IDEOLOGICAL VOTING ON THE NATIONAL LABOR RELATIONS BOARD REVISITED (WITH SPECIAL REFERENCE TO DECISION-BARGAINING OVER EMPLOYER RELOCATION DECISIONS)

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"It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board."[1]

1. Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1097 (D.C. Cir. 2001).

I. INTRODUCTION

Consider the following real-world scenario:[2]

After conducting a review of its research and development function and concluding that its technology was dated, Company decides to close its research and development operations in New Jersey and to relocate the work done at the closed facility to its Connecticut research center. In making and implementing this decision Company did not bargain with Union, the collective-bargaining representative of the New Jersey employees. Union files an unfair labor practice charge with the National Labor Relations Board (NLRB or Board), alleging that Company's failure and refusal to bargain with Union over the relocation decision violates Section 8(a)(5) of the National Labor Relations Act (NLRA or Act).[3] Six years later the Board issued a decision holding that Company violated the Act as alleged. While that decision was pending on appeal before the United States Court of Appeals for the District of Columbia Circuit, the Board requested and the court ordered a remand of the case to the agency. Three years later the Board determined that Company did not violate the Act. The facts before the agency in its initial ruling finding a violation of the Act and its later holding validating as lawful Company's managerial and operational decision did not change. What did change was the occupant of the White House, the membership of the Board, and the ideologies of the Board members considering and deciding this important federal labor law issue.

As I have suggested elsewhere,[4] in certain areas of labor law and policy a Board member's ideology can play an outcome-influential, if not outcome-determinative, role in the agency's decisionmaking. Ideology, as used and understood herein, refers to three facts and factors: (1) the political party of the President making appointments to the Board, (2) the political party affiliation of the appointed Board members, and (3) the member's pre-appointment professional background.

If ideology matters, will a Republican Board member who represented employers in labor-management matters and

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2. *See infra* notes 230-47 and accompanying text.

3. *See* 29 U.S.C. § 158(a)(5) (2012); *infra* notes 230-47 and accompanying text.

4. *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 761 (2006).

disputes prior to being appointed to the Board by a Republican President vote for and in favor of management interests and concerns in certain cases? Will a Democratic Board member who represented labor unions prior to her Board appointment vote for and side with union positions and views in particular cases? Affirmative answers to the foregoing questions are supported by the ideological voting exemplars discussed in this article,[5] including and with special reference to the issue presented in the scenario with which this article opened: Does Section 8(a)(5) require predecision bargaining when an employer elects to relocate certain operations or functions from one of its facilities to another?[6]

The discussion proceeds as follows. Part II provides an overview of the NLRA and the NLRB and nominations and appointments to the agency. Part III's qualitative inquiry discusses examples of ideological voting on the Board and the ways in which such voting results in jurisprudential flip-flops and policy oscillations.[7] This phenomenon causes "abrupt changes in policy" which are "often undone three or four years later"[8] and can create uncertainty and instability for employees, unions, and employers subject to the Board's adjudicatory power and regulation.[9] Part IV examines the evolution of and changes in the Board's different answers to the question whether an employer is legally obligated to bargain or not bargain with a union over management's relocation decisions,[10] and explores the

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5. *See infra* Part III.B.

6. *See infra* Part IV. For in-depth discussion and analysis of the NLRA's collective-bargaining regime and work relocations, see PHILIP A. MISCIMARRA & RONALD TURNER ET AL., THE NLRB AND MANAGERIAL DISCRETION: SUBCONTRACTING, RELOCATIONS, CLOSINGS, SALES, LAYOFFS, AND TECHNOLOGICAL CHANGES 337-417 (2d ed. 2010).

7. *See* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); *see also* Julius Cohen & Lillian Cohen, *The National Labor Relations Board in Retrospect*, 1 INDUS. & LAB. REL. REV. 4, 648 (1948); Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51 (2004); Turner, *supra* note 4, at 716-51.

8. Estreicher, *supra* note 7, at 171.

9. *See* Harold J. Datz, *When One Board Reverses Another: A Chief Counsel's Perspective*, 1 AM. U. LAB. & EMP. L.F. 67, 71 (2011) ("A reversal of precedent results in instability, unpredictability and uncertainty in the law. Employers, employees, and unions cannot act in reliance on the law, for it may change. What is lawful today may be unlawful tomorrow and vice-versa.").

10. Whether Section 8(a)(5) of the Act is violated by an employer's failure to engage in predecision bargaining with a union over the relocation of bargaining unit work is distinct from, and should not be confused with, the issue of employer entrepreneurial issues and NLRA Section 8(a)(3). *See* 29 U.S.C. § 158(a)(3) (2012) ("It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

role that ideology played in the agency's stances on this important issue. Part V concludes with observations on issues raised by ideological voting and Board flip-flops and the ways in which such voting has troubling implications for those who believe in the "rule of law" and impartial adjudication.

II. THE NLRA AND THE NLRB

In 1935 the United States Congress passed, and President Franklin D. Roosevelt signed into law, the NLRA, "the most dramatic statutory assault on corporate prerogatives in American history."[11] This important and controversial[12] federal labor law contains a representation election procedure, in which workers can vote for or against labor unions seeking governmental certification as the exclusive collective bargaining of employees in an appropriate bargaining unit,[13] and also prohibits certain employer and union unfair labor practices.[14]

The NLRA created the NLRB and empowered the agency to administer and enforce the Act.[15] The Board "was a

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membership in any labor organization . . . ."). In a much publicized 2011 case involving The Boeing Company, the Board's General Counsel filed an unfair labor practice complaint alleging that the employer, unlawfully retaliating against the union for past strikes, decided to open new operations in a South Carolina plant and not in Washington State, in violation of Section 8(a)(3) and other provisions of the Act. *See* Complaint and Notice of Hearing, The Boeing Company and IAM Dist. Lodge 751, Case 19-CA-32431 (N.L.R.B. Apr. 20, 2011); Philip A. Miscimarra, *Capital Investment, Relocations, and Major Business Changes under the NLRA*, 27 A.B.A. J. LAB. & EMP. L. 79 (2011) (discussing the Board's action against Boeing and problems with the litigation). In December 2011, the Board dropped the case after Boeing and the International Association of Machinists and Aerospace Workers agreed to a new contract addressing and providing job security for Washington area workers. *See* Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 10, 2011, at B3.

11. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1397 (1993).

12. *See* Cohen & Cohen, *supra* note 7, at 648-49 (reporting the "bitter struggle over the passage" of the Act and noting that "immediately after the creation of the Board the same pressures that were vainly exerted to prevent the Board from being conceived persisted to make sure that even if the Board were born, it would be only a 'still-life' birth.").

13. *See* 29 U.S.C. § 159(a) (2012) ("Representatives designated or selected for the purposes of collective bargaining by the majority of all employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."); 29 U.S.C. § 159(c) (stating that the NLRB is to process election petitions, conduct secret ballot elections, and certify election results).

14. *See* 29 U.S.C. § 158(a) (employer unfair labor practices), (b) (union unfair labor practices).

15. *See* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING § 2.1 (2d ed. 2004).

quintessential product of the New Deal. It was created by a Democratic president and Congress as an administrative means of stabilizing labor-management relations, and, as such, was part of a much larger attempt to regulate and manage an economy that had gone spiraling out of control."[16] Under the statute as enacted in 1935, the Board comprised of three members appointed to five-year terms by the President, with the advice and consent of the United States Senate.[17] In 1947 Congress amended the Act and, among other things, added two additional Board members (with one member designated by the President as the chair)[18] and a General Counsel.[19] Converting the Board "from a multimember board of three . . . into an agency with two separate and generally independent branches—a five-member board and a General Counsel—was achieved by particular men in order to produce particular results."[20] For important members of the United States House of Representatives and the Senate, the separation of the Board and the General Counsel was "a device to dilute the anti-employer bias of the agency and to make the agency under the new act amenable to the continuing influence of the congressional leadership group."[21] Thus, proponents of the 1947 amendment "objected not so much to the particular allocation of specialized tasks under the over-all control of the three-man Wagner Act Board as, more urgently, to the kinds of decisions that emerged through this structure."[22]

Board members perform a quasi-judicial function and consider and decide cases via a process of case-by-case adjudication.[23] While the NLRA grants the Board the authority

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16. Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1096 (1985).

17. *See* FRANK W. MCCULLOCH & TIM BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD 23 (1974). Board members "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. § 153(a) (2012).

18. *See* Labor Management Relations Act, ch. 120, sec. 101, § 3(a), 61 Stat. 136, 139 (1947) (enacted).

19. *See id.* at § 3(d). The General Counsel is also appointed by the President with the advice and consent of the Senate and serves a four-year term. *Id.*

20. Seymour Scher, *The Politics of Agency Organization*, 15 W. POL. Q. 328, 328 (1962).

21. *Id.* at 332; *see also id.* at 329 ("[T]hose . . . who viewed the Wagner Act as unfair to employers and saw the Board as an agency hopelessly biased in favor of unions and unionization urged some kind of architectural overhaul of the agency along with substantive changes in the law.").

