that where the parties have entered into a settlement of outstanding unfair labor practice charges, and the settlement requires recognition and bargaining with the union, any petition challenging the union's majority status that is filed after the allegedly unlawful conduct, but before the settlement, must be dismissed.\(^8\)

\(^{1}\) 280 NLRB 357 (1986).
\(^{2}\) 329 NLRB 341 (1999).
\(^{3}\) 219 NLRB 119 (1975).
\(^{4}\) The Board reasoned that a successor employer stands in the shoes of the predecessor employer respecting the union and that it did not make sense to grant the union greater rights respecting its representation of employees than it possessed with respect to the predecessor employer.
\(^{5}\) 329 NLRB 464 (1999).
\(^{6}\) 320 NLRB 431 (1995).
\(^{7}\) 278 NLRB 483 (1986).
\(^{8}\) The Clinton Board extended its holding in *Douglas-Randell* in the subsequent cases *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998), and *Supershuttle of Orange County*, 330 NLRB 1016 (2000).
III. The Bush II Board

Between 2004 and 2007, the Board had a 3-2 majority of Bush-appointed members, with Chairman Robert Battista, Member Peter Schaumber and either Member Ronald Meisburg or Member Peter Kirsanow forming the majority and Democrat appointees Wilma Liebman and Dennis Walsh forming the minority. During this three-year period, the 3-2 Bush-appointed majority reversed several Clinton-era Board precedents and established a number of precedents viewed as favorable to employers. Foreshadowing how an Obama Board will deal with the Bush-era rulings, new Board Chairman Wilma Liebman dissented in almost every significant decision issued by the Bush Board during this three-year period.

A. Contingent Workers

Revisiting the issue of contingent workers, in *Oakwood Care Center*, the Bush Board, in a 3-2 decision, returned to the prior precedent of *Greenhoot, Inc.* and *Lee Hospital*, and held that employees obtained from a labor supplier cannot be included in a unit of permanent employees of the employer to which they are assigned, unless all parties consent to the bargaining arrangement. The majority found that such units, combining jointly-employed supplied employees and permanent employees solely employed by the user employer, are multi-employer units. Under Section 9(b) of the Act, consent is required for the establishment of such multi-employer units. The decision overruled the Clinton Board’s controversial decision in *M.B. Sturgis* which had held that bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by the user employer and a supplier employer are permissible under the Act. *Sturgis* had overruled over 20 years of Board precedent finding such units to be impermissible, absent consent.

The Bush Board pointed out that in the units authorized by *Sturgis*, some of the employees would be employed by the user employer while others would be employed by the joint employer. “Thus, the entity that the two groups of employees look to as

49 The “Bush II Board” refers to the NLRB during the two terms of President George W. Bush. Hereafter it simply is referred to as the Bush Board.

50 343 NLRB 659 (2004).

51 205 NLRB 250 (1973).

52 300 NLRB 947 (1990).

53 331 NLRB 1298 (2000).

54 *Oakwood Care Center* is one of several decisions in which the Bush Board reversed decisions by the Clinton Board and returned to established Board precedent. See also *Brown University*, 342 NLRB 483 (2004) (returning to precedent established in 1972); *IBM Corp.*, 341 NLRB 1288 (2004) (returning to precedent established in 1988); *MV Transportation*, 337 NLRB 770 (2002) (returning to precedent established in 1975).
their employer is not the same. No amount of legal legerdemain can alter this fact,” the Bush Board noted. The majority also noted that national labor policy was better served by limiting Sturgis-type units to cases where all parties consent. Allowing such units without consent was perceived to open the door to significant conflicts among the various employers and groups of employees participating in the collective bargaining process. The multiple employers are placed in the position of negotiating with one another as well as with the union. The Bush Board concluded that these are precisely the types of conflicts that Section 9(b) and the Board’s community of interest tests are designed to avoid.

