

**American Bar Association Section of Labor and Employment Law  
Committee On Development of the Law Under the NLRA  
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**Current Developments Under the NLRA and Prospects for the Future:  
What Can We Anticipate From the Obama Board?**

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President Obama’s election signals the return of balanced decision-making at the Board. Within a few days of his inauguration, the President designated Member Liebman as the Board’s Chair. As of this writing, there remain three vacancies to be filled – two Democrats and one Republican. Until the new nominees are confirmed, we can expect that Chairman Liebman and Member Schaumber will continue to work towards deciding pending cases, as they have since January 2008.<sup>1</sup> As a two member Board, they have issued 312 decisions, and were unable to reach agreement on only 21 cases.<sup>2</sup>

Even with this considerable effort, there remain significant issues for the Board to decide, many of which have been pending for some time. These issues, in no particular order, include:

<b>ISSUE</b>	<b>CASES</b>
<b>Retaliatory State Lawsuits (BE&amp;K/Bill Johnson’s)</b>	<i>Allied Mechanical</i> , 7-CA-41687 <i>Dilling Mechanical</i> , 25-CA-25094 <i>E.P. Donnelly, Inc.</i> , 4-CD-1188 <i>Federal Security</i> , 13-CA-38669(R)
<b>Unilateral Changes -- Post-expiration modifications to benefit plan</b>	<i>E. I Dupont De Nemours, Louisville Works</i> , 9-CA-40777 <i>E. I Dupont De Nemours and Company</i> , 4-CA-33620
<b>Job Targeting</b>	<i>J.A. Croson Company</i> , 9-CA-35163
<b>Bannerings/Signal Picketing Cases—8(b)(4)(B)</b>	<i>Eliason &amp; Knuth of Arizona</i> , 28-CC-955 <i>Associated General Contractors, San Diego</i> , 28-CC-946 <i>Carignan Construction Co.</i> , 31-CC-2113 <i>Grayhawk Development</i> , 28-CC-973 <i>Held Properties</i> , 31-CC-2115 <i>Held Properties</i> , 31-CC-2126 <i>Marriott Warner Center Woodland Hills</i> , 31-CC-2121 <i>New Star General Contractors, Inc.</i> , 27-CC-877

<sup>1</sup> There is a caveat to their continuing to decide cases without a third Board Member. Several petitions for review have been filed in the Circuit Courts challenging whether the two member Board constitutes a lawful quorum, and therefore, whether it has the authority to render decisions. The issue was argued on December 4, 2008, before the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 08-1162, *pet’n for review of 352 NLRB 179* (2008). The impact of an adverse decision on the other decisions issued by the two member Board is not clear.

<sup>2</sup> *Obama Has Opportunity to Quickly Create Democratic Majority on Board*, Daily Labor Reporter (BNA), 15 DLR S-9 (Jan. 27, 2009).

ISSUE	CASES
	<i>Richie's Installations</i> , 21-CC-3337 <i>Sheet Metal Workers Local 15 (Galencare, Inc., d/b/a Brandon Regional Medical Center)</i> , No. 12-CC-1258(R) <i>Starkey Construction</i> , 5-CC-1289 <i>United Parcel Service</i> , 28-CC-933
<b>Access</b>	<i>New York New York Hotel &amp; Casino</i> , 28-CA-14519(R) <i>(Oral Argument Held November 9, 2007)</i> <i>Roundy's</i> , 30-CA-17185 <i>Simon DeBartolo Group</i> , 29-CA-23218 <i>Wal-Mart Stores, Inc.</i> , 12-CA-20986 <i>Venetian Casino, LLC</i> , 28-CA-16000(R)
<b>8(a)(2)/8(b)(1)(A) and (2) Recognition based on Neutrality Agreement</b>	<i>Dana Corporation</i> , 7-CA-46965; -CB-14083
<b>Beck Initial Notice</b>	<i>Kroger Limited Partnership</i> , 25-CB-8896
<b>Beck - Annual Renewal of Objections</b>	<i>Colt's Manufacturing Company</i> , 34-CB-2631 et al. <i>L-3 Communications Vertex Aerospace LLC</i> , 15-CB-5169
<b>Remedy Issues - GC Request for Compound Interest</b>	<i>Cadence Innovation</i> , 9-CA-43672 <i>Kentucky River Medical Center</i> , 9-CA-42249
<b>Dues Checkoff – Post-Contract Expiration Obligations</b>	<i>Hacienda Resort</i> , 28-CA-13274 (R2)
<b>Dana/Metaldyne-Related Issues</b>	<i>Gilsa Dairy Products</i> , No. 17-RC-12584 <i>Res-Care</i> , 11-RD-694 <i>Rite Aid</i> , 31-RD-1578 <i>USC Norris Cancer Hospital</i> , 21-UD-407 <i>Securitas Security Services USA</i> , 31-RD-1579 <i>Robinson Aviation</i> , 11-RD-6705 <i>Paragon Systems</i> , 10-RD-1477
<b>Independent Contractors</b>	<i>Lancaster Symphony Orchestra</i> , 4-RC-21311 <i>Plano Symphony Orchestra</i> , 16-RC-10844
<b>Yeshiva University Issue</b>	<i>Point Park University</i> , 6-CA-34243(R)