22. *Id.*

23. *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 359 (2002); Mozart G. Ratner, *Policy-Making by the New "Quasi-Judicial" NLRB*, 23 U. CHI. L. REV. 12, 12 (1955).

to make rules and regulations,[24] unlike most agencies the Board rarely resorts to substantive rulemaking.[25] The Supreme Court has made clear that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[26]

As previously mentioned, Board members are appointed to five-year terms by the President with the advice and consent of the Senate.[27] As a matter of custom, and not law, no more than three of the five members of the NLRB may belong to the political party of the sitting President.[28] The President nominates packages of nominees sent to him by the Senate; this "batching" of NLRB nominees links the appointment of Democratic appointees to Republican appointees with the package, and not individuals, approved by the Senate.[29] As for the five-year term, Professor and former NLRB chair William B. Gould has argued that this term plays a political role in the Board's operations: "[T]he Board is exposed—not only to the

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24. *See* 29 U.S.C. § 156 (2012) (authorizing the Board to make, amend, and rescind rules and regulations); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609-10 (1991) (discussing the Board's substantive rulemaking powers).

25. *See* CHARLES J. MORRIS, THE BLUE EAGLE AT WORK 183 (2005); James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 234 (2005) ("[O]ver its seventy year history the Board has chosen to operate virtually exclusively through adjudication, eschewing its rulemaking authority."); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1565 (2002) (noting the Board's failure to use its rulemaking authority); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 573-74 (1970) (remarking that the Board exercises its adjudicatory authority more than its rulemaking power).

26. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

27. *See supra* note 17 and accompanying text.

28. *See* WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR 15 (2000) ("Traditionally, the Board consists of three members of the president's own party and two members of the opposition. In contrast to the situation in other regulatory agencies—most of which are also quasi-judicial—this political allocation is a matter of custom, not of law."); *see also* Datz, *supra* note 9, at 69 ("Traditionally, the Board is composed of three Democrats and two Republicans when the President is a Democrat and three Republicans and two Democrats when the President is a Republican. Thus, it is customary to speak of a 'Democratic Board' and a 'Republican Board.'"); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems With its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2020 (2009) ("Those familiar with the Board know that it changes the rules depending on which party occupies the White House. Eight years allows a Board to remake the law fairly significantly, as the Board issues hundreds of decisions each year.").

29. *See* GOULD, *supra* note 28, at 39 (discussing packaging of nominees); Michael Ashley Stein, *Hardball, Politics, and the NLRB*, 22 BERKELEY J. EMP. & LAB. L. 507, 509-10 (2001) (book review); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. LAW. 1, 4 n.12 (2000).

politics governing the initial appointment and confirmation process, which inevitably generate policy discussions—but also to political pressures from Congress and the president each time a member comes up for reappointment."[30] As members "generally choose to stay in Washington" when their terms expire, "they are inevitably affected by the political environment and the necessity to survive in it."[31] (This problem can be avoided, in Gould's view, by limiting Board members to one nonrenewable term of seven or eight years.)[32]

For the first eighteen years of the agency's existence "most Board members were drawn from government or academia—never from industry or labor," and "the notion of appointing someone from the management or union side to the Labor Board was considered completely verboten; it was generally agreed that such a person could not possibly be fair to both sides, much less be perceived as such."[33] That practice changed during the presidency of Dwight D. Eisenhower, the first Republican elected to that office since the 1935 enactment of the NLRA.[34] In 1953 Eisenhower appointed management lawyer Guy Farmer and Albert Beeson, a non-lawyer industrial relations director, to seats on the Board.[35] Eisenhower's departure from the nomination-of-neutrals norm was not followed by Democratic Presidents John F. Kennedy or Lyndon B. Johnson; both appointed to the Board individuals who were not from union or management backgrounds.[36] In 1970 President Richard M. Nixon nominated management lawyer Edward B. Miller and other management-side members; since that time, "a majority of the Board members appointed have come from management or union-side rather than neutral backgrounds."[37]

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30. GOULD, *supra* note 28, at 125.

31. *Id.* at 293.

32. *See id.* at 126.

33. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1364-65 (2000).

34. *See* B. Glenn George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 668 n.14 (1985). For more on President Eisenhower's appointments to the Board, see Seymour Scher, *Regulatory Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB*, 23 J. POL. 667, 671-672 (1961).

35. Flynn, *supra* note 33, at 1368-69. Eisenhower continued to appoint neutrals to the agency. *See* JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994, at 98, 125, 129, 151-52, 343 n.8 (1995).

36. *See* Flynn, *supra* note 33, at 1378.

37. *Id.* at 1365.

III. IDEOLOGICAL VOTING: CONCEPT AND EXEMPLARS

A. *The Hypothesis*

The view that the NLRB is, or can be, an administrative agency comprised of partial, if not partisan, members carrying out the mandate and protecting the interests of management and organized labor is held by a number of observers of the agency's history and rulings.[38] Former NLRB Chairman Guy Farmer expressed his opinion that the Board was a "political animal" and had been so "since its inception."[39] While he was not told by the White House how to decide and vote in a particular case, Farmer believed that a Board member "felt pressure to implement the 'philosophy that he thought his administration wanted him to project on the Board.'"[40] Professor Joan Flynn has asked whether "Board members who come from the management or union side [are] more one-sided in their decision-making than their colleagues from government or other 'impartial' backgrounds."[41] In her view, "there seems little doubt that management and union representatives appointed to the Board are likely to be highly predisposed to the management or union-side point of view."[42] Moreover, Flynn writes, a number of academics in the field of labor law "adhere to a fairly predictable line—more often than not pro-union."[43] And, as noted by Professor James Gross, "a presidential administration can make or change labor policy without legislative action through appointments to the NLRB," with labor policy "in a shambles in part because its meaning seems to depend primarily on which political party won the last election."[44] Studies have "found strong evidence that [Board] members were influenced by their own ideological preferences and those of appointing Presidents toward unions and employers

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38. Professor Clyde Summers has commented on the Board's resolution of disputes between labor and management: "No matter how the Board decides these issues, it can not avoid aiding one and hindering the other. Impartiality is impossible. There can be no impartial rules governing the relationship between a tree and the woodman's ax, even though we let the chips fall where they may." Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 97 (1954).

39. GROSS, *supra* note 35, at 97.

40. *Id.* (quoting former NLRB Chairman Guy Farmer).

41. Flynn, *supra* note 33, at 1398.

42. *Id.* at 1403.

43. *Id.*

44. GROSS, *supra* note 35, at 275; *see also* Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1102 (1985) ("A change in presidential administration from Republican to Democrat gives rise to a pro-labor shift in NLRB performance, and a change from Democrat to Republican produces a pro-business shift.").

(as measured by the political party affiliation of members and Presidents)."[45]

Does ideology play a role in NLRB decisionmaking? As I have suggested elsewhere, a Board member's ideology can serve as a predictive indicator of that member's vote in cases involving certain labor law issues brought to the Board for analysis and decision.[46] Thus, one can with great confidence predict that in some cases members who represented management prior to their appointments to the Board will vote for and in favor of management concerns and interests, and can anticipate that NLRB members from union-side backgrounds will vote for legal rules and policies favoring organized labor.

Ideology, generally "understood as normative commitments of various sorts,"[47] matters. More specifically, ideology—measured by (1) the political party of the President appointing the Board member, (2) the member's political party affiliation, and (3) the member's professional background prior to his or her appointment to the Board—is an important jurisprudential element in a number of areas of NLRB-declared law and policy. "Ideology," so understood, is not and should not be viewed in a negative light or as a pejorative term. Nor should this discussion be understood as making the argument that ideology always serves as a predictive indicator and always plays an outcome-influential and/or outcome-determinative role in the Board's decisions. As "more than ninety percent of the NLRB's decisions are unanimous," any such claims would be imprecise.[48] The only claim made here is that ideology has been a persistent and, in many critical instances, a vote-predictive factor in NLRB decisionmaking.

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45. William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 INDUS. & LAB. REL. REV. 237, 241 (1995); *see also* William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539, 549 (1982) (discussing that common perceptions of political bias in NLRB decisions are accurate); Charles D. Delorme, Jr. et al., *The Determinants of Voting by the National Labor Relations Board on Unfair Labor Practice Cases: 1955-1975*, 37 PUB. CHOICE 207, 217 (1981) ("[S]ome of the most important political and economic variables affect the behavior of . . . the NLRB.").

46. Turner, *supra* note 4, at 709.

47. Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: a Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004).

48. Turner, *supra* note 4, at 711 (quoting Ross Runkel, NLRB Reversals During the Bush Administration, LawMemo, Jan. 19, 2006, http://www.lawmemo.com/articles/nlrbreversals.htm).