B. Limitations on Coverage of the Act

In Brown University,\(^{55}\) the Bush Board, by a vote of 3-2, overturned the Clinton Board’s decision in New York University\(^ {56}\) and held that graduate student assistants are not “employees” within the meaning of Section 2(3) of the Act. The decision in Brown is the final act (at least for now) in a dispute that began in 1972. The Nixon Board held in Adelphi University\(^ {57}\) that graduate student assistants should not be included in a bargaining unit. Two years later, in Leland Stanford Junior Univ.\(^ {58}\) the Board observed that graduate students were primarily students and therefore not employees under the Act. The Board concluded that the relationship between graduate student assistants and their universities was more an academic and not an economic relationship. Almost 25 years later, the Clinton Board reversed course and in New York University held that graduate student assistants at NYU met the test “establishing a conventional master-servant relationship with a university.”

In its 2004 ruling in Brown University, the Bush Board came full circle and held that “the imposition of collective bargaining on graduate students would improperly intrude into the educational process and be inconsistent with the purposes and policies of the Act.” The Board concluded that the “principle time commitment” of Brown University’s teaching and research assistants “focused on obtaining a degree and, thus, being a student.” Consequently, the imposition of collective bargaining on the relationship between a university and its graduate student assistants would “intrude on the core academic freedoms in a manner simply not present in cases involving faculty employees.”\(^ {59}\)

\(^{55}\) 342 NLRB 483 (2004).
\(^{56}\) 332 NLRB 1205 (2000).
\(^{57}\) 195 NLRB 639 (1972).
\(^{58}\) 214 NLRB 621 (1974).
\(^{59}\) The rulings in New York University and Brown University demonstrate a key difference in how the pro-employer and pro-labor members of the Board view the collective bargaining relationship. The pro-labor members tend to view union membership as a fundamental right that all workers should enjoy and the pro-employer members appear to view union membership as a limited statutory right.
In *Brevard Achievement Center*, the Bush Board held that disabled workers who were in a primarily rehabilitative relationship with their employer were not statutory employees within the meaning of Section 2(3) of the Act. Consistent with its earlier ruling in *Brown* University, the Board stressed that the Act was intended by Congress to cover primarily economic relationships between employer and employee. “The imposition of collective bargaining on relationships that are not primarily economic does not further the policies of the Act,” the Bush Board concluded. Finding its longstanding rule that it would not assert jurisdiction over relationships that were “primarily rehabilitative” to be consistent with this statutory interpretation, the Board reaffirmed its “primarily rehabilitative” standard as the test for assessing the “employee” status of disabled workers in rehabilitative programs.

Finally, the Bush Board expanded the definition of a statutory supervisor under Section 2(11) of the Act. In *Oakwood Healthcare, Inc.*, and its companion cases *Golden Crest Healthcare Ctr.* and *Croft Metals, Inc.*, the Bush Board reexamined the terms “independent judgment,” “assign” and “responsibly to direct” as set forth under Section 2(11). Following a series of cases in which the federal courts of appeals and the U.S. Supreme Court rejected the Board’s interpretation of Section 2(11), the Bush Board sought to harmonize recent appellate decisions with its jurisprudence on what constitutes supervisory authority.

In *Oakwood Healthcare* and its companion cases, the Board defined “assign” as the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.* tasks, to an employee.” Further, the Bush Board defined “responsibly to direct” by using the following example: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ … and carried out with independent judgment.” Specifically, the element of “responsible” direction involves a finding of accountability, so that it must be shown that the “employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary” and that “there is a prospect of adverse consequences for the putative supervisor” arising from his or her direction of other employees. “Independent judgment” was described as judgment that cannot be effectively controlled by any other person, and the degree of discretion must rise above the “routine or clerical.”

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60 342 NLRB 982 (2004).


63 348 NLRB 727 (2006).

64 348 NLRB 717 (2006).
Applying the above definitions, the Bush Board held that the employer carried its burden of proving that all permanent charge nurses, except those in the emergency room, were statutory supervisors under the Act. It based its decision on the fact that the charge nurses assigned other nurses and aides to particular patients and geographic areas, and “weigh[ed] the individualized condition and needs of a patient against the skills or special training of available nursing personnel.”

C. Limitations on the Rights of Employees and Unions

In *IBM Corp.*, the Bush Board returned to the precedent established in *E.I. du Pont De Nemours* and held that an employer is not required to ensure that employees in a non-unionized workplace are permitted to have a co-worker present at an investigatory interview with their employer, even if the affected employee reasonably anticipates that the interview might result in discipline. The Bush Board’s decision in *IBM Corp.* overruled the Clinton Board’s ruling in *Epilepsy Foundation*, which extended the right to have a co-worker present during such interviews to unrepresented employees.

