



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

February 25, 2011

The Honorable Phil Roe
Chairman, Subcommittee on Health, Education,
Labor, and Pensions
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Dear Chairman Roe:

I have served as the Chairman of the National Labor Relations Board since January 20, 2009, when I was appointed by President Obama. I have served on the Board since November 14, 1997, when I was confirmed by the Senate after having been nominated by President Clinton. Since then, I was reappointed by President Bush and confirmed by the Senate to a second term in 2002 and a third term in 2006. My current term is set to expire on August 27, 2011.

On February 11, 2011, the Subcommittee held a hearing entitled "Emerging Trends at the National Labor Relations Board." I respectfully request that this letter be included in the hearing record. The views expressed in it are mine alone.

Of the witnesses who testified at the hearing, two were sharply critical of the Board's recent actions: G. Roger King and Philip A. Miscimarra, both attorneys in private practice representing management clients. I will not attempt to respond in comprehensive detail to the assertions made by Mr. King and Mr. Miscimarra. But I do feel obliged to address the main thrust of their testimony: that the Board is somehow overreaching its statutory authority, invading the province of Congress and abandoning long-established institutional norms. Such accusations are simply untrue.¹

¹ Mr. King, a critic of the present Board, was a champion of the prior Board, which itself was no stranger to controversy, as a hearing held by this Subcommittee in 2007 evidences. See "The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights," Joint Hearing before the House Subcommittee on Health, Employment, Labor and Pensions and

1. *The Proper Role of a Board with Fewer than Five Confirmed Members*

In his written testimony before the Subcommittee, Mr. King argues that the current Board - because it consists of four members (not the full five provided for in the National Labor Relations Act) and because it includes one recess appointment² -- should not issue major decisions, reconsider existing precedent, or pursue rulemaking. Such “self-imposed restraint,” Mr. King insists, is required by the Board’s past practice and by “sound public policy.”³

In fact, accepting Mr. King’s view would mean a sharp break with Board tradition and would disable the Board from carrying out its statutory duty. A review of the Board’s history shows why. The statute has provided for five Board members since 1947. Between August 1, 1947, and today, the Board has had five sitting members (including both Senate-confirmed members and recess appointees) less than two-thirds of the time. And vacancies on the Board have become far more common – indeed, chronic – in recent years. The last time that the Board had five confirmed members was August 21, 2003, more than seven years ago.

the Senate Subcommittee on Employment and Workplace Safety (December 13, 2007). The contrast between Mr. King’s recent testimony and his prior writings about the prior Board is striking. In 2006, Mr. King observed:

While both management and labor interests and their advocates certainly have the right to analyze, support or criticize Board decisions, certain of the recent verbal outcries regarding Board decisions are highly partisan, and have the appearance of being part of a coordinated effort to chill and discourage present Board members from addressing many of the important issues and cases before them. Further, an equally unfortunate ancillary part of this apparent coordinated campaign is the suggestion that the Board is no longer a legitimate part of the country’s administrative jurisprudence system.

G. Roger King, “‘We’re Off to See the Wizards,’ A Panel Discussion of the Bush II Board’s Decisions ... and the Yellow Brick Road Back to the Record of the Clinton Board,” paper presented to the Section of Labor and Employment Law, American Bar Association, at p. 1 (2006). Mr. King deplored “Board bashing,” argued that “recent attempts to marginalize the Board are ill-advised,” observed that the “efficiency and productivity of the Board continues to serve as a role model for many Federal agencies,” and noted that “Board precedent from time to time no doubt will continue to be reversed in the future – which is not necessarily bad.” *Id.* at pp. 12-13.

² Member Craig Becker is serving under a recess appointment. His nomination was filibustered in the Senate in the last Congress, even though a majority of the Senate favored his nomination.

The three confirmed members of the Board are myself, Member Mark Pearce, and Member Brian Hayes. There is one vacancy on the Board.

³ G. Roger King, Statement to the Record, p. 2 (Feb. 11, 2011).

Needless to say, the Board has often issued major decisions, including decisions overruling precedent, with fewer than five confirmed members. For example, on July 17, 2002, a divided Board issued *MV Transportation*, 337 NLRB 770 (2002), eliminating the successor-bar rule and overruling *St. Elizabeth Manor*, 329 NLRB 341 (1999). At the time, the Board consisted of four members (three Republicans and one Democrat). The three-member majority that overruled precedent consisted entirely of recess appointees: then-Chairman Peter Hurtgen, Member William Cowen, and Member Michael Bartlett. I was the only confirmed Board member, and I dissented. The current Board has announced its intention to reconsider *MV Transportation*. See *UGL-UNICCO Services Co.*, 355 NLRB No. 155 (2010). Mr. King has criticized the Board for doing so, but by his own standard, *MV Transportation* – decided with less than a full Board and without a single confirmed member in the majority – would seem to have been a wholly illegitimate exercise of power.