There are many other issues for the Board to address as appropriate cases come before it. Over the years, the Bush Board seriously undermined the ability of workers to organize, excluded employees from the protections of the Act, restricted the remedies available to employees, narrowed employee conduct deemed to be protected activity, diminished the right to bargain collectively and undermined the right to strike while sanctioning partial lockouts of known union adherents. Many of these decisions overruled longstanding precedent, and their reexamination by the Board is warranted. They are discussed below.

### **Undermining Worker Organizing**

The Bush Board's efforts to dismantle worker protections came at a time when the right to organize is more and more under attack and they further entrenched the "culture of near-

impunity that has taken shape in much of U.S. labor law and practice.”<sup>3</sup> The numbers paint a stark and compelling picture of what workers face when they try to form a union. During organizing campaigns, more than one-fourth of employers discharge workers for union activity; more than half threaten a full or partial shutdown of their company if the union effort succeeds; and between 15 and 40 percent make illegal changes to wages, benefits, and working conditions, give bribes to those who oppose the union, and/or spy on union activists.<sup>4</sup>

Against this backdrop, in the *Dana* decision, the Board tossed out the decades-old rule that allows an employer and union, following voluntary recognition, a reasonable period of time to negotiate a collective bargaining agreement without challenge to the union’s majority status.<sup>5</sup> The dissent accused the majority of “cutting voluntary recognition off at the knees.”<sup>6</sup> Indeed, in the *Dana* decision, the Board elevates the rights of a *minority* of workers who do not support a union over the rights of a *majority* of workers who do.<sup>7</sup>

In *Dana*, the union supported its majority status on the basis of cards signed by a majority of the workers. The Board attacked and criticized the signed cards for a whole host of reasons: card signing is a “public action, susceptible to group pressure...;”<sup>8</sup> “misrepresentations about the purpose for which the card will be used may go unchecked;”<sup>9</sup> employees “may not even understand the consequences of voluntary recognition...;”<sup>10</sup> “card signings take place over a protracted period of time;”<sup>11</sup> and “[t]here are no guarantees of comparable safeguards [compared with an NLRB election], in the voluntary recognition process.”<sup>12</sup>

However, not one of these concerns was raised by the Board in a companion case involving an employer’s efforts to get rid of a union. In *Wurtland*, even though a petition signed

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<sup>3</sup> Lance Compa, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (Human Rights Watch 2000) at 10.

<sup>4</sup> Chirag Mehta and Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, American Rights at Work, (2005), available at <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/UROCUEdcompressedfullreport.pdf>; see also Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobilization on Workers, Wages and Union Organizing*, Cornell University (Sept. 6, 2000).

<sup>5</sup> *Dana Corp.*, 351 NLRB 434 (2007).

<sup>6</sup> *Dana*, 351 NLRB at 444. “Today’s decision . . . undercuts the process of voluntary recognition as a legitimate mechanism for implementing employee free choice and promoting the practice of collective bargaining. It does so at a critical time in the history of our Act, when labor unions have increasingly turned away from the Board’s election process – frustrated with its delays and opportunities it provides for employer coercion – and have instead sought alternative mechanisms for establishing the right to represent employees . . . . If disillusionment with the Board’s election process continues, while new obstacles to voluntary recognition are created, the prospects for industrial peace seem cloudy, at best.” *Id.*

<sup>7</sup> As of January 6, 2009, the Board had received 529 requests for *Dana* notices and 46 election petitions have been filed in voluntary recognition cases. There were 26 elections held by that date, with the voluntarily recognized union winning 18 elections and losing eight. In one of the eight lost elections, the employees chose representation by a rival union. Of the remaining 20 petitions filed in voluntary recognition cases, 11 were withdrawn, three were dismissed by the agency, and six remain pending. *Obama Has Opportunity to Quickly Create Democratic Majority on Board*, Daily Labor Reporter (BNA), 15 DLR S-9 (Jan. 27, 2009).

<sup>8</sup> 351 NLRB at 438.

<sup>9</sup> 351 NLRB at 439.

<sup>10</sup> 351 NLRB at 439.

<sup>11</sup> 351 NLRB at 439.