The history leading to the ruling in *IBM Corporation* is an excellent example of the tortured path of some NLRB precedents. In *Materials Research Corp.*, the Board held that *Weingarten* rights include the right to request the presence of a co-worker at an investigatory interview in a non-union setting. Three years later, in *Sears, Roebuck and Co.*, the Board overruled *Materials Research* and held that *Weingarten* rights did not apply to employees in a non-union workplace. The Board similarly refused to extend *Weingarten* rights in a non-union setting in *E.I. du Pont De Nemours*. Coming full circle, the Clinton Board voted 3-2 in *Epilepsy Foundation of Northeast Ohio* to revert to the rule adopted by the Board in its 1982 ruling in *Materials Research* and extend *Weingarten* rights to non-union employees. Four years later, the Bush Board again reversed course and in *IBM Corp.* held that *Weingarten* does not apply to employees in a non-union setting.

D. Limitations on Labor’s Ability to Organize and Retain Members

In a long-awaited decision, *Dana Corp.*, the Bush Board modified the recognition-bar doctrine and held that an employer’s voluntary recognition of a labor
organization does not bar a decertification or rival union petition that is filed within 45 days of the notice of recognition. In so doing, the Bush Board reversed a 40-year old precedent. Prior to the ruling in Dana, an employer’s voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately barred an election petition filed by an employee or a rival union for a reasonable period of time. This doctrine, first established by the Board in Keller Plastics, Inc., 73 reasoned that insulating a voluntarily-recognized union from challenge to its status while negotiating for a first collective bargaining agreement promoted labor relations stability.

In Dana, the Bush Board agreed to re-examine the recognition-bar doctrine announced in Keller Plastics. The Bush Board framed the issue as finding the proper balance between two important but often competing interests under the Act: protecting employee freedom of choice on the one hand and promoting stability of bargaining relationships on the other. In striking that balance, the majority in Dana concluded that although the basic justifications for providing an insulated period were sound, they did not warrant immediate imposition of an election bar following voluntary recognition.

Pursuant to the Bush Board’s ruling in Dana, no election bar will be imposed following the voluntary recognition of a union unless (1) bargaining unit employees receive notice of the employer’s recognition of the union and of their right, within 45 days of the notice, to file a decertification petition or to support an election petition by a rival union, and (2) 45 days have passed from the date of the notice and a petition has not been filed. A petition will be processed if, like other petitions, it is supported by 30 percent of the members in the bargaining unit.

In MV Transportation,74 the Bush Board found the Clinton Board’s reasoning in St. Elizabeth Manor75 faulty and, in any event, plainly insufficient to warrant such an abrupt departure from longstanding Board and court precedent. Accordingly, the Bush Board overruled St. Elizabeth Manor and returned to the previously well-established doctrine that an incumbent union in a successorship situation is entitled to – and only to – a rebuttable presumption of continuing majority status, which does not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status.76

Finally, in Truserve Corp.,77 the Bush Board held that, absent a finding of a violation of the Act, or an admission by the employer of such a violation, there is no

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73 157 NLRB 583 (1966).
74 337 NLRB 770 (2002).
75 329 NLRB 341 (1999).
76 See Southern Moldings, Inc., 219 NLRB 119 (1975) (voluntary recognition bar rule applied only to the initial organization of an employer's employees and was not applicable when a successor employer voluntarily recognized the union that represented the predecessor's employees).
77 349 NLRB 227 (2007).
basis for dismissing a decertification petition based on a settlement of alleged but unproven unfair labor practices. To do so, the majority concluded, would unfairly give determinative weight to allegations of unlawful conduct and be in derogation of employee rights under Section 7 of the Act. Accordingly, the Bush Board overruled a series of decisions by the Clinton Board, *Douglas-Randall*, Liberty Fabrics, and *Supershuttle of Orange County*. In doing so, the Bush Board returned to the doctrine enunciated in *Passavant Health Center*, and its progeny. Those cases held that a settlement agreement is not an admission that the employer's actions, alleged but not found to be unlawful, constituted an unfair labor practice unless such an admission is an express part of the agreement. Consequently, the fact that the alleged actions occurred prior to the filing of the decertification petition provides no basis for a conclusion that the petition was tainted by unlawful conduct.