There is no shortage of decisions in which the prior Board overruled precedent, despite the fact that the three-member (Republican) majority included one or more recess appointees. For example, in 2004, a divided Board overruled precedent in (among other cases) decisions involving the right of employees in non-union workplaces to have a coworker present during investigatory interviews,⁴ the employee-status of university teaching assistants,⁵ pro-union conduct by supervisors,⁶ and bargaining units including joint employees of two employers.⁷ The three-member majority in each case included one recess appointee (then-Member Ronald Meisburg). In 2006, a divided Board overruled precedent involving a union’s photographing of employees; there were then two recess appointees (then-Member Peter Schaumber and then-Member Peter Kirsanow) in the three-member majority.⁸ In 2007, a divided Board overruled precedent in several cases, including (but not limited to) decisions involving the voluntary-recognition bar,⁹ the burden of proof for backpay claims,¹⁰ the filing of decertification petitions following unfair labor practice settlements,¹¹ and the backpay period for union salts subjected to hiring discrimination.¹² In all of these cases and others, the three-member majority included a recess appointee (then-Member Kirsanow).

The approach of the prior Board, to be sure, was not unprecedented. Indeed, the Board has repeatedly overruled precedent when it consisted of only three members in all, but the decision was unanimous. The greatest number of examples comes from the (Republican majority) Board of 1985.¹³ A leading instance is *Sears, Roebuck Co.*, 274 NLRB 230 (1985), which involved the right of non-union workers to have a co-worker present at investigatory interviews.

⁴ *IBM Corp.*, 341 NLRB 1288 (2004).

⁵ *Brown University*, 342 NLRB 483 (2004).

⁶ *Harborside Healthcare*, 343 NLRB 906 (2004),

⁷ *Oakwood Care Center*, 343 NLRB 659 (2004).

⁸ *Randell Warehouse of Arizona*, 347 NLRB 591 (2006).

⁹ *Dana Corp.*, 351 NLRB 434 (2007).

¹⁰ *St. George Warehouse*, 351 NLRB 961 (2007).

¹¹ *Truserv Corp.*, 349 NLRB 227 (2007).

¹² *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

¹³ See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, slip op. at 2 fn. 1 (2010) (concurring opinion) (collecting cases).

Let me be clear that I am not criticizing the practice of prior Boards. In none of my dissents in the more recent decisions cited did I suggest that the majority acted improperly because of how it was constituted. What I do contend, however, is that Mr. King's position has little if any support in the Board's history. The Board's tradition, rather, is not to overrule precedent with fewer than three votes to do so, as Member Pearce and I have explained in a recent concurring opinion.¹⁴ Whether the Board consists of three, four, or five members in total, and whether the three-member majority includes recess appointees, has generally made no difference.

In his testimony at page 2, Mr. King quotes -- without explaining the context -- a statement from my partial dissent in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77 (2007). My dissent in that case in no way supports Mr. King's criticism of the current Board.

In *Schreiber Foods*, the point of contention between Member Schaumber and myself was how to interpret a statement in the Board's 2002 opposition to a petition for writ of certiorari, submitted to the Supreme Court, involving an earlier Board decision, *Meijer, Inc.*, 329 NLRB 730 (1999). In his own partial dissent, Member Schaumber argued that the Board should overrule *Meijer*. He contended that the Board, in its opposition, had essentially promised the Supreme Court that *Meijer* would be reconsidered by the Board (and thus that there was no need for the Court to review the decision). I disagreed with Member Schaumber's reading of the opposition, pointing out that at the time, the Board had only three members, and at most two of them would have supported overruling *Meijer*, since I had been in the majority in that decision. "Given the Board's well-known reluctance to overrule precedent when at less than full strength (five Members)," I wrote, "the Board could not have been signaling to the Court that full-dress reconsideration of *Meijer* was in the offing." 349 NLRB at 97. While my statement in *Schreiber* arguably could have been more precise, I was referring to the Board's tradition that three votes are required to overrule precedent, and not asserting that a Board of fewer than five members would never do so.¹⁵

All of this said, I certainly believe that the ideal situation is for the Board to operate with five, Senate-confirmed members. That ideal, however, has been increasingly difficult to achieve. In my more than 13 years on the Board, I have served as the *sole* member (for six weeks) and on two-, three-, four-, and five-member Boards. Indeed, the Board recently spent a full 27 months with only *two* members, a truly unfortunate situation that led to an adverse Supreme Court decision after Member Schaumber and I, pursuant to a prior delegation by the other Board members and relying on a legal opinion from the Department of Justice, continued to issue decisions where we could reach agreement.¹⁶ When the Board has a lawful quorum (at least three

¹⁴ *Id.*, slip op. at 2 & fn. 1 (citing cases).