<sup>12</sup> 351 NLRB at 439.

by a majority of workers stated that they wished “for a vote to remove the union,” the Board concluded that no election need be conducted because the “more reasonable interpretation” was that the workers wanted to remove their union, not that they wanted to *vote to remove the union*.”<sup>13</sup> Instead of challenging the legitimacy of the signed cards as in *Dana*, the Board in *Wurtland* presumed that “signatory employees rejected union representation” without addressing any of the concerns that the majority claimed troubled them about the signatory employees in *Dana*. Indeed, the Board opined that requiring an NLRB election would unduly prolong the time during which the union would remain the workers’ representative, *i.e.*, “until the election results were certified, including any period required for the resolution of challenges and objections.”<sup>14</sup>

No better was the Board’s decision in *Shaw’s Supermarkets*.<sup>15</sup> There, the employer sought to withdraw recognition from a union on the basis of “slips” signed by workers. The Board never questioned the “comparable safeguards” of using signed slips to record worker sentiment; forgot all about its preference for elections to determine questions concerning representation; and suddenly worried that an election process would not yield a prompt result. Far worse was its fear that “employees will be forced to endure representation that they have unquestionably rejected.”<sup>16</sup>

### **Removal of Employees From the Protections of the Act**

Decisions by the Bush Board overturned precedents to deny representation and bargaining rights to tens of thousands of the nation’s workforce who were previously covered, including teaching and research assistants,<sup>17</sup> and, effectively, temporary employees working jointly for a supplier employer and a user client, unless both employers consent.<sup>18</sup> Existing precedents were artificially construed and applied in order to characterize workers as “non-employees,” “managers,” and “independent contractors” and to exclude such categories as disabled individuals working as janitors,<sup>19</sup> faculty members,<sup>20</sup> artists’ models,<sup>21</sup> and newspaper carriers and haulers.<sup>22</sup>

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<sup>13</sup> *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817, 818 (2007).

<sup>14</sup> *Wurtland*, 351 NLRB at 819.

<sup>15</sup> *Shaw’s Supermarkets*, 350 NLRB 585 (2007).

<sup>16</sup> *Shaw’s*, 350 NLRB at 588-589.

<sup>17</sup> *Brown University*, 342 NLRB 483 (2004) (reversing a four-year-old decision in *New York University*, 332 NLRB 1205 (2000) and eliminating from the Act’s protections thousands of graduate student workers who have been actively seeking union representation during the pendency of the *Brown* case, including those at Columbia University, Yale University, Tufts University, Pratt Institute and the University of Pennsylvania, among others.

<sup>18</sup> *Oakwood Care Center*, 343 NLRB 659 (2004), overruling *M.B.Sturgis*, 331 NLRB 1298 (2000).

<sup>19</sup> *Brevard Achievement Center*, 342 NLRB 982 (2004).

<sup>20</sup> *LeMoyne-Owen College*, 345 NLRB 1123 (2005), following a remand from the Court of Appeals for the District of Columbia Circuit of the Board’s initial decision reported at 338 NLRB 1 (2003) (faculty are excluded from the Act’s protection because they “play a major and effective role in the formulation and effectuation of management policies.”) 345 NLRB at 1132-1133.

<sup>21</sup> *Penna. Academy of Fine Arts*, 343 NLRB 846 (2004).

<sup>22</sup> *St. Joseph News-Press*, 345 NLRB 474 (2005).

In a trilogy of cases with enormous impact, the Board radically expanded the statutory definition of “supervisor.”<sup>23</sup> This re-drawing of supervisory lines affects the continued organizing and collective bargaining rights of hundreds of thousands of professional, technical and skilled employees who rely on less highly trained or experienced personnel to help them accomplish their work.<sup>24</sup>

### **Restricting and Narrowing Already Inadequate NLRB Remedies**

The decisions of the Bush Board undermined the Act’s already meager remedies for employer abuse and interference with protected rights. Coupled with the substantial delays in Board proceedings that in many instances are aggravated by employers’ procedural maneuvering, these rulings effectively eliminated any deterrent effect and in practice further encourage employers to violate workers’ rights.

The Bush Board made radical changes in long-standing rules regarding back pay eligibility. Reversing 45 years of established precedent,<sup>25</sup> it held that the General Counsel and illegally terminated workers will now carry the burden, in a proceeding to determine back pay following a finding of illegal conduct, to come forward with evidence that the illegally terminated workers took reasonable steps to look for work after being fired.<sup>26</sup> If a worker does not present evidence of an adequate search for work, the employer will have no back pay obligation. The Board also undercut the likelihood of back pay by announcing a new rule that employees who wait more than two weeks before seeking interim work, what the Board characterizes as “an unreasonably long time,” will be denied back pay for that period because to do otherwise would “reward idleness.”<sup>27</sup>

The Board also shifted the burden to the General Counsel and workers to prove that applicants who were denied employment had a “genuine interest” in working for the employer

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<sup>23</sup> *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727 (2006); and *Croft Metals, Inc.*, 348 NLRB 717 (2006).