E. Expansion of Employer Rights

In *Crown Bolt, Inc.*, the Bush Board held that an employer's threat to close its facility in the event employees vote for union representation will not be presumed disseminated throughout the bargaining unit. This decision overruled the Clinton Board’s decision in *Springs Industries, Inc.*, which had held that plant-closure threats would be presumed disseminated throughout the plant absent evidence to the contrary.

In overruling *Springs Industries*, the Bush Board relied on several considerations. First, the Bush Board found that because the burden of proof in election-objection cases rests with the objecting party, *Springs Industries* “runs counter to the burden-allocation norm.” Second, while the holding of *Springs Industries* is limited to plant-closure threats, its rationale is not, so “there is no apparent basis for declining to extend [the dissemination presumption] to other kinds” of statements. Third, the presumption is unnecessary. If dissemination of plant-closure threats is “all but inevitable,” as the Clinton Board stated in *Springs Industries*, then it should be easy for the objecting party to prove. Fourth, employers face an undue burden in proving a lack of dissemination.

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81 278 NLRB 483 (1986).
83 343 NLRB 776 (2004).
84 332 NLRB 40 (2000).
85 The Bush Board argued that its decision in *Crown Bolt* simply reinstated the evidentiary requirement of *Kokomo Tube Co.*, 280 NLRB 357 (1986), where the Board found a threat of plant closure made to a single employee insufficient to overturn an election in the absence of evidence of dissemination. *Crown Bolt*, 343 NLRB at 777.
Finally, circumstantial variations affect the probability of dissemination in any particular case, arguing against presuming dissemination in all closure-threat cases.

In another case expanding the rights of employers, *Lutheran Heritage Village-Livonia*, the Board held that the maintenance of work rules prohibiting “abusive and profane language,” “verbal, mental and physical abuse,” and “harassment … in any way” could not reasonably be understood as interfering with employees’ Section 7 rights under the Act. The Bush Board adopted the reasoning in *Adtrans*, *ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, where the D.C. Circuit concluded that a rule prohibiting abusive or threatening language was lawful because it was based on the employer’s legitimate right to establish a “civil and decent” workplace and to protect itself from liability for workplace harassment by maintaining rules prohibiting conduct that could lead to liability. Adopting the court’s view, the Bush Board majority agreed that a rule prohibiting “abusive and profane language,” as well as rules prohibiting “verbal abuse” and “harassment,” were lawful.

The Bush Board recognized that maintenance of a rule that does not expressly prohibit protected activity “can nonetheless be unlawful if employees would reasonably read it to prohibit Section 7 activity.” However, the majority determined that here the employees could not reasonably read the rule in that way. “That is, reasonable employees would infer that the [employer’s] purpose in promulgating the challenged rules was to ensure a ‘civil and decent’ workplace, not to restrict Section 7 activity.” The majority also held that where, as in this case, the rule does not refer to Section 7 activity, was not adopted in response to organizational activity, and had never been enforced to restrict Section 7 activity, “we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way.”

In a long-awaited and controversial decision, *Register-Guard*, a majority of the Bush Board sustained an employer’s e-mail policy limiting employee usage to business-related purposes and barring “non-job-related solicitations.” The majority rejected an argument by the General Counsel that employees “should have greater rights in regard to e-mail usage than in regard to the use of other company property,” because e-mail had become a primary means by which employees communicate at work. Instead, the Bush Board concluded that employers have a basic property right to regulate and restrict employees’ use of company property and reasoned that e-mail had not so fundamentally “changed the pattern of industrial life” as to require a limitation of employers’ property rights.

The Bush Board also relaxed its prior standard for determining whether an employer had applied an e-mail usage policy or any other workplace policy.