¹⁵ More often than not, given the make-up of the Board, a three-vote majority is formed when the Board comprises five members and divides three-two. But, as the cases I have cited above illustrate, the Board has, in fact, reversed precedent with three votes when it was at *less* than full strength, consisting of three or four members. At the time of the *Meier* opposition, however, the Board consisted of just three members: two recess appointees, Member Bartlett and Member Cowen, and myself. I had been in the majority in *Meijer*. A two-one Board, adhering to tradition, would not have overruled *Meijer* and would not have told the Supreme Court that it intended to do

so.

¹⁶ *New Process Steel, L.P. v. NLRB*, ___ U.S. ___, 130 S. Ct. 2635 (2010).

members), it has the authority to decide any case that comes before it and to engage in any rulemaking permitted by the statute. Given the chronic vacancies that have plagued the Board in recent years, it would be an abdication of the Board's statutory duty to defer acting on important issues until, at some unknowable time in the future, it has five confirmed members. As I have pointed out, it has been more than seven years since that ideal has been realized.

2. The Proper Role of the Board in Shaping Federal Labor Policy

In his written testimony, Mr. Miscimarra suggests that the current Board is somehow intruding into the exclusive province of Congress. That suggestion is unwarranted.

It is indisputable that the Board has only the authority that Congress has given it in the National Labor Relations Act. The statute informs, guides, and ultimately constrains everything the Board does. The Supreme Court, in turn, is the ultimate arbiter of what the statute means.

In determining how narrow, or how broad, the Board's authority is, then, it is necessary and proper to turn to the Supreme Court's decisions applying the National Labor Relations Act. Here is what the Supreme Court has said in one, typical decision:

This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy....

This Court therefore has accorded Board rules considerable deference.... We will uphold a Board rule as long as it is rational and consistent with the Act, ... even if we would have formulated a different rule had we sat on the Board.... Furthermore, a Board's rule is entitled to deference even if it represents a departure from the Board's prior policy.

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990) (citations omitted). These principles follow from the fact that the National Labor Relations Act is, in many respects, written in general terms and, within those fairly wide limits, leaves it to the Board to develop specific legal rules regarding unfair labor practices and union representation elections. As the Supreme Court has observed, the Board, "if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978).

Mr. Miscimarra's testimony offers a view of the Board's authority as sharply limited, a view that seems to give very little weight to what the Supreme Court has said, again and again. He then criticizes certain recent decisions of the Board as amounting to policy changes that only Congress can make. It is certainly true that Congress has the ultimate authority to address any and every issue of labor law considered by the Board. Where Congress has addressed an issue, there is no question that the Board is duty-bound to apply the law. But if Congress has *not* spoken – and this will often be the case – the Board has the authority and the duty to decide the issue, as the Supreme Court has repeatedly recognized. If the Board oversteps its authority, of course, the federal courts can overturn its decision.

Mr. Miscimarra cites the Board's recent decisions finding a union's stationary display of large banners near a secondary employer's worksite to be lawful. The lead decision on this issue is *Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159 (2010). The National Labor Relations Act nowhere refers to banners. The key statutory provision, Section 8(b)(4) (ii), rather, uses very general language: a union may not "threaten, coerce, or restrain" a secondary employer. Does the stationary display of a banner violate that prohibition? That is a classic question of labor law policy -- never addressed, incidentally, by any earlier Board decision or by the Supreme Court. And it is a question that requires consideration of serious First Amendment constitutional concerns, as well, as the *Eliason* decision explains. Notably, every federal court to consider the question has found bannering displays to be lawful -- rejecting the view of the prior Board General Counsel, who sought to enjoin the displays pending litigation before the Board. See *Eliason*, supra, 355 NLRB No. 159, slip op. at 1 fn. 3. The Board had the authority and the duty to decide *Eliason* and similar cases. It could not simply wait for Congress -- which has not amended the Act with respect to secondary activity by unions since 1959 -- to decide the question. In my view, the *Eliason* decision was correct, but it is subject to review in the federal appellate courts and ultimately by the Supreme Court.