<sup>24</sup> RNs are the largest occupational group in the healthcare industry, holding 2.2 million jobs in 2000. Almost 1.3 million of these RNs are employed in hospitals, representing fully one quarter of all hospital employees. See 2002-2003 BLS Occupational Outlook Handbook, Registered Nurses, Health Industry. In addition, there are approximately 420,000 LPNs currently employed in both hospitals and nursing homes. And the impact of these decisions will not be limited to nurses or to the health care industry; they potentially affect all professional employees, who number 27 million. See BLS, 2000-2010 Employment Projections, Table 2.

<sup>25</sup> *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962); see also NLRB Compliance Manual §10550.1: “In the event of a dispute concerning interim earnings, it is the respondent’s legal burden to prove interim earnings and other facts that may mitigate the loss resulting from its unlawful action;” and Compliance Manual §10558.1: “It is the respondent’s burden to establish that the discriminatee [illegally terminated worker] failed to make a reasonable effort to seek interim employment.”

<sup>26</sup> *St. George Warehouse*, 351 NLRB 961 (2007) (the illegal discharges occurred in 1999; the decision of the NLRB Administration Law Judge finding wrong-doing issued in 2002).

<sup>27</sup> *The Grosvenor Resort*, 350 NLRB 1197 (2007) (employees were denied backpay for the period of time that they were engaged in picketing to get their jobs back). This new rule contradicts instructions in the existing NLRB Compliance Manual, §10558.3 which advises that “the Board has found that a brief period during which the discriminatee undertook no activities to seek employment did not constitute a failure to mitigate, citing *Saginaw Aggregates*, 198 NLRB 598 (1972) and *Retail Delivery Systems*, 292 NLRB 121, 125 (1988).

who illegally refused to hire them.<sup>28</sup> This built on a prior burden shifting case in which the Board created a second class of discriminatees – those illegally denied employment because the employer suspected they were union organizers, seeking work to organize its workforce.<sup>29</sup> Despite the historical presumption, still applicable to all other discriminatees, that applicants would have continued working indefinitely if not for the employer’s illegal conduct in denying them employment, this new subclass of discriminatees is now required to present affirmative evidence to prove that, if hired, they would have worked for the employer for the entire backpay period. According to the dissent, in promulgating this new rule, the Board rejected “precedent endorsed by two appellate courts and rejected by none, without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis.” The dissent points out that the rule being changed by the Board was established “in the Board’s first reported case” in 1935.<sup>30</sup>

These radical changes divert the Board’s resources away from enforcing the Act and, instead, toward saving money for law-breakers, who on average have paid back pay awards amounting only to \$3,500 even before these burden-shifting new rules took effect.<sup>31</sup> The end result of these rulings is that the Bush Board made it cheaper for employers to violate the law.

Other Bush Board decisions also created an extremely narrow view of what constitutes remedial action and the necessity for such relief. Broad cease-and-desist orders were abandoned,<sup>32</sup> only mass discharges qualified for a bargaining order remedy,<sup>33</sup> the so-called extraordinary remedies in cases involving brutal tactics by employers to crush union organizing activities all but disappeared,<sup>34</sup> and Section 10(j) injunction actions “[fell] into virtual disuse.”<sup>35</sup>

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<sup>28</sup> *Toering Electric Co.*, 351 NLRB 225 (2007) (backpay proceeding in which refusal to hire occurred in 1995-96; NLRB Administrative Law Judge decisions finding illegal conduct issued in 1997 and 2000).

<sup>29</sup> *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007) (carving out less favorable rules when employers unlawfully refuse to hire workers intent on organizing the workforce by applying a new evidentiary requirement that in order to be entitled to continuing backpay, the General Counsel and worker have the burden of proving by affirmative evidence that the worker would have continued to work for the employer but for the employer’s unlawful discrimination).

<sup>30</sup> *Oil Capitol*, 349 NLRB at 1357, referencing *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 347 (1953), citing *Pennsylvania Greyhound Lines*, 1 NLRB 1, 51 (1935).

<sup>31</sup> Historically, it has been the responsibility of the General Counsel to calculate the amount of backpay owed and the obligation of the adjudicated wrong-doer to present evidence to reduce that amount. See n. 25, *supra*.

<sup>32</sup> *Intermet Stevensville*, 350 NLRB 1270 (2007) (*Intermet II*) (refusing a broad order where the employer unlawfully laid off four workers because of their union support despite prior case); *Intermet Stevensville*, 350 NLRB 1349 (2007) (*Intermet I*), which found numerous violations by the employer during its anti-union campaign, including threats of plant closure and job losses; demotion, reassignment and reduction in wages for a suspected union supporters, the confiscation of union literature; and other worker abuses.