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86 343 NLRB 646 (2004).
87 253 F.3d 19 (D.C. Cir. 2001).
88 351 NLRB 1110 (2007).
discriminately to adversely affect protected employee communications. In the past, if an employer permitted employees to use its e-mail system for any personal purpose, the employer generally lost all rights to prohibit any other type of personal system usage based on the Board’s expansive view of disparate treatment. In *Register-Guard*, however, a majority of the Bush Board, over a vigorous dissent, narrowed its disparate treatment analysis to “communications of a similar character.” The majority’s decision adopted the reasoning of the United States Court of Appeals for the Seventh Circuit, which disagreed with earlier Board decisions applying disparate treatment concepts to bulletin board usage (thus, faulting the Board for finding unlawful conduct where an employer allowed wedding announcements to be posted but prohibited the posting of solicitations generally).

Under the new standard established by the Bush Board in *Register-Guard*, an employer may permit employee personal e-mail usage unrelated to Section 7 activity, but prohibit any use of the e-mail system for union solicitation. The Bush Board also addressed the application of this disparate treatment standard to solicitation rules in general. It held that, without violating the Act, “an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use.”

Applying this standard to the facts in *Register-Guard*, the Bush Board concluded that the employer did not act unlawfully by disciplining an employee for using the e-mail system for union solicitation purposes even though it “tolerated personal employee e-mail messages concerning social gatherings, jokes, baby announcements, and the occasional offer of sports tickets or other similar personal items.” In reaching this conclusion, the majority reiterated that there was no evidence that the newspaper permitted employees to use e-mail to solicit other employees to support any group or organization.

**F. Tougher Burden of Proof and Evidentiary Standards for General Counsel**

In *St. George Warehouse*, the Bush Board, by a 3-2 vote, modified its procedures in backpay cases. Under the new rule, the NLRB General Counsel has the burden of producing evidence concerning an employee’s efforts to find interim employment following an unlawful discharge. In this case, the Board reaffirmed the principle that the employer bears the ultimate burden of persuasion concerning whether an unlawfully discharged employee made an adequate search for interim employment. However, the Bush Board majority determined that once the employer shows there were comparable jobs available in the relevant geographic area, the burden of production “is properly on the discriminatee and the General Counsel … to show that

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89  351 NLRB 961 (2007).
the discriminatee took reasonable steps to seek those jobs.” To meet this burden of production, the General Counsel must produce the employee to testify or offer other competent evidence of the employee’s interim job search. This is a significant change from the Board’s past practice, which placed the burden of proof in backpay cases entirely on the employer.

In *Oil Capitol Sheet Metal, Inc.*, the Bush Board announced new evidentiary standards for determining the duration of the backpay period when a discriminatee is a “salt.” In cases of this kind, a professional union organizer attempts to find employment with a nonunion employer with the intent of organizing the workforce. Here, the full Board found unanimously that the employer violated Section 8(a)(3) and (1) by refusing to hire a salt.

The Bush Board split by a vote of 3-2, however, over the remedy to be ordered. Prior to this decision, the remedy for an unlawful discharge or refusal to hire included the employer’s payment of backpay to the employee for the period from the unlawful act until the employer made a valid offer of reinstatement (or instatement, in the case of an unlawful refusal to hire). The Board previously had applied a presumption that, if hired, the “salt” would have stayed on the job for an indefinite period. The Bush Board declined to continue to apply those presumptions. It reasoned that the presumptions were inconsistent with the reality of salting. According to the Bush Board, the reality is that salts, when hired, stay on the job until they succeed in their organizational effort, or reach the point where such efforts are unsuccessful. In either situation, the salt typically quits that job and moves on to another nonunion employer. The Board recognized, however, that this will not always be the case. There may be instances where the union will permit a member to work for the targeted employer for an indefinite period. The Bush Board majority reasoned that in such instances, the union is in the better position to explain its intentions, and thus the burden to establish the expected duration of employment should be on the union.

In dissent, Members Liebman and Walsh criticized the majority for overturning precedent without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis. The dissent would have continued to treat salts as the Board treats all other employees who are subjected to employment discrimination.

In *Harborside Healthcare, Inc.*, the Bush Board, in a 3-2 decision, reaffirmed longstanding precedent that pro-union supervisory conduct may be grounds for setting

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90 349 NLRB 1348 (2007).