B. *Ideological Voting Exemplars*

This section focuses on certain areas of NLRB law and policy in which ideology has played an observable and influential role.[49]

1. Regulating Election Campaign Misrepresentations

One of the NLRB's core functions is conducting representation elections in which employees "have the opportunity of exercising a reasoned, untrammeled choice for or against labor organizations . . . ."[50] The Board long ago declared that it seeks "to provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees."[51] Where an election is held and that standard is not met "the experiment must be conducted over again," the election results must be set aside, and a new election must be held.[52]

The question whether the NLRB should set aside elections where misrepresentations have been communicated to employees has been answered in the affirmative and in the negative by different Boards. In the 1962 *Hollywood Ceramics Co.* decision the Board (Chairman Frank McCulloch (DDG)[53] and Members John Fanning (RDG) and Gerald Brown (DDG)) ruled that elections "should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply," and the misrepresentation "may reasonably be expected to have a significant impact on the election."[54]

Thereafter, in *Shopping Kart Food Markets, Inc.*,[55] the full five-member Board overruled *Hollywood Ceramics*.[56] Members

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49. *Id.* at 716-51. For additional discussions of ideological voting on the NLRB and the impact and implications thereof, see also Datz, *supra* note 9, at 71-80 (providing recent examples of the Board's reversal of precedents).

50. Sewell Mfg. Co., 138 N.L.R.B. 66, 69 (1962).

51. Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

52. *Id.*

53. The three-letter parenthetical following a Board member's name refers to three facts: (1) the political party of the President appointing that member to the NLRB; (2) the member's political party affiliation; and (3) the member's professional background preceding the appointment. For example, the DDG following Chairman McCulloch's name in the text indicates that he was appointed by a Democratic President, is himself a Democrat, and worked in government prior to taking a seat on the Board. Another reference, RRM, refers to a member who appointed by a Republican President and is a Republican and represented management interests prior to the appointment. The pertinent information for each member noted in the text can be found in the Appendix.

54. Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962).

55. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1311 (1977).

John Penello (RDG) and Peter Walther (RRM), with the concurrence of Chairman Betty Murphy (RRM) and over the dissents of Members John Fanning (RDG) and Howard Jenkins (DRG), held that the Board would "no longer set elections aside on the basis of misleading campaign statements."[57] The Board would only intervene when a party to an election proceeding used deceptive practices involving the NLRB or "forged documents which render the voters unable to recognize the propaganda for what it is."[58] In the *Shopping Kart* Board's view, employees are not "naïve and unworldly;" they are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."[59]

Twenty months later, in *General Knit of California, Inc.*, the Board overruled *Shopping Kart.*[60] The *Shopping Kart* dissenters (Chairman Fanning (RDG) and Member Jenkins (DRG)) and Member John Truesdale (DDG) outvoted Member Penello (RDG) and Member (and former Chair) Murphy (RRM) and resurrected the *Hollywood Ceramics* regime.[61] Adhering strictly to the *Hollywood Ceramics* standard, the majority stated that the Board would "apply that standard equally to both sides" and would reduce the likelihood of delays in election certifications and the commencement of collective bargaining by acting "expeditiously on objections involving alleged misrepresentations."[62]

Subsequently, in 1982, the Board flip-flopped again in *Midland National Insurance Co.*, overruling *General Knit* and

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56. *Id.* at 1314 (1977); Board cases are typically decided by three-member panels. *See* 29 U.S.C. § 153(b) (2012). In "complex or novel" cases, or "ones . . . on which certain Board members have no known positions," all five Board members may participate. EDWARD B. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB 77 (rev. ed. 1980).

57. *Shopping Kart Food Mkt.*, 228 N.L.R.B. at 1313.

58. *Id.*

59. *Id.* Dissenting Members Fanning and Jenkins argued that the Board should have adhered to *Hollywood Ceramics* and expressed their "firm belief that employees should be afforded a degree of protection from overzealous campaigners who distort the issues by substantial misstatements of relevant and material facts within the special knowledge of the campaigner, so shortly before the election that there is no effective time for reply." *Id.* at 1315 (Members Fanning and Jenkins, dissenting).

60. Gen. Knit of Cal., Inc., 239 N.L.R.B. 619, 620 (1978).

61. *Id.* at 620.

62. *Id.* at 623. In dissent, Member Penello argued that the *Hollywood Ceramics* standards were "vague and flexible" and delayed the onset of the parties' collective bargaining. *Id.* at 626 (Member Penello, dissenting). Member Murphy, dissenting, opined that "[t]he Board has neither the qualifications, the practical experience, nor the resources to make valid psychological assessments of the actual effects of a given statement on the behavior of a given set (or group of subsets) of employees." *Id.* at 635 (Member Murphy, dissenting).

resurrecting *Shopping Kart*.[63] Chairman John Van de Water (RRM) and Members Robert Hunter (RRG) and Don Zimmerman (DIG) acknowledged that "reasonable, informed individuals can differ, and indeed have differed, in their assessment of the effect of misrepresentations on voters and in their views of the Board's proper role in policing such misrepresentations."[64] Convinced that *Shopping Kart's* line between objectionable and unobjectionable campaign speech produced "predictable and speedy" results and reduced the incentive for lengthy litigation, the Board reasoned that employees were mature individuals capable of recognizing and discounting campaign propaganda.[65] Weighing the benefits of the *Shopping Kart* rule against the possibility that some voters could be misled by campaign misrepresentations, the Board adopted the deregulatory position and announced that the agency "will no longer probe into the truth or falsity of the parties' campaign statements," "will not set elections aside on the basis of misleading campaign statements," and will only set aside an election "where a party has used forged documents which render voters unable to recognize propaganda for what it is."[66]

As can be seen, the Board's different and alternating positions on the regulation of campaign misrepresentations corresponded with changes in presidential administrations and in the composition of the agency's membership.[67] *Hollywood Ceramics'* regulation-of-misrepresentation ruling was decided by Democratic President John F. Kennedy's appointees McCulloch and Brown, both Democrats with government service backgrounds, and Eisenhower appointee Fanning, a Democrat with a background in government.[68] *Shopping Kart's* deregulatory regime was put into place by Republican President Richard M. Nixon's appointee Penello, a Democrat with government experience, and Republican President Gerald R. Ford's appointees Walther and Murphy, Republicans with management backgrounds.[69] *General Knit's* return to the *Hollywood Ceramics* standard was announced in a decision by Fanning; Jenkins, a Republican appointed by the Democratic

63. Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 129 (1982).

64. *Id.* at 130.

65. *Id.* at 131-32.

66. *Id.* at 133.

67. In the view of one court, the Board's flip-flops in this area of the law are an example of the agency's "fickleness" and "indecision." Mosey Mfg. Co. v. NLRB, 701 F.2d 610, 612, 615 (7th Cir. 1983); *see infra* Appendix.

68. Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962); *see infra* Appendix.

69. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311 (1977); *see infra* Appendix.

President Kennedy; and Truesdale, a Democrat appointed by Democratic President James Earl Carter, Jr.[70] And *Midland National*'s return to *Shopping Kart* was the work of Van de Water and Hunter, two Republican appointees of Republican President Ronald Reagan, and Zimmerman, an independent appointed by Democratic President Carter.[71]

2. Are Medical Interns And Residents "Employees"?

The Board has grappled with and provided differing answers to the question whether NLRA Section 2(3) applies to and provides statutory coverage for persons working as medical interns, residents, and clinical fellows (commonly referred to as house staff).[72]

In *St. Clare's Hospital & Health Center*[73] a Board majority comprised of Members Jenkins (DRG), Murphy (RRM), Penello (RDG) and Walther (RRM) dismissed a union petition for a representation election in a unit comprised of the hospital's house staff.[74] Because the house staff "render[ed] services which are directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees."[75] "[W]hen an individual is providing services at the educational institution itself as part and parcel of his or her educational development the individual's interest in rendering such services is more academic than economic . . . . [W]e do not think that such a relationship should be regulated through collective bargaining."[76]

In its 1999 ruling in *Boston Medical Center Corp.* the Board—Chairman Truesdale (DDG) and Members Sarah Fox (DDU) and Wilma Liebman (DDU)—overruled *St. Clare's*.[77] Rejecting decades-long Board precedent, the Board concluded that interns, residents, and fellows fell within Section 2(3)'s

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70. Gen. Knit of Cal., Inc., 239 N.L.R.B. 619 (1978); *see infra* Appendix.

71. Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982); *see infra* Appendix.

72. See 29 U.S.C. § 152(3) (1978) ("The term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor . . . .").

73. St. Clare's Hosp. & Health Ctr., 229 N.L.R.B. 1000 (1977).

74. *Id.* at 1000; *see infra* Appendix. Member Fanning (RDG) dissented. *Id.* at 1005.

75. *Id.* at 1002.

76. *Id.* at 1003; *see also id.* ("[E]xtending bargaining privileges to residents, interns and fellows would not be in the best interest of national labor policy."); Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251, 251 (1976) (finding that house staff personnel were primarily students and were therefore not Section 2(3) employees).

77. Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 152 (1999).

broad definition of "employee" even though "a purpose of their being at the hospital may also be, in part, educational."[78] Concluding that the "essential elements" of the house staff's relationship with the medical center obviously "define an employer-employee relationship,"[79] the Board determined that "nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act."[80] Accordingly, the Board declared,

> we accord individuals who clearly are employees within the meaning of the Act the rights that are afforded all such employees, and likewise impose the responsibilities commensurate with those rights. We believe that our interpretation of the statute, informed by analysis of the facts here and experience, is a reasonable one that takes into account the entire nature of the house staff-hospital relationship.[81]

Two members, both with management-side background and experience, dissented. Member Peter Hurtgen (DRM) saw no reason to depart from prior case law and stated that "as a policy matter, the Board should continue to exercise its discretion to exclude" house staff, especially where there were no changed circumstances warranting a change in the applicable law and rule.[82] He further stated: "I would not alter longstanding and workable precedent simply because of a change in Board membership. In my view, the interests of stability and predictability in the law require that established precedent be reversed only upon a showing of manifest need. There is no such showing here."[83] In a separate dissent Member J. Robert Brame (DRM) argued that the Board's decision "places in jeopardy the finest system of medical education in the world."[84] Medical residents are students who work at (and not for) hospitals, provide direct patient care as "an indispensable component of

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78. *Id.* at 160.

79. *Id.* at 152. The Board noted that the house staff worked for the employer, were compensated for their services, received fringe benefits and were eligible for workers' compensation, and received paid vacations, sick leaves, and parental and bereavement leave, and also received dental, life, health, and malpractice insurance. *See id.* at 187. Moreover, and unlike traditional students, the house staff did not pay tuition or fees, did not take examinations in a classroom setting, and did not receive grades. *See id.* at 161.

80. *Id.* at 160.

81. *Id.* at 164.

82. *Id.* at 169 (Member Hurtgen, dissenting).

83. *Id.*

84. *Id.* at 170 (Member Brame, dissenting).

[their] medical education," and receive stipends not as compensation but as support during the extended graduate education program.[85] The Board's decision "forces medical education into the uncharted waters of organizing campaigns, collective bargaining, and strikes," Brame wrote.[86] "If the majority is successful in this endeavor, American graduate medical education will be irreparably harmed."[87]

Which Board members favored employee representational efforts and voted to recognize medical interns and residents as Section 2(3) employees, and which members agreed with hospital employers that persons in house staff positions are students with no collective bargaining rights? Three Democratic appointees of Democratic President Bill Clinton, two with union-side backgrounds and one with prior service in government, determined that individuals in house staff positions were statutory employees; two members, both management-side Republicans, dissented.[88]

3. Are Graduate Assistants "Employees"?

Ideological voting is also on display in the Board's differing responses to the question whether university graduate assistants are Section 2(3) employees.[89]

In *New York University* Chairman Truesdale (DDG) and Members Liebman (DDU) and Hurtgen (DRM), all appointed by Democratic President Clinton, concluded that certain university graduate assistants were statutory employees eligible to vote in a Board-conducted representation election petitioned for by the United Auto Workers.[90] The assistants, graduate students employed as teachers or researchers, worked under the direction and control of the university's departments and programs, were compensated for their services through the university's payroll system, and spent fifteen percent of their time performing graduate assistant duties.[91] As their "relationship with the Employer is thus indistinguishable from a traditional master-servant relationship," the Board determined they "plainly and literally fall within the meaning of 'employee' as defined in

85. *Id.* at 176.
86. *Id.* at 182.
87. *Id.*
88. Boston Medical Center Corp., 330 N.L.R.B. 152 (1999).
89. *See supra* note 77 and accompanying text.
90. New York Univ., 332 N.L.R.B. 1205 (2000).
91. *Id.* at 1206.

Section 2(3)."[92] The assistants were "no less 'employees' than part-time or other employees of limited tenure or status,"[93] and the fact that their work was primarily educational did not mean that they were not employees as the "educational benefits" flowing from their work was not a requirement for a graduate degree in most of the university's departments.[94] Noting, further, that it could not "say as a matter of law or policy that permitting graduate assistants to be considered employees entitled to the benefits of the Act will result in improper interference with the academic freedom of the institution they serve,"[95] the Board declined to "deprive workers who are compensated by, and under the control of, a statutory employer of their fundamental statutory rights to organize and bargain with their employer, simply because they are also students."[96]

New York University did not survive a subsequent presidential election and new appointments to the NLRB. In *Brown University*[97] Chairman Robert J. Battista (RRM) and Members Peter C. Schaumber (RRM) and Ronald E. Meisburg (RRM), all appointed by Republican President George W. Bush, overruled the Board's 2000 decision and ruled that the university's teaching assistants, research assistants, and proctors were not statutory employees. The Board noted that the assistants received financial aid and were not paid for their work, and that their graduate status and pursuit of a Ph.D. were "inextricably linked" and "clearly educational."[98] Invoking the university's right to academic freedom, the Board concluded that the "imposition of collective bargaining on the relationship between a university and its graduate student assistants . . . would limit the university's freedom to determine a wider range of matters" and would "intrude on core academic freedoms in a manner simply not present in cases involving faculty employees."[99]

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92. *Id.* at 1206.

93. *Id.* at 1206.

94. *Id.* at 1207; see also *id.* at 1209 (Member Hurtgen, concurring) ("[T]he graduate students involved herein do not perform their services as a necessary and fundamental part of their studies. Thus, I regard the [assistants] as employees who should have the right to bargain collectively.").

95. *Id.* at 1209.

96. *Id.*

97. Brown Univ. and Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America, 342 N.L.R.B. 483, 483 (2004).

98. *Id.* at 488-89.

99. *Id.* at 490 n.26.

Questioning the majority's approach, Members Liebman (DDU) and Dennis P. Walsh (RDG) dissented.[100] In their view, the fact that graduate assistants' "employment relationship is not their 'primary' relationship with their employer" was not a reason to exclude the assistants from the Act's coverage.[101] The graduate assistants worked under the control and direction of the university; were compensated for their services by stipends, health fees, and tuition payments; and received compensation for matters not related to academic achievement, with income taxes withheld and a showing of work eligibility under federal immigration laws required.[102] The majority erred "in seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there was no room in the ivory tower for a sweatshop."[103] Refuting the majority's position that collective bargaining would hinder the university's academic freedom, the dissenters argued that graduate assistants "presumably will be reluctant to endanger" that freedom in collective bargaining negotiations.[104] "[C]ollective bargaining and academic freedom are not incompatible; indeed, academic freedom for instructors can be strengthened through collective bargaining."[105]

As can be seen, employee representational rights were recognized and protected by Clinton appointees, and were not recognized and protected by Bush appointees. *New York University* and *Brown University* thus illustrate the outcome-influential and outcome-determinative role ideology can play in NLRB decisionmaking.[106]

4. Weingarten Rights In Nonunion Workplaces

In *NLRB v. J. Weingarten, Inc.*,[107] the United States Supreme Court, agreeing with the Board, held that an employer's denial of an employee's request for the presence of a union representative during an investigatory interview[108] conducted by

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100. *Id.* at 493.

101. *Id.* at 496 (Members Liebman and Walsh, dissenting).

102. *See id.* at 497.

103. *Id.* at 494.

104. *Id.* at 500.

105. *Id.*

106. *See* New York Univ., 332 N.L.R.B. 1205, 1205 (2000); *Brown Univ.*, 342 N.L.R.B. at 483.

107. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

108. An investigatory interview is one which the "employee reasonably believes may result in the imposition of discipline." *Id.* at 262.

the employer violated Sections 7 and 8(a)(1) of the Act.[109] Deferring to the Board and endorsing the agency's "evolutional approach,"[110] the Court reasoned that the Board's permissible but not required construction of Section 7 "reached a fair and reasoned balance upon a question within its special competence" and did not "exceed the reach of that section."[111]

Do nonunion employees—workers who, unlike the employees in *Weingarten*, are not represented by a union for purposes of collective bargaining—have *Weingarten* rights? *Materials Research Corp.*[112] answered this question in the affirmative in a case involving an employer's denial of a nonunion employee's request for a coworker's assistance at an investigatory interview.[113] Members Fanning (RDG), Jenkins (DRG) and Zimmerman (DIG) opined that "the right enunciated in *Weingarten* applies equally to represented and unrepresented employees."[114] In their view, this right is derived from Section 7's protection of concerted activity for workers' mutual aid or protection and was not dependent upon a union's Section 9 status as the exclusive representative of bargaining unit employees.[115] Indeed, the Board stated, nonunion workers may have even greater need for the assistance of fellow employees; because unrepresented workers are not subject to or covered by a labor agreement, the support of other nonunion workers "may diminish any tendency by an employer to act unjustly or arbitrarily."[116] Dissenting Chairman Van de Water (RRM) and Member Hunter (RRG) argued that employees have no right to a coworker's presence and assistance at an investigatory interview where there is no recognized or certified union representative.[117]

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109. *See* 29 U.S.C. §§ 157, 158(a)(1) (2012).

110. *J. Weingarten*, 420 U.S. at 265.

111. *Id.* at 267. The Court made clear that an employee must ask for a union representative and may relinquish that right and participate in an investigatory interview without representation. In addition, the employer may lawfully decline the employee's request for a representative and "is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one." *Id.* at 257-58. Additionally, the employer has no duty to bargain with the union representative attending the interview and "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." *Id.* at 260.

112. Materials Research Corp., 262 N.L.R.B. 1010 (1982).

113. *Id.* at 1010.

114. *Id.* at 1016.

115. *Id.* at 1012; *see* 29 U.S.C. § 159(a) (2012).

116. *Materials Research Corp.*, 262 N.L.R.B. at 1015.