<sup>33</sup> *Compare National Steel Supply, Inc.*, 344 NLRB 973 (2005) (bargaining remedy granted) with *Desert Toyota*, 346 NLRB No. 3 (2005), *Abramson, LLC*, 345 NLRB 171 (2005) and *The Register Guard*, 344 NLRB 1143 (2005) (bargaining order remedies denied). See, Brudney, *Neutrality Agreements and Card Check Recognition*, 90 Iowa L. Rev. at 871-872 (“stunning decline of 85% . . . substantially exceeded the 50% decline in election activity over the same period;” increased number of unfair labor practices charges filed belies any inference of “heightened levels of law-abiding conduct by the employer community.”)

<sup>34</sup> *Albertson’s Inc.*, 351 NLRB 254 (2007) (rejecting its Administrative Law Judge’s recommendation for a broad order and special remedies despite numerous violations for failure to furnish information, unilaterally changing terms and conditions of employment, bypassing the union, maintaining unlawful rules and unlawfully disciplining workers).

The Bush Board refused to issue bargaining order remedies despite recommendations from Administrative Law Judges that it do so.<sup>36</sup> The Board restricted the application of bargaining orders only to mass discharges<sup>37</sup> where the unit size was small<sup>38</sup> and the employer's highest-ranking officers were involved.<sup>39</sup>

Special remedies, even in cases of egregious violations of law, virtually disappeared under the Bush Board.<sup>40</sup> In fact, the Board rejected requests for far more modest remedial steps. In a case involving virtually all Chinese speaking workers with limited proficiency reading English, the Bush Board rejected as "not warranted" a request that management read aloud its Notice to Employees at an assembly and even a request to translate into Chinese the final decision in the case.<sup>41</sup>

### **Workers Have Fewer Protected Rights, Especially Pro-Union Workers**

Bush Board rulings overruled precedent, announced new rules, and applied existing law in ways that significantly altered prior policy and stripped workers of their rights. During organizing campaigns, employers were permitted greater leeway to intimidate and coerce

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<sup>35</sup> Rick Valliere, *Organized Labor Would Fare Better Under State Labor Laws, Professor Says*, Daily Lab. Rep. (BNA) at A-7 (Jan. 11, 2006) (quoting former NLRB Chairman William B. Gould).

<sup>36</sup> *Desert Toyota*, 346 NLRB 110 (2004) (the employer discharged the principal employee organizer and made statements to another employee linking the discharge to the worker's union support; maintained an unlawful no-solicitation rule, created the impression of surveillance, interrogated non-bargaining unit employees and solicited them to report union activities by others); *Abramson, LLC*, 345 NLRB 171 (2005) (a co-owner made repeated threats of plant closure, threatened employees with loss of jobs and benefits, and unlawfully denied recall to the leading union supporter following a post-election layoff); *The Register Guard*, 344 NLRB 1143 (2005) (employer unlawfully granted a unit-wide wage increase during the union campaign, conducted meetings in which it solicited and addressed employees' grievances and sent workers a letter with a form addressed to the union withdrawing their union authorization cards); *Hialeah Hospital*, 343 NLRB 391 (2004) (high level officers of the employer embarked on a course of discharge, threats of discharge, spying, and other illegal conduct within hours of learning of a union's organizing effort in a small unit of twelve employees; the employer warned the entire workforce that it would discover the identities and get rid of those employees who had contacted the union and told them that it would "not allow" a union).

<sup>37</sup> *California Gas Transport, Inc.*, 347 NLRB 1314 (2006); *National Steel Supply, Inc.*, 344 NLRB 973 (2005) (the employer unlawfully refused to reinstate 27 of its 32 workers).

<sup>38</sup> *California Gas Transport, Inc.*, 347 NLRB 1314 (2006); *Center Construction Co., Inc., d/b/a Center Service System Division*, 345 NLRB 729 (2005).

<sup>39</sup> *Evergreen America Corp.*, 348 NLRB 178 (2006); see also *California Gas Transport*, 347 NLRB 1314 (2006); *Center Construction*, 345 NLRB 729 (2006); *Smoke House Restaurant*, 347 NLRB 192 (2006); *Concrete Form Walls, Inc.*, 346 NLRB 831 (2006).

<sup>40</sup> *First Legal Support Services*, 342 NLRB 350 (2004) (illegal terminations, threats of discharge in retaliation for their union activities or those of their family members, being required to sign agreements that they were independent contractors and not employees and bribes offered in return for giving up their union support did not justify special remedies such as allowing the union access to the employer bulletin board, an opportunity to address workers on-site, and a list of employees' names so the union could contact them to talk about the campaign).