91 *See Ferguson Elec. Co.*, 330 NLRB 514 (2000), *enf’d*, 242 F.3d 426 (2d Cir. 2001) (paid union organizer who is unlawfully denied employment entitled to same backpay remedy as any other employee refused employment); *Aneco Inc. v. NLRB*, 285 F.3d 326 (4th Cir. 2002) (employer’s burden to rebut presumption that salt would have worked continuously from date employer unlawfully refused to hire him until date offer of employment was extended).

92 343 NLRB 906 (2004).
aside an election without there being an explicit threat of reprisal or promise of benefit. The decision responded to a remand from the Sixth Circuit,\(^93\) where the court criticized the Board for finding pro-union supervisory conduct non-objectionable by using a legal standard that deviated from established Board precedent. The standard applied by the Board and rejected by the Sixth Circuit appeared to require an explicit threat of reprisal or promise of benefit for such conduct to be objectionable.\(^94\)

The Board then reaffirmed its established standard, restating it to include the elements of the inquiry to be conducted. The restated two-part standard inquires:

1. Whether the supervisor’s pro-union 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 pro-union 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.

In determining whether the supervisory conduct affected the election outcome, the majority stated that it would consider, among other things, whether the employer opposed the union’s campaign, including any anti-union statements by higher-level officials and whether the employer disavowed the pro-union supervisory conduct.

After emphasizing that it is incumbent on the Board to protect employees from the conduct of supervisors that interfere with employees’ freedom of choice, whether pro-union or anti-union, the majority in *Harborside Healthcare* modified prior Board law involving supervisory solicitation of union authorization cards. In lieu of the rule set out by the Clinton Board in *Millsboro Nursing & Rehabilitation Center, Inc.*,\(^95\) that such solicitation is not objectionable unless it “contains the seeds of potential reprisal, punishment or intimidation,” the Bush Board adopted a rule that supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances. The majority reasoned that a supervisor, by definition, has the power to affect the working life of employees, and the solicitation of cards affords the supervisor the opportunity to obtain a graphic illustration of who is pro-union and, by the process of eliminating non-


\(^94\) See *Pacific Physician Services*, 313 NLRB 1176 (1994) (requiring supervisory pro-union conduct to involve an explicit threat of reprisal or promise of benefits to invalidate an election) and *Sutter Roseville Med. Center*, 324 NLRB 218 (1997) (same).

\(^95\) 327 NLRB 879 (1999).
signers, who is not. Therefore, employees solicited by a supervisor would reasonably be concerned that the “right” response will be viewed with favor, and a “wrong” response with disfavor.96

IV. Expected Reversals by the Obama Board

Currently, there are two sitting members on the National Labor Relations Board – Chairman Wilma Liebman (D) and Member Peter Schaumber (R). On July 9, 2009, President Obama nominated Craig Becker (D), Mark Gaston Pearce (D), and Brian Hayes (R) to be members of the NLRB. If confirmed by the Senate, the Board would have a full complement of five members for the first time since December 16, 2007.

With Chairman Liebman leading a pro-union majority, it is widely anticipated that an Obama Board will reverse many of the controversial decisions issued by the Bush Board. One need only read the dissenting opinions of then Member Liebman to the Bush Board’s decisions to gain insight into how she intends to vote.

A. Contingent Workers

1. Oakwood Care Center

In their dissent in Oakwood Care Center, Members Liebman and Walsh cited the rise of alternative work arrangements in response to global economic pressures on employers. They argued that workers in these arrangements would now effectively be barred from organizing, unless their employers consented. Rejecting the majority’s “supposed strict construction” of the Act, the dissent pointed to the Bush Board’s “disturbing reluctance to recognize changes in the economy and the workplace and to ensure that our law reflects economic realities and continues to further the goals that Congress has set.” The Obama Board will likely overrule Oakwood Care Center and readopt the Clinton Board’s reasoning in M.B. Sturgis.

B. Limitations on Coverage of the Act

1. Brown University

It is likely that the Obama-appointed Board will overturn Brown University and return to the broader interpretation of Section 2(3) adopted by the Clinton Board in New York University. In their dissent in Brown University, Members Liebman and Walsh stated that “collective bargaining by graduate student employees is increasingly a fact of American university life,” and characterized the majority’s opinion as “woefully out of touch with contemporary academic reality.”