117. *See id.* at 1019 (Chairman Van de Water, concurring and dissenting); *Id.* at 1021 (Member Hunter, dissenting).

A few years later, in *Sears, Roebuck & Co.*,[118] the Board overruled *Materials Research.*[119] In an opinion by Chairman Donald Dotson (RRM) and Member Patricia Diaz Dennis (RDM), the Board determined that employees have no *Weingarten* rights in the absence of a Section 9 collective bargaining representative.[120] *Materials Research* "told employers, in effect, that they have the right to act on an individual basis with respect to an employee's terms or conditions of employment except for the conduct of an investigatory interview."[121] Having tied the representational right to Section 9, the Board declared that the "Section 7 rights of one group cannot be mechanically transplanted to the other group at the expense of important statutory policies."[122]

Returning to the issue years later in *E.I. du Pont de Nemours*,[123] the Board reaffirmed the agency's position that nonunion workers did not have *Weingarten* rights. Chairman James M. Stephens (RRG) and Members Wilford Johansen (RRG), Marshall Babson (RDM), and Mary Cracraft (RDM) determined that a "fair and reasoned balance" between the interests of labor and management was best assured "by not imposing the constraints of investigatory interviews that recognition of the *Weingarten* right entails."[124] Conceding that a literal reading of Section 7 suggested that nonunion employees did have representational rights, the Board thought it less likely that a nonunion employee would provide the type of helpful assistance at an interview as that provided by a union representative.[125] Extending such rights to nonunion workers could actually work to their detriment, the Board reasoned, as employers may legally forego the interview[126] and employees

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118. Sears, Roebuck & Co., 274 N.L.R.B. 230 (1985).

119. *Id.* at 230.

120. *Id.*

121. *Id.* at 231. Member Hunter (RRG) concurred, adhering to the views expressed in his *Materials Research* dissent. *See Materials Research Corp.*, 262 N.L.R.B. at 1021; *see supra* notes 117 & 118 and accompanying text. Hunter did not believe that the Act compelled the finding that nonunion workers do not have *Weingarten* rights. Extending such rights to nonunion workers was a "permissible but not a reasonable construction of the Act." *Sears, Roebuck & Co.*, 274 N.L.R.B. at 232 (Member Hunter, dissenting).

122. *Sears, Roebuck & Co.*, 274 N.L.R.B. at 231.

123. E.I. DuPont De Nemours, 289 N.L.R.B. 627 (1988), *review denied by* Slaughter v. NLRB, 876 F.2d 11 (3d Cir. 1989) (per curiam).

124. *E.I. DuPont De Nemours*, 289 N.L.R.B. at 628 (internal quotation marks omitted).

125. *Id.*

126. *See supra* note 109.

would not be able to challenge disciplinary actions in dispute resolution proceedings.[127]

From 1985 to 2000 the Board adhered to the rule that nonunion employees did not have *Weingarten* rights. The no-rights-rule was jettisoned and *Materials Research* was resurrected in *Epilepsy Foundation of Northeast Ohio.*[128] Chairman Truesdale (DDG) and Members Fox (DDU) and Liebman (DDU) rejected as speculative the employer's argument that employee witnesses "would not be motivated to act in the interests of their fellow workers, or that employees might lack the abilities to offer constructive assistance to the interviewed employee."[129] Also rejected as speculative was the contention that an assertion of *Weingarten* rights in the nonunion setting would disadvantage employees in the event the employer decided to forego the interview.[130] This assertion "assumes the worst in employer motives"[131] and "ignores the fact that employees are not *obligated* to request the presence of a *Weingarten* representative."[132] In addition, the Board rejected dissenting Member Hurtgen's (DRM) argument that recognizing *Weingarten* rights would place an "unknown trip-wire" in front of employers involved in investigations of employee misconduct.[133] Truesdale, Fox, and Liebman could not "understand how an employer's ignorance of employee rights provides a justification for denying those rights to employees."[134]

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127. *Id.* at 630.

128. Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 676 (2000), *aff'd in part and rev'd in part*, 268 F.3d 1095 (D.C. Cir. 2001).

129. *Id.* at 679.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 684 (Member Hurtgen, dissenting) ("[B]y grafting the representational rights of the unionized setting onto the nonunion workplace, employers who are legitimately pursuing investigations of employee conduct will face an unknown trip-wire placed there by the Board.").

134. *Id.* at 679. *Epilepsy Foundation* survived judicial review by the United States Court of Appeals for the District of Columbia Circuit. *See* Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001) (per curiam). Writing for the court, Judge Harry T. Edwards noted that "the Board has changed its position several times in considering whether employees in nonunion workplaces may invoke the *Weingarten* right." *Id.* at 1099. This change of mind was not a forbidden action. "It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board." *Id.* at 1097. As "[a]n otherwise reasonable interpretation of § 7 is not made legally infirm because the Board gives *renewed*, rather than new, meaning to a disputed statutory provision," the court did not invalidate the Board's return to *Materials Research*. *Id.*

Epilepsy Foundation was not the Board's final word on the subject. In *IBM Corp.*[135] Chairman Battista (RRM) and Member Meisburg (RRM), with the concurrence of Member Schaumber (RRM), announced that "national labor relations policy will best be served by overruling existing precedent and returning to the earlier precedent of *du Pont*, which holds that *Weingarten* rights do not apply in a nonunion setting."[136] Agreeing with the policy considerations noted in the Board's prior rulings denying *Weingarten* rights to unrepresented employees, Battista and Meisburg introduced new elements into the decisional calculus: the "ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence."[137] In an age of corporate scandals, post-9/11 terrorism concerns, and the mandates of antidiscrimination laws, "the policy considerations expressed in *du Pont* have taken on a new vitality."[138] The confidentiality of employer investigations could be compromised where a nonunion employee "inadvertently 'let slip' confidential, sensitive, or embarrassing information" in conversations with other employees or friends.[139] Thus, "on balance, the right of an employee to a coworker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations."[140]

Members Liebman (DDU) and Walsh (RDG) dissented: "Today, American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy."[141] Accusing the Board of treating nonunion workers like "second-class citizens of the workplace," and assuming *arguendo* that affording *Weingarten* rights to unrepresented employees could make it more difficult for employers to conduct investigations, the dissenters argued that there was no post-*Epilepsy Foundation* evidence that nonunion coworker representation had interfered with investigations.[142] Nor were they persuaded by the contention that coworker

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135. IBM Corp., 341 N.L.R.B. 1288 (2004), *dismissed*, Schult v. NLRB, No. 04-1225, 2004 WL 2595890, at *1 (D.C. Cir. Nov. 2, 2004).

136. *Id.* at 1289.

137. *Id.* at 1290.

138. *Id.* at 1291.

139. *Id.* at 1293.

140. *Id.* at 1294. In a concurring opinion Member Schaumber argued that the "better construction and the one most consistent with the language and policies of the Act" would hold that the *Weingarten* right is unique to union-represented employees. *Id.* at 1295 (Member Schaumber, concurring).

141. *Id.* at 1305 (Members Liebman and Walsh, dissenting).

142. *Id.*

assistance was not good policy in light of threats of terrorism, workplace violence, and corporate scandals: "[A]llowing workers to represent each other has no conceivable connection with workplace violence and precious little with corporate wrongdoing, which in any case seem concentrated in the executive suite, not the employee cubicle or the factory floor."[143] Overruling *Epilepsy Foundation* "not because they must, and not because they should, but because they can," the majority was "taking a step backwards" in issuing a decision "unlikely to have an enduring place in American labor law."[144]

The changes in Board law in this area followed election results. *Materials Research's* extension of *Weingarten* rights to nonunion employees was rejected by three Reagan appointees in *Sears*,[145] and four Reagan appointees (two Republicans and two Democrats) reaffirmed *Sears* in the 1988 *DuPont* decision.[146] Clinton appointees returned to the representational rights position in *Epilepsy Foundation*; three management-side and Republican Bush appointees outvoted two Democrats in flip-flopping back to *DuPont*.[147]

5. Nonmajority Bargaining Orders

As mandated by NLRA Section 9, an employer must bargain with the exclusive representative "designated or selected" by a majority of employees in an appropriate bargaining unit.[148] The usual (and, from the Board's perspective, the preferred) route taken by a union seeking exclusive bargaining status is the NLRB-conducted election and the certification procedures set forth in Section 9(c) of the statute.[149] In certain instances, however, the Board will not hold or will set aside the results of an election where the employer has engaged in serious unfair labor practices.[150] As the Supreme Court made clear in *NLRB v. Gissel Packing Co.*,[151] the Board has the authority to issue bargaining orders when a union has demonstrated the support of a majority of bargaining unit employees and the employer has committed unfair labor practices that "have the tendency to

143. *Id.*
144. *Id.* at 1311.
145. Sears, Roebuck & Co., 274 N.L.R.B. 230, 230 (1985).
146. E. I. DuPont De Nemours, 289 N.L.R.B. 627, 628 (1988).
147. *See* Epilepsy Foundation v. NLRB, 268 F.3d 1095, 1100 (2001).
148. *See* 29 U.S.C. § 159(a) (2012).
149. *See* 29 U.S.C. § 159(c).
150. *See* 29 U.S.C. § 160(h).
151. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

undermine majority support and impede the election processes."[152]

Gissel noted and left open the question whether bargaining orders can be issued by the Board "without need of inquiry into majority status on the basis of [union authorization] cards or otherwise."[153] The Board has considered, and provided different answers to, this question.