<sup>41</sup> *Chinese Daily News*, 346 NLRB 906 (2006); John Logan, *The Long, Slow Death of Workplace Democracy at the Chinese Daily News*, available at <http://www.americanrightsatwork.org/dmdocuments/OtherResources/burke%20report.pdf>.

workers through threats and surveillance of workers' union activities.<sup>42</sup> Employers were allowed to institute and maintain onerous and ambiguous workplace rules that discourage union support and chill employees' exercise of their legal rights to support a union.<sup>43</sup> Significantly, a Bush Board decision upholding a work rule that prohibited workers from "fraterniz[ing] on duty or off duty ... with ... co-employees" was denied enforcement by the Court of Appeals for the District of Columbia, which characterized the Board's view as "unreasonable," and observed that "employees could hardly engage in protected activity *without* fraternizing with each other."<sup>44</sup> Even non-coercive pro-union conduct by a low level supervisor, which the Board acknowledged was not objectionable under the law as it existed at the time the election was conducted, was used to invalidate workers' votes to form a union despite the vigorous and openly aggressive anti-union campaign conducted by the employer.<sup>45</sup>

In case after case, workers' rights yielded to employer property interests however miniscule,<sup>46</sup> to employer discretion,<sup>47</sup> to national security,<sup>48</sup> to deferral to arbitration,<sup>49</sup> and to

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<sup>42</sup> *Crown Bolt, Inc.*, 343 NLRB 776 (2004) (announcing a new rule that threats that the employer will close its facility if employees choose to unionize are no longer presumed to be disseminated throughout the bargaining unit); *Aladdin Gaming, LLC*, 345 NLRB 585 (2005) (permitting managers to closely observe and monitor employees' union discussions and then interrupt their conversations to deliver pro-employer lectures); *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006) (interrupting a break time conversation between an employee and a union organizer, watching them until they completed their conversation and immediately instructing employees not to speak with organizers did not constitute illegal surveillance).

<sup>43</sup> *Delta Brands, Inc.*, 344 NLRB 252 (2005) (announcing a new policy that maintenance of an unlawful overly broad no-solicitation rule during an anti-union campaign is no longer sufficient to set aside an election); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (expanding permissible employer work rules to include those that prohibit "abusive and profane language," "harassment of other employees ... in any way" and "verbally, mentally, or physically abusing" a fellow employee or supervisor as such employer rules are not unlawful and do not discourage lawful, protected employee organizing activities); *Stanadyne Automotive Corp.*, 345 NLRB No. 6 (2005) (upholding as lawful a ban on "harassment," despite lack of any clarification limiting it to unprotected, harassing conduct or improper behavior and even though the rule was expressly announced in direct response to union activity); *Palms Hotel and Casino*, 344 NLRB 351 (2005) (a rule forbidding "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members" was ruled to be lawful over the dissent's assertion that it would chill Section 7 rights); see also *River's Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007).

<sup>44</sup> *Guardsmark, LLC*, 344 NLRB 809 (2005), *enf'd denied*, *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 379 (D. C. Cir. 2007), *emphasis in original*.

<sup>45</sup> *Harborside Healthcare Inc.*, 343 NLRB 906 (2004) (supervisors' attempts to solicit employees to support the union constitute unlawful coercive conduct requiring that the union's election win be set aside even though the employer conducted an openly aggressive and vicious anti-union campaign); *Chinese Daily News*, 344 NLRB 1071 (2005) (a supervisor's distribution of union authorization cards and attendance at a union meeting was "inherently coercive" such that the union's election victory must be set aside even though only one supervisor engaged in such conduct and the employer conducted a virulently hostile, open and aggressive anti-union campaign.).

<sup>46</sup> *Johnson Technology, Inc.*, 345 NLRB 762 (2005) (the employer's property interest in a single piece of scrap paper is protected over the lawful union activity of a worker who used the scrap paper to make a notice of a union meeting after the employer *unlawfully* removed a prior notice).

<sup>47</sup> *Guardsmark, LLC*, 344 NLRB 809 (2005); *Stanadyne Automotive Corp.*, 345 NLRB 85 (2005); *Palms Hotel and Casino*, 344 NLRB 351 (2005) (employer work rules do not chill Section 7 rights).