The same is true of the Board's decision in *Dana Corp.*, 356 NLRB No. 49 (2010). Nothing in the language of the Act answers the question posed there -- the legality under Section 8(a)(2) of a pre-recognition framework agreement -- and neither does any previous decision of the Board or the Supreme Court.¹⁷ Section 8(f) of the Act, invoked by Mr. Miscimarra, involves pre-hire agreements in the construction industry, and it has no bearing at all on the issue posed in *Dana*. With all due respect, his suggestion that "this is another area where policy changes should originate in Congress" is very difficult to comprehend. Meanwhile, the Board's decision has been praised by other commentators.¹⁸

Finally, Mr. Miscimarra points to *New York University*, 356 NLRB No. 7 (2010), which involves the question of whether university graduate assistants are statutory employees for purposes of the Act. The Act's definition of "employee," Section 2(3), says that the term "shall include any employee," except for certain specified exclusions (e.g., "agricultural laborer[s]"). No one argues that graduate assistants are specifically excluded. Again, the general language of the Act leaves the issue for the Board to decide, within appropriate limits. The Supreme Court has made that much clear, in upholding the Board's decision that union salts are statutory employees.¹⁹ Any determination of who is, and who is not, a statutory employee necessarily involves determining the coverage of the Act. Whenever the Board finds employee status, then, it could be argued that it is somehow expanding the Act's scope. But that argument is unsound, unless one accepts the curious proposition that the Board has the authority only to find that contested categories of workers are *not* statutory employees.

¹⁷ The Board's decision explained with great care why an earlier Board decision cited by Mr. Miscimarra, *Majestic Weaving Co.*, 147 NLRB 859 (1964), was not controlling.

¹⁸ See Andrew M. Kramer and Samuel Estreicher, *NLRB Allows Pre-recognition Framework Agreements*, 245 New York L.J. 4 (Feb. 23, 2011).

¹⁹ See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

In sum, the Board has addressed, and will address, the sorts of questions that every prior Board has ruled upon. In doing so, it will be fulfilling exactly the role that Congress envisioned for the Board, when it enacted the National Labor Relations Act in 1935. And its decisions will be subject to judicial review, with the federal courts sometimes agreeing, and sometimes disagreeing, with the Board. Speaking for myself, I have previously made clear my view that the Board operates under significant constraints – the language of the statute, its own precedent, and judicial review – and that fundamental changes in federal labor law can come only from Congress.²⁰

3. *The Board's Recent Requests for Briefing in Certain Cases*

Among the most perplexing of the criticisms made by Mr. King is his objection to the Board's requests in certain cases for *amicus* briefs. Mr. King describes this as "indirect rulemaking." While I do not believe that it is appropriate for me to comment publicly on cases that are pending at the Board, I have no hesitation in defending, as a general matter, the practice of inviting *amicus* briefs.

This practice plainly serves three important interests: open government, fair process, and informed decision-making. Surely it is better to tell the public what issues the Board intends to consider, and to permit interested persons to participate in the Board's decision-making process, than it is to keep the public in the dark and to exclude stakeholders from participation. And surely it is better that the Board have the benefit of the views of the larger labor-management community, not just the perspectives of the parties to a particular case.

* * *

For the reasons I have explained, I believe that the criticisms of the Board offered at the hearing are unwarranted.²¹ What are the "emerging trends" at the Board? I think there are three.

²⁰ For example, in remarks delivered as part of the Access to Justice Lecture Series at Washington University Law School on February 17, 2010, I said: "I do not think that fundamental changes in labor law – as opposed to incremental improvements – can reasonably be expected to come from the National Labor Relations Board, whoever serves there."

²¹ I might add, however, that the Board has never been a stranger to criticism or controversy. As one commentary observed a quarter century ago:

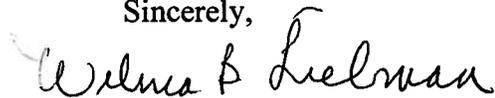
The only change [over the years] has been in the nature of the Board's critics – sometimes management, sometimes labor, sometimes both – depending on which group felt at any given moment that its ox had been gored by the conflicting interpretations given to various sections of the law by the shifting majorities in control of the NLRB in Democratic and Republican administrations. The list of the Board's detractors is by no means confined to those directly involved in the cases before it for adjudication. The roster has embraced almost everyone at one time or another— Presidents of the United States, Congress, the federal judiciary, and that most insatiable of faultfinders, the press.

A. H. Raskin, *Elysium Lost: The Wagner Act at Fifty*, 38 Stan. L. Rev. 945, 948 (1986).

First, greater productivity in decision-making, reflecting the Board's new quorum and with it, the ability to decide cases and to avoid deadlock. Second, greater transparency and public participation in its decision-making – perhaps at the price of greater controversy, but with a corresponding gain in the fairness and quality of the Board's decision-making process. Third, a willingness to take carefully considered steps to keep the National Labor Relations Act vital, as exemplified in the Board's unanimous decision to begin awarding compound interest on backpay awards to employees victimized by unfair labor practices – more than 20 years after the Board was first urged to adopt that remedial change.²²

Thank you for the opportunity to submit this statement. I appreciate the Subcommittee's interest in the Board's work, and I look forward to a respectful dialogue about the important issues that the National Labor Relations Act requires the Board to address.

Sincerely,



Wilma B. Liebman
Chairman

cc: Hon. Robert Andrews, Ranking Member

²² *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).