In *United Dairy Farmers Cooperative Association*,[154] a majority of a three-member panel (Members Murphy (RRM) and Truesdale (DDG)) determined that the agency's "remedial authority under Section 10(c) of the Act may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support" but declined to issue a nonmajority bargaining order in the case before them.[155] Chairman Fanning (RDG) and Member Jenkins (DRG) would have issued such an order.[156] Member Penello (RDG) argued that the Board's remedial power under Section 10(c) did not limit the majority rule principle of NLRA Section 9(a).[157] In his view, granting bargaining representative status to a union in the absence of majority support is a decision for "Congress, the body which constructed the Act with the majority rule principle as its foundation."[158]

When the United States Court of Appeals for the Third Circuit remanded the case to the Board,[159] Chairman Fanning and Members Jenkins and Zimmerman (DIG) held that a bargaining order was warranted.[160] They concluded that, notwithstanding the "risk of imposing a minority union on the

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152. *Id.* at 614.

153. *Id.* at 613. Employee support for a union is typically shown by authorization cards signed by workers who thereby express their desire to have the union represent them for purposes of collective bargaining. Authorization cards can support bargaining orders because "employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." *Id.* at 606.

154. United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026 (1979), *aff'd and remanded*, 633 F.2d 1054 (3d Cir. 1980).

155. *Id.* at 1027; *see* 29 U.S.C. § 160(c) (2012).

156. *See United Dairy Farmers Coop. Ass'n*, 242 N.L.R.B. at 1032.

157. *See id.* at 1041 (Member Penello, concurring in part & dissenting in part).

158. *Id.* at 1042.

159. *See* United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1056 (3d Cir. 1980) (holding that the Board has the authority to issue nonmajority bargaining orders in certain cases, and remanding the case for consideration of the question whether the facts constituted a level of misconduct justifying the issuance of the order to bargain).

160. United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772, 775 (1981).

employees,"[161] the order was required given the "gravity, extent, timing, and constant repetition" of the employer's violations of the Act and the company's previous misconduct which was the subject of a prior NLRB decision.[162]

In 1984 the Board revisited the nonmajority bargaining order issue in *Gourmet Foods, Inc.*[163] Chairman Dotson (RRM) and Members Dennis (RDM) and Hunter (RRG) changed the law:

> Our own view of the statute, its legislative history, Board and court precedent, and legal commentary have convinced us that the majority rule principle is such an integral part of the Act's current substance and procedure that it must be adhered to in fashioning a remedy, even in the most "exceptional" cases. We view the principle as a direct limitation on the Board's existing statutory remedial authority as well as a policy that would render improper exercise of any remedial authority to grant nonmajority bargaining orders which the Board might possess.[164]

Member Zimmerman's lone dissent argued that the Board did have the statutory authority to issue nonmajority bargaining orders where employees have been subjected to egregious and flagrant unfair labor practices; for their rights "cannot be adequately protected if . . . employers are permitted by the Board to engage in unlawful acts that are so coercive as to prevent majority support from ever developing."[165] Nothing in the Act or in the statute's legislative history directed the Board to interpret Section 9(a) as a bar to a remedial nonmajority bargaining order, he reasoned, and such an order "entails only a minimal interim encroachment, if at all, on the majority rule principle. Ultimately, the order is the best available Board remedy to secure uncoerced majority rule."[166]

Board members appointed by President Reagan rejected *United Dairy* and made clear in *Gourmet Foods* that the Board

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161. *Id.*

162. *Id.*; *see* United Dairy Farmers Coop. Ass'n, 194 N.L.R.B. 1094, 1099 (1972), *enforced*, 465 F.2d 1401 (3d Cir. 1972).

163. Gourmet Foods, Inc., 270 N.L.R.B. 578, 579 (1984).

164. *Id.* at 583.

165. *Id.* at 589 (Member Zimmerman, dissenting).

166. *Id.* at 591.

had no authority to issue nonmajority bargaining orders.[167] This movement reflects and is a product of the members' ideologies.

6. Challenging An Employer's Voluntary Recognition Of A Union

In 1966, the Board considered a case involving the question whether a bargaining relationship established by the employer's lawful recognition of a union representing a majority of employees in a bargaining unit could be disrupted by the union's subsequent loss of majority status prior to the employer's and union's execution of a collective bargaining agreement.[168] Announcing a recognition-bar doctrine barring an election petition filed by an employee or a rival union, the Board held that "the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining;" reasoning that negotiations can only succeed "if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time."[169]

Forty-one years later, in *Dana Corporation*,[170] the Board modified the recognition-bar doctrine.[171] Chairman Battista (RRM) and Members Schaumber (RRM) and Peter Kirsanow (RRM) held that an employer's voluntary recognition of a union would not constitute an election bar, unless (1) bargaining-unit employees received notice of the recognition and of their right to file a decertification petition within 45 days of the notice or to support a rival union's petition, and (2) 45 days have passed from the date of the aforementioned notice without the filing of a valid petition.[172] Satisfaction of both conditions would provide the recognized union with an irrebuttable presumption of majority status for a reasonable period of time which would "enable the parties to engage in negotiations for a first collective bargaining agreement."[173] In so ruling, the Board acknowledged that a

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167. United Dairy Co-op Ass'n, 242 N.L.R.B. 1026 (1979); *Gourmet Foods*, 270 N.L.R.B. at 580.

168. *See* Keller Plastics Eastern, Inc., 157 N.L.R.B. 583 (1966). An employer's collective bargaining relationship with a union can be established by a Board certification election, by a remedial bargaining order (*see supra* notes 149-150 and accompanying text), and by the employer's voluntary recognition of a union representing a majority of bargaining-unit employees. *See Keller Plastics Eastern, Inc.*, 157 N.L.R.B. at 586 (1966); Brooks v. NLRB, 348 U.S. 96, 98 (1954).

169. *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. at 587 (1966).

170. Dana Corp., 351 N.L.R.B. 434 (2007).

171. *Id.* at 437.

172. *Id.* at 434. "If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed." *Id.*

173. *Id.* at 441.

"more rigid recognition-bar doctrine has been in effect since it was announced in *Keller Plastics*," and commented that "the principle of *stare decisis* is entitled to considerable weight."[174] But the rules governing representation elections are not "fixed and immutable,"[175] and "a higher standard of notice to employees that recognition has been extended, and a postrecognition opportunity for employees to petition the Board for an election, must be met before an election bar is imposed."[176]

Members Liebman (DDU) and Walsh's (RDG) partial dissent noted that "in the 40 years since *Keller Plastics* . . . no Board Member—until now—and no court have challenged the [recognition] bar itself . . . ."[177] In their view, the "majority decision cuts voluntary recognition of a union off at the knees," providing employers with little incentive to voluntarily recognize a union where that decision can be second-guessed by a decertification petition, and the employer-union bargaining relationship would be left open to attack by a minority of employees at the very beginning of that relationship.[178] "Sadly, today's decision will surely enhance already serious disenchantment with the Act's ability to protect the right of employees to engage in collective bargaining."[179]

Changes in the Board's composition resulted in the overruling of *Dana Corp.*, and a return to the previously well-settled rule, barring election petitions for a reasonable period of time after a voluntary recognition of a majority representative.[180] In *Lamons Gasket Company* Chairman Liebman (DDU) and Members Craig Becker (DDU) and Mark Pearce (DDU) concluded that *Dana Corp.* had "been shown to be unnecessary and, in fact, to disserve the purposes of the Act,"[181] and had "imposed an extraordinary notice requirement, informing employees only of their right to reconsider their choice to be represented, under a statute commanding that the Board remain strictly neutral in relation to that choice."[182] That notice requirement "casts doubt on the majority's choice by suggesting

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174. *Id.*

175. *Id.* at 441 n.32 (quoting Excelsior Underwear, 156 N.L.R.B 1236, 1239 (1966) (quoting Sewell Mfg., 138 N.L.R.B. 66, 70 (1962))).

176. *Id.* at 441.

177. *Id.* at 444 (Members Zimmerman and Walsh, dissenting in part, but concurring in the result).

178. *Id.* at 447.

179. *Id.* at 444.

180. Lamons Gasket Co., 357 N.L.R.B. No. 72, 1 (Aug. 26, 2011).

181. *Id.* at 2.