<sup>48</sup> *IBM Corp.*, 341 NLRB 1288 (2004) ("because of the events of September 11, 2001 and their aftermath, we must now take into account the presence of both real and threatened terrorist attacks"); *ITT Industries, Inc.*, 341 NLRB 937, 942 (2004) (dissenting from the majority's decision that off-site employees of the employer had Section 7 rights to handbill in the parking lot at a sister facility, Chairman Battista warned that "our nation now faces significant security risks" such that "[e]mployers ... must be particularly vigilant at this time of our nation's history."

other statutes.<sup>50</sup> As Bush Board decisions continued to shrink workers' rights, both the "protectedness" and the "concertedness" of employee conduct were viewed more narrowly. Examples include the Bush Board's rulings that nursing home workers were not engaged in protected conduct when they called a state patient care hotline to report excessive heat,<sup>51</sup> that an employee's solicitation of a coworker to testify before a state agency in support of her sexual harassment complaint was not protected because she was advancing only her own cause;<sup>52</sup> and, in explicitly overruling precedent, that non-union workers had no right to be accompanied by a fellow worker when they were called into an employer meeting that could lead to their discipline.<sup>53</sup>

Employer property interests, however tenuous, were more valued and far more aggressively protected than workers' rights. An employer's property rights in its parking lot were deemed more important than the rights of workers who waited there with the hope of bringing their work complaints to the attention of the company's president.<sup>54</sup> In a case involving an employee who used company scrap paper to write a union notice to replace one that a supervisor had unlawfully torn down from a bulletin board, the Board ruled that that the single piece of scrap paper constituted a property interest more deserving of the Act's protection than an employee's federal labor law rights.<sup>55</sup> And, the employer's property interest in its email system, admittedly used for all types of non-business communications, was found to outweigh the workers' right to communicate about matters of concern over work place issues.<sup>56</sup>

Workers also lost ground on evidentiary rulings. Although the Bush Board was willing to infer that statements made by a pro-union supervisor to three employees were likely repeated other employees so as to require setting aside an election in the union's favor,<sup>57</sup> it refused a similar inference where objectionable pre-election conduct by an employer was at issue.<sup>58</sup> Indeed, five decades of precedent were swept aside in a Bush Board ruling that an employer's threats to close its workplace if employees voted for union representation would no longer be

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<sup>49</sup> *Smurfit-Stone Container Corp.*, 344 NLRB 658 (2005) (deferral to arbitration award even though the arbitrator upheld the discipline of an employee who was engaged in protected, concerted activities); *Aramark Services, Inc.*, 344 NLRB 549 (2005) (deferral to arbitrator's decision even though the arbitrator's decision "is not a model of clarity," but is "at least susceptible" to an appropriate interpretation).

<sup>50</sup> *Krystal Enterprises, Inc.*, 345 NLRB 227 (2005) (employee was lawfully discharged for violation of employer's sexual harassment policy even though his union activity was "a motivating factor" and rampant sexual horseplay and misconduct, the purported reason for his discharge, was generally tolerated); *IBM Corp.*, 341 NLRB 1288 (2004) (the potential for workplace discrimination and sexual harassment are articulated as a factor in denying nonunion workers the opportunity for representation during disciplinary interviews).

<sup>51</sup> *Waters of Orchard Park*, 341 NLRB 642 (2004).

<sup>52</sup> *Holling Press, Inc.*, 343 NLRB 301 (2004).

<sup>53</sup> *IBM Corp.*, 341 NLRB 1288 (2004), overruling *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).

<sup>54</sup> *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005).

<sup>55</sup> *Johnson Technology, Inc.*, 345 NLRB 762 (2005).

<sup>56</sup> *Register Guard*, 351 NLRB 1110 (2007).

<sup>57</sup> *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004).

<sup>58</sup> *Werthan Packaging, Inc.*, 345 NLRB 343 (2005) (no inference that a manager had similarly and systematically interrogated 25 employees where, on the day before the election, the manager approached a short tenure employee wearing a union button and asked if she had filled out a union card, then wrote something down on a clipboard and was then observed walking up to other employees, talking to them and writing on the clipboard; a process repeated with about 25 employees).

presumed to have been disseminated throughout the workforce.<sup>59</sup> The prior rule was based on the logic that discussion of this most serious of threats among employees was “all but inevitabl[e]” and that to think otherwise was “totally unrealistic” and “the ultimate in naiveté.”<sup>60</sup>

### **Workers’ Rights to Bargain Collectively and to Strike Were Under Attack**

In a pair of cases involving partial lockouts, the Bush Board seriously undermined the fundamental right to strike by sanctioning lockouts in which the employers discriminated among their workers solely on the basis of union membership and union support. In one, the Board allowed an employer to lock out strikers who had offered to return to work while it continued to employ those who had crossed the picket lines and abandoned the strike. The Court of Appeals for the Seventh Circuit, in a unanimous decision, denied enforcement, harshly chastising the Bush Board that its decision was “in derogation of nearly four decades of employee protection.”<sup>61</sup>