96 The Bush Board also overruled B.J. Titan Service Co., 296 NLRB 668 (1989), to the extent it held that a pro-union supervisor’s statement linking job security to support of the union is never objectionable and held that whether such a statement is coercive will depend on the circumstances.
2. **Brevard Achievement Center**

In their dissent in *Brevard*, Members Liebman and Walsh observed that this case “presents the Board with the perfect opportunity to revisit longstanding precedent governing disabled workers in light of a legal and policy landscape that has evolved dramatically in the last 15 years.” Chairman Liebman indicated that the Board should abandon doctrines based on outdated notions about the place of the disabled in our society. It is likely the Obama Board will reverse *Brevard* if given the opportunity.

3. **Oakwood Healthcare**

Previously pending in Congress was the Re-Employment of Skilled and Professional Employees and Construction Tradeworkers Act, also known as the RESPECT Act. This legislation is expected to be reintroduced. If passed, the legislation would limit which workers can be classified as supervisors and thereby excluded from a bargaining unit under Section 2(11) of the Act. Notwithstanding the status of the RESPECT Act, the Obama Board likely will have an opportunity to reverse the Bush Board’s decision in *Oakwood Healthcare* fairly quickly since supervisory status issues are frequently appealed to the Board. If this should happen, we can expect the Supreme Court will once again take up the issue of Section 2(11) supervisory status.

C. **Limitations on the Rights of Employees and Unions**

1. **IBM Corporation**

Based on the analysis and conclusions of the dissent in *IBM Corp.*, along with the fact that the Board has changed its position on this issue four times in the 26 years since *Weingarten*, it is probable that the Obama Board will revisit this issue once again and reverse the Bush Board’s decision in *IBM Corp*. Members Liebman and Walsh argued in their dissent that the majority neither demonstrated that the Clinton Board’s holding in *Epilepsy Foundation* was contrary to the Act, nor offered compelling policy reasons for failing to follow precedent. Addressing the holding in *IBM Corp.*, Member Liebman noted that the majority had “overruled a sound decision not because they must, and not because they should, but because they can. As a result, today’s decision itself is unlikely to have an enduring place in American labor law.” It seems likely that the debate over *Weingarten* rights for nonunion employees will continue and that *IBM Corp.* is unlikely to endure beyond the Obama Board’s first opportunity to reverse it. The long saga continues.

D. **Limitations on Labor’s Ability to Organize and Retain Members**

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97 It is telling that Members Liebman and Walsh criticized the Bush Board’s failure to follow precedent in *IBM Corp.*, when it was the Clinton Board that rejected a 10-year old precedent in *Epilepsy Foundation*. The Bush Board’s ruling in *IBM Corp.* merely reestablished that precedent.
1. *Dana Corporation*

Members of organized labor have indicated that the Bush Board’s decision in *Dana Corporation* is at the top of its “hit list.” Not only does *Dana* conflict with the Employee Free Choice Act, which was reintroduced in the House and Senate in March 2009, it undermines neutrality and card check, as well as voluntary recognition agreements. As a result, it is likely that with Obama-appointees comprising a majority of the Board, the decision in *Dana* will be reversed when the opportunity arises.

**E. Expansion of Employer Rights**

1. *Crown Bolt*

In their partial dissent, Members Liebman and Walsh emphasized the severity of plant-closing threats, rejecting the Bush Board’s view that circumstantial variations from case to case sufficiently affect the probability that such threats will be disseminated to warrant dispensing with the *Springs Industries* presumption. The dissent disagreed that dissemination should be easy for the objecting union to prove, stating that “employees are often reluctant, even afraid, to testify against their employer.” Finally, the dissent noted the consistency of the *Springs Industries* presumption with the analogous “lore of the shop” principle, under which the Board assumes that plant-closure threats and other serious unfair labor practices will live on in the lore of the shop by being disseminated to new employees months and even years after the event. We should expect the *Springs Industries* presumption to be restored by the Obama Board.