182. *Id.*

that voluntary recognition is inherently suspect,"[183] and "[i]n no other context does the Board require that employees be given notice of their right to change their minds about a recent exercise of statutory rights."[184]

Returning to the pre-*Dana Corp.* rule adopted by the *Keller Plastics* Board, the Board altered the rule of that 1966 decision, announcing that the agency now "define[s] a reasonable period of bargaining, during which the recognition bar will apply, to be no less than 6 months after the parties' first bargaining session and no more than 1 year."[185]

The sole dissenter, Member Brian Hayes (DRM), argued that in overruling *Dana Corp.*, his colleagues made "a purely ideological choice, lacking any real empirical support and uninformed by agency expertise."[186] Declining to "respond in kind," the majority opined that —

> The rule that we return to today was adopted by the Board in 1966 and was repeatedly reaffirmed by Board Members appointed by Republican and Democratic Presidents during the subsequent 41 years until it was reversed in *Dana*. Notwithstanding the dissent's heated rhetoric, we take some comfort in aligning ourselves with this long line of distinguished public servants.[187]

Eight Board members casted votes in *Dana Corp.* and *Lamons Gasket Company*.[188] Four Republican members from management backgrounds preferred *Dana Corp.'s* notice-to-employees regime; three Democratic members from union backgrounds and one Democrat with government experience, prior to joining the Board, rejected the notice requirement.[189] The impact of ideological voting is evident.

7. Providing Employee Witness Statements To The Union

In *Piedmont Gardens*[190] the employer obtained written statements from three employees who claimed that they had

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183. *Id.* at 5.
184. *Id.*
185. *Id.* at 10.
186. *Id.* at 11 (Member Hayes, dissenting).
187. *Id.* at 10.
188. Dana Corp., 351 N.L.R.B. 434 (2007); *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 at 1.
189. *See infra* Appendix.
190. Piedmont Gardens, 359 N.L.R.B. No. 46, 1 (Dec. 15, 2012).

observed another employee sleeping on the job.[191] After reviewing the witnesses' statements, the employer fired the allegedly sleeping employee.[192] The union filed a grievance challenging the discharge, and sent an information request to the employer seeking, in relevant part, any and all statements used as part of its investigation.[193] The employer's human resources director denied that request, stating that the "law does not require that we provide you with witness statements collected during our investigation," citing the Board's 1978 decision in *Anheuser-Busch, Inc.* as support for its non-disclosure position.[194]

Ruling that the employer's failure to provide the statements did not violate Section 8(a)(5) of the Act,[195] an Administrative Law Judge found that the resolution of the case was governed by *Detroit Edison Co. v. NLRB*, wherein the agency held that "the 'general obligation' to honor requests for information . . . does not encompass the duty to furnish witness statements."[196] In so holding the Board in *Anheuser-Busch* reasoned that witness statements are not fundamentally different from the types of information contemplated by the Supreme Court in *NLRB v. Acme Industrial Co.*[197] and that the "disclosure of witness statements involves critical considerations which do not apply to requests for other types of information."[198]

In a December 2012 decision, the Board overruled *Anheuser-Busch.*[199] Chairman Pearce (DDU) and Members

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191. *Id.*

192. *Id.* at 2.

193. *Id.*

194. *Id.* at 2 (citing Anheuser-Busch, Inc., 237 N.L.R.B. 982 (1978)).

195. As construed by the Supreme Court, Section 8(a)(5) requires that, upon request, an employer must provide a union "with relevant information necessary to the union's proper performance of its duties as the collective-bargaining representative of its employees, including information that the union needs to determine whether to take a grievance to arbitration absent settlement." *Id.* at 2 (construing NLRB v. Acme Indus., 385 U.S. 432 (1967)).

196. *Id.* at 3.

197. *Id.* at 3 (summarizing the Board's decision in *Anheuser Busch*, where the Board distinguished *NLRB v. Acme Indus.*). *See NLRB v. Acme Indus.*, 385 U.S. 432 (1967) (ordering employer to furnish to union information allowing the union to decide whether to process a grievance); *id.* at 435-36 ("There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.").

198. *Piedmont Gardens*, 359 N.L.R.B. No. 46 at 3 (quoting *Anheuser-Busch Inc.*, 237 N.L.R.B. at 984). The Board in Piedmont Gardens expressed its concern about the "potential dangers" of the "premature release" of witness statements, including the risk that employees would be coerced or intimidated by employers or unions "in an effort to make them change their testimony or not testify at all." *Id.*

199. *Id.* at 1.

Richard Griffin (DDU) and Sharon Block (DDU),[200] finding that the rationale of *Anheuser-Busch* was flawed, announced that the Board would apply the test articulated by the Supreme Court in *Detroit Edison Co. v. NLRB*[201] "in future cases where the employer argues that it has a confidentiality interest in protecting witness statements from disclosure."[202] In the Board's view, information that is "relevant and necessary to the union's representative duties, then requested information is, at bottom, fundamentally the same for purposes of the Act."[203] Recognizing that there may be circumstances in which disclosing witness statements "may raise legitimate and substantial concerns of confidentiality or retaliation," the Board found no basis for assuming that all witness statements are exempt from disclosure.[204] Opting for a more flexible approach, the agency stated that it would apply the following test (which would be applied prospectively)[205]: "if the requested information is determined to be relevant, the party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party's need for the information."[206]

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200. In January 2012, President Barack Obama appointed Members Griffin, Block, and Terence Flynn to the Board pursuant to the Recess Appointments Clause of the United States Constitution. Canning v. NLRB, 705 F.3d 490, 498 (D.C. Cir. 2013), *cert. granted*, 133 S.Ct. 2861 (2013); *See* U.S. CONST. art. II, § 2, cl. 3. At the time of those appointments two members—Chairman Pearce and Brian Hayes—had been confirmed by the United States Senate. *Canning*, 705 F.3d at 500. In *Canning*, the court held that the recess appointments of Griffin, Block, and Flynn were invalid under the Recess Appointments Clause. *Id.* Consequently, the court determined, the Board did not have the required quorum of three members when it issued its decision on February 8, 2012, and the agency's decision finding that the employer violated the Act must be vacated. *Id.* at 507; *see* 29 U.S.C. § 153(b); *see also* New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010). The Supreme Court has granted certiorari and is considering the question whether the aforementioned recess appointments violate the Constitution.

201. *In Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the union, arbitrating a grievance filed on behalf of employees, requested that the employer disclose to the union the actual scores (linked with names) of employees who had taken an aptitude test, and the employer refused to provide that information. *Id.* at 318. The Court rejected the Board's holding that the employer violated Section 8(a)(5) of the Act and declined to adopt the Board's absolute rule that "arguably relevant information must always predominate over all other interests." *Id.* at 318-19 ("[A]ny possible impairment of the function of the Union in processing the grievances of employees is more than justified by the interests served in conditioning the disclosure of the test scores upon the consent of the very employees whose grievance is being processed. . . . The Company's interest in preserving employee confidence in the testing program is well founded."). *Id.* at 319.

202. *Piedmont Gardens*, 359 N.L.R.B. No. 46 at 1.

203. *Id.* at 3.

204. *Id.* at 4.

205. *Id.*

206. *Id.* "[T]he party asserting the confidentiality defense may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely

8. Dues Checkoff And The Unilateral-Change Doctrine

In its 1962 *Bethlehem Steel Co.*[207] decision the Board concluded that the employer's contractually created dues-checkoff obligations to the union—requiring the employer to deduct union dues from employees' wages and remit the dues to the union—ceased upon the expiration of the collective bargaining agreement.[208] Accordingly, an employer's unilateral and post-contract discontinuance of the checkoff did not violate Section 8(a)(5) of the Act.[209]

Bethlehem Steel was followed in *Hacienda Hotel, Inc.*,[210] wherein the Board (Chairman Truesdale (DDG) and Members Hurtgen (DRM) and Brame (DRM)) saw no reason to depart from the "bright-line" and well-established "rule that an employer's dues-checkoff obligation terminates at contract expiration."[211] Dissenting Members Fox (DDU) and Liebman (DDU) found no statutory or policy reason to except the dues-checkoff obligation "from the general rule that following the expiration of a collective-bargaining agreement, an employer is obliged to maintain the status quo with regard to employees' terms and

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manner and seek an accommodation from the other party." *Id.* Dissenting Member Hayes (DRM) would not have overturned *Anheuser-Busch*, opining that the bright-line rule of that case "protects the integrity of the arbitration process, protects employee witnesses who participate in workplace investigations from coercion and intimidation, and enables employers to conduct effective investigations into workplace misconduct." *Id.* at 6 (Member Hayes, dissenting). He predicted that unions "will almost certainly ask for witness statements in any instance of a represented employee's alleged misconduct" and will file unfair labor practice charges if the employer claims confidentiality and refuses to provide the requested statements. *Id.* at 8. "[T]he private grievance arbitration machinery will often grind to a halt awaiting a final Board decision, even though the misconduct issue involves no statutory matter other than the information request issue." *Id.*

207. *See* Bethlehem Steel Co., 136 N.L.R.B. 1500, 1502 (1962), *remanded on other grounds sub nom.* Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963).

208. *Id.* In addition, the Board found that the employer acted lawfully when it unilaterally ceased to give effect to a union-security provision in its collective bargaining agreement with the union which required employees to join the union thirty days after commencing employment. *Id.* at 1501; *see also* 29 U.S.C. § 158(a)(3) (2012) (authorizing employer "to require as a condition of employment" union membership "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later."). While the parties could enforce a union-security provision when the agreement was in force, that provision became inoperative upon the termination of the contract and could not be imposed by either the employer or the union. *See Bethlehem Steel Co.*, 136 N.L.R.B. at 1502.