Relying on this earlier decision (and prior to the Seventh Circuit’s refusal to enforce it), the Board upheld another employer’s decision to lock out only its non-probationary employees, “all of whom were union members,” while allowing its probationary employees, “all of whom the . . . [employer] believed were not union members,” to continue working.<sup>62</sup> The majority justified the employer’s selective lockout on the basis that non-probationary employees had a more ‘vital interest’ in the outcome of the contract negotiations than probationary employees. As in the prior case, these were rationales that even the employer had not proffered during the litigation of the case.<sup>63</sup> The partial lockout caused the union to lose support and provided the employer with an opportunity to stop bargaining and withdraw recognition from the union. In an unpublished decision, the U.S. Court of Appeals for the District of Columbia similarly refused to enforce the Board’s decision.<sup>64</sup>

The Bush Board made it even easier for employers to deny employment to returning strikers. It is well-settled law that, in order to be considered “permanent replacements” who will be allowed to continue working in the place of returning strikers after the strike has ended, the replacement workers must have “a mutual understanding with the [employer] that they are permanent.” The Board nonetheless held that at-will employees who had signed agreements stating that their employment could “be terminated by myself or by [the employer] at any time, with or without cause” could still be considered “permanent” replacements if the employer elected to deny reinstatement to its workforce at the end of the strike.<sup>65</sup>

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<sup>59</sup> *Crown Bolt, Inc.*, 343 NLRB 776 (2004) (announcing a new rule that threats that the employer will close its facility if employees choose to unionize are no longer presumed to be disseminated throughout the bargaining unit); overruling *Springs Industries*, 332 NLRB 40 (2000); *General Stencils, Inc.*, 195 NLRB 1109 (1972), *enf. denied* 472 F.2d 170 (2d Cir. 1972); *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977).

<sup>60</sup> *Crown Bolt, Inc.*, *supra*, note 59 at 780 and cases cited therein.

<sup>61</sup> *Midwest Generation*, 343 NLRB 69 (2004), *rev’d and remanded sub nom. IBEW Local 15 v. NLRB*, 429 F.3d 651, 662 (7<sup>th</sup> Cir. 2005).

<sup>62</sup> *Bunting Bearings Corp.*, 343 NLRB 479 (2004), *review granted and remanded sub nom. Steelworkers v. NLRB*, 179 Fed. Appx. 61 (D.C. Cir. 2006).

<sup>63</sup> *Id.* at 481.

<sup>64</sup> *Steelworkers v. NLRB*, 179 Fed. Appx. 61 (D.C. Cir. 2006).

<sup>65</sup> *Jones Plastic & Engineering Co.*, 351 NLRB 61 (2007), *pet’n for review denied sub nom. Steelworkers v. NLRB*, 544 F.3d 841 (7<sup>th</sup> Cir. 2008).

Bush Board decisions evinced a willingness to relieve employers of their collective bargaining obligations and allow them greater discretion to make unilateral changes. When employers make changes in employees' working conditions in violation of their legal obligations to bargain with the workers' union representative, the traditional remedy has been to order the employer to restore the status quo, bargain with the union, and rescind any actions taken as a result of the illegal unilateral changes, including disciplinary actions. Longstanding Board precedent has recognized that even if workers are fired, "[n]o otherwise valid reasons asserted to justify discharging the employee can repair the damage suffered by the bargaining representative as a result of the application of the changed term or condition."<sup>66</sup> But in *Anheuser-Busch, Inc.*, the Bush Board eliminated this critical remedy and overruled almost two decades of Board precedent.<sup>67</sup> The Board had originally upheld the lawfulness of the discharges in 2004, then reinstated this same decision following a remand from the District of Columbia Circuit Court, relying on an interpretation of the Act which the court had specifically and tellingly refused to endorse.<sup>68</sup>

## Conclusion

The foregoing shows how far the Bush Board moved the Act away from its intended purpose of promoting collective action and collective action. The new Board will have much to do in reexamining these remarkably ideological decisions, and in returning to enforcement of the Act in the manner its framers intended. Over the coming years, the Board has an opportunity to once again become relevant to American workers seeking the protection of the Act.

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<sup>66</sup> *Great Western Produce, Inc.*, 299 NLRB 1004, 1005 (1990), citing *Boland Marine & Mfg. Co.*, 225 NLRB 824 (1976), *enfd* 562 F.2d 1259 (5<sup>th</sup> Cir. 1977); see also *Tocco, Inc.*, 323 NLRB 480 (1997).

<sup>67</sup> *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007) (workers discharged based on evidence from illegal video surveillance not entitled to reinstatement, overruling *Great Western* and *Tocco, supra.*), *review denied sub nom. Brewers & Maltsters, Local Union No. 6 v. NLRB*, 2008 U.S. App. LEXIS 24774 (D.C. Cir. Dec. 8, 2008).

<sup>68</sup> *Anheuser-Busch, Inc.*, 342 NLRB 560 (2004); *reversed and remanded sub nom. Brewers & Maltsters Local 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005), *decision on remand*, 351 NLRB 644 (2007).