2. *Lutheran Heritage*

Dissenting, Members Liebman and Walsh observed that “the ill-defined scope of the [employer’s] ‘verbal abuse’ and abusive language” rules, as well as its “no harassment” rule, would reasonably tend to cause employees to “steer clear of the prohibited zone” and refrain from voicing disagreement with their terms and conditions of employment or vigorously attempting to organize skeptical workers. “Although we agree with our colleagues and the District of Columbia Circuit that employers have a legitimate interest in protecting themselves by maintaining rules that discourage conduct that might result in employer liability,” the dissent wrote, “that interest is appropriately subject to the requirement that employers articulate those rules with sufficient specificity that they do not impinge on employees’ free exercise of Section 7 rights.”

3. *The Register-Guard*

The strong dissenting opinion by then Member Liebman in *Register-Guard* is significant evidence of the likely outcome an Obama Board would reach should this issue be presented in another case. Liebman’s dissent described the Board as the “Rip Van Winkle of administrative agencies,” reasoning that “only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized
communication both within and outside the workplace.” Additionally, an Obama-Board would likely find a violation of the Act based on an employer treating employee union-related communications differently than other non-work related communications.

F. Tougher Burden of Proof and Evidentiary Standards for General Counsel

1. St. George Warehouse

In their dissenting opinion, Members Liebman and Walsh argued that the majority in St. George Warehouse failed to articulate any persuasive reason for overruling “more than 45 years of established precedent,” which placed the burden of proof in backpay cases entirely on the employer. Member Liebman filed a separate dissenting opinion in which she characterized the majority’s decision as an “unfortunate” continuation of “the Board’s recent trend of weakening the backpay remedy under the National Labor Relations Act.” It seems clear that Chairman Liebman intends to reverse this trend.

2. Oil Capitol Sheet Metal, Inc.

In the view of dissenting members Liebman and Walsh, the majority’s approach in Oil Capitol not only violated the well-established principle of resolving remedial uncertainties against the wrongdoer, but it treated salts “as a uniquely disfavored class of discriminatees, notwithstanding the Supreme Court’s ruling that salts are protected employees under the National Labor Relations Act.” The dissent also stated that the majority’s reasons for adopting its new evidentiary approach were “dubious at best,” and that it was unreasonable to presume that salts would leave employment at some fixed point in time, known by a union in advance. These arguments aside, the fact that Chairman Liebman criticized the majority for overturning precedent without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis indicates that the decision will likely be overturned at the first opportunity.

3. Harborside Healthcare

Chairman Liebman has described Harborside as the “most disturbing decision” of 2004. In her dissent, then Member Liebman argued that the majority had created an “arbitrary double standard” in its treatment of pro-union and anti-union conduct, pointing out that employers had long been permitted to require employees to attend captive audience meetings before an election. She warned that the majority’s ruling that supervisory card solicitation is inherently coercive “jeopardizes the outcome of many elections” because such solicitation tends to involve “borderline” supervisors, who may be unaware of their supervisory status until their conduct is challenged. It therefore is expected that an Obama Board will reverse Harborside Healthcare.

V. Conclusion

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A review of the expected Obama changes from this author’s vantage point, while somewhat overwhelming, may not be as unsettling as it is to others – at least as it relates to the notion of ever-shifting Board precedent. Perhaps it is because the changing tides of labor law have been in effect throughout my labor law career. Since before the times of the Clinton Board, we have continually witnessed the flip-flop of Board decisions. While it might be comforting, and indeed easier, to advise clients as to the state of Board law and know that the precedent that is relayed to them will remain static during the new Administration, these thoughts are naïve. And, although it seems more justifiable to see changes made in areas where workplace and labor dynamics have changed substantially in recent years (e.g. the use of temporary employees in the workplace, the use of e-mail in the workplace, and labor’s use of neutrality and card check agreements in the wake of corporate campaigns), we also know that other areas will be revisited as well (e.g. the suitability of Weingarten rights for non-union employees).

But, it should be of some comfort to know that practitioners have not been left entirely in the dark and without guidance as to the shape and form of decisions to come. Numerous, vociferous dissents often provide ample guidance for practitioners to be able to advise clients not only of the state of the law as it exists today, but also as to what we anticipate the law will be tomorrow. One can only anticipate that as the composite of the Board continues to change, each side will continue to work to implement labor policy the way in which that party believes the Act was intended to be interpreted and applied, and the pendulum will continue to swing.