209. *See Bethlehem Steel Co.*, 136 N.L.R.B. at 1502; on employer bargaining obligations and unlawful unilateral actions, see *supra* text accompanying note 205.

210. Hacienda Hotel, Inc., 331 N.L.R.B. 665 (2000), *vacated sub nom.* Local Joint Exec. Bd. v. NLRB, 309 F.3d 578 (9th Cir. 2002).

211. *Id.* at 667.

conditions of employment until the parties agree on changes or bargain to impasse."[212]

Granting the union's petition for review of the Board's decision, the United States Court of Appeals for the Ninth Circuit could not discern the Board's rationale for excluding dues-checkoff from the unilateral change doctrine.[213] The court vacated the Board's decision and remanded the case "so that the Board can articulate a reasoned explanation for the rule it adopted, or adopt a different rule and present a reasoned explanation to support it."[214]

On remand, a different Board majority (Chairman Battista (RRM) and Members Schaumber (RRM) and Kirsanow (RRM)) again held that the employer did not violate the statute.[215] In their view, the union's agreement to contractual language linking the checkoff of dues to the duration of the labor agreement waived any right to the continuation of the checkoff following the expiration of that agreement.[216] Members Liebman (DDU) and Walsh (RDG), dissenting, argued that the employer's unilateral decision to refuse to honor its employees' dues check-off obligations violated the Act, and complained that the majority had failed to supply a reasoned explanation for the exclusion of dues-checkoff from the rules governing unilateral changes in terms and conditions of employment.[217]

The case returned to the Ninth Circuit.[218] Concluding that the union did not clearly and unmistakably waive the right to continue the dues-checkoff obligation following the agreement's expiration, the court again instructed the Board to either explain the rule the agency adopted in the 2000 decision or abandon that rule and adopt a different rule and articulate "a reasoned explanation" for that rule.[219]

On remand four Board members deadlocked and dismissed the unfair labor practice complaint against the employer.[220] Chairman Liebman (DDU) and Member Pearce (DDU) expressed their doubts about the validity of the Board's 1962 *Bethlehem Steel* decision but honored the Board's tradition that precedent

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212. *Id.* (Members Fox and Liebman, dissenting).

213. *Local Joint Exec. Bd.*, 309 F.3d at 586.

214. *Id.* at 580.

215. *See* Hacienda Hotel, Inc., 351 N.L.R.B. 504 (2007), *vacated sub nom.* Local Joint Exec. Bd. v. NLRB, 540 F.3d 1072 (9th Cir. 2008).

216. *See id.* at 505.

217. *See id.* at 507 (Members Liebman and Walsh, dissenting).

218. Local Joint Exec. Bd. v. NLRB, 540 F.3d 1072 (9th Cir. 2008).

219. *Id.* at 1082.

220. Hacienda Hotel, Inc., 355 N.L.R.B. No. 154 (Aug. 27, 2010).

will only be overruled by a three-member Board majority.[221] Members Schaumber (RRM) and Hayes (RRM), agreeing that they were constrained by the aforementioned tradition, argued for adherence to existing precedent privileging the employer's post-contract cessation of the dues checkoff.[222] Thus, the employer prevailed after ten years of litigation before the Board and the Ninth Circuit.[223]

Changes in the Board's membership subsequently resulted in a change in the agency's position on the question litigated in the *Hacienda Hotel* decisions. In *WKYC-TV, Inc.*[224] the Board, by a 3-1 vote, abandoned the *Bethlehem Steel* rule and held, over the dissent of Member Hayes (RRM), that an employer's dues-checkoff obligation "continues after expiration of a collective-bargaining agreement that establishes such an arrangement."[225] Chairman Pearce (DDU) and Members Griffin (DDU) and Block (DDG) determined that an employee's payment of dues via a checkoff arrangement was "no different from other voluntary checkoff arrangements, such as employee savings accounts and charitable contributions" which survive the expiration of contracts.[226]

Examining and finding flaws in the reasoning of *Bethlehem Steel*[227] and declining to continue to follow that 1962 decision,[228] a Board majority comprised of Democrats appointed by Democrat President Barack Obama overruled a fifty-year-old Board precedent.[229]

IV. EMPLOYER RELOCATION DECISIONS: TO BARGAIN OR NOT TO BARGAIN?

Employer decisions regarding plant relocations, closings, the subcontracting of work, capital investments, and other business-related matters resulting in the restructuring and reorganization of companies can significantly impact employees

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221. *Id.* at 2 (Member Liebman and Pearce, concurring).

222. *See id.* at 4 (Members Schaumber and Hayes, concurring).

223. *See* Local Joint Exec. Bd. v. NLRB, 540 F.3d 1072 (9th Cir. 2008) (implying that employer finally prevailed after ten years of back and forth from the NLRB to the 9th Circuit).

224. WKYC-TV, Inc., 359 N.L.R.B. No. 30 (Dec. 12, 2012).

225. *Id.* at 1.

226. *Id.* at 3-4.

227. *See id.* at 6-8.

228. *See id.* at 8. Noting that *Bethlehem Steel* had been the law for fifty years, the Board opted to apply its new rule prospectively and would continue to decide all pending cases under *Bethlehem Steel*. *Id.* at 11.

229. *See* id. at 1, 8-9.

and the unions that represent them. The NLRB has been asked to resolve labor-management conflicts arising from employers' managerial decisions in cases presenting the question whether an employer is required to collectively bargain with a labor organization before deciding to relocate certain operations.[230] This issue—is "predecision bargaining" mandated by the Act?—raises fundamental questions concerning an employer's collective bargaining obligations under federal labor law.

This part traces the evolution of and changes in the Board's jurisprudence governing an employer's obligation to engage in predecision bargaining[231] in relocation cases, and highlights the role that ideology played in the agency's regulation of this aspect of managerial decisions.

A. *The Employer's Duty To Bargain*

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[232] In construing that section, reference must be made to the definition of collective bargaining in Section 8(d), which defines the duty to bargain as the obligation of both parties "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[233] Section 8(d) also provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession."[234]

Subjects that fall within Section 8(d)'s "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining triggering the bargaining duty.[235] Management must bargain with the union representative of its

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230. *See infra* Part IV.C.

231. It should be noted that an employer violates the Act by failing to bargain over the effects of its managerial decisions as distinguished from any obligation to bargain over the decision itself. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 681-82 (1981) (explaining effects bargaining must take place "in a meaningful manner and at a meaningful time."); Stamping Specialty Co., 294 N.L.R.B. 703, 703 (1989) (discussing an employer that unlawfully denied the union the opportunity for effects-bargaining).

232. 29 U.S.C. § 158(a)(5) (2012). *See also id.* § 158(b)(3) (explaining union's statutory duty to collectively bargain).

233. 29 U.S.C. § 158(d).

234. *Id.*

235. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 344 (1958). Where a subject has been classified as a mandatory subject of bargaining the employer and the union may support their respective bargaining positions with economic weapons such as lockouts and strikes. *See First Nat'l Maint. Corp.*, 452 U.S. at 675. In addition, the employer must, upon request, disclose pertinent information concerning a mandatory subject. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 149-53 (1956).

employees before taking actions "that settle an aspect of the relationship between the employer and employees,"[236] and may not make certain unilateral changes in working conditions prior to such bargaining and the reaching of a bona fide impasse.[237] Once an impasse is reached,[238] the employer may lawfully institute unilateral changes which are consistent with its pre-impasse proposals made to the union.[239] Because it can be difficult to identify the precise point in time at which an impasse has been reached, the critical issue of whether the Section 8(a)(5) bargaining obligation has been satisfied and post-impasse changes can be made stands as a "significant obstacle to an employer who wants to make a decision that requires major expenditures and clockwork timing but which nonetheless is the subject of mandatory bargaining."[240]

B. *The Supreme Court's Predecision Bargaining Jurisprudence*

The Supreme Court has addressed the issue of an employer's duty to engage in predecision bargaining in two contexts, one involving the "contracting out" of work performed by bargaining unit employees, and the other presenting the question whether an employer's decision to close part of its operations was subject to the bargaining mandate.

In *Fibreboard Paper Products Corp. v. NLRB*[241] the Court held that the employer was required to bargain over the subcontracting of work previously performed by members of an existing bargaining unit.[242] Chief Justice Earl Warren, writing for the Court, noted that the primary issue before the Court was the legality of the employer's contracting out of the maintenance work done by employees who were capable of performing that

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236. Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).

237. *See* NLRB v. Katz, 369 U.S. 736, 747 (1962); Taft Broad. Co., 163 N.L.R.B. 475, 478 (1967), *petition for review denied sub nom.* Am. Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

238. The Board considers the following factors in making an impasse determination: (1) the parties' bargaining history; (2) good faith negotiations; (3) the length of negotiations; (4) the issues of disagreement between the parties; and (5) the parties' understanding regarding the status of negotiations. *See Taft Broad. Co.*, 163 N.L.R.B. at 478.

239. *See Katz*, 369 U.S. at 744-45; *Taft Broad.*, 163 N.L.R.B. at 478.

240. Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 88 (1988).

241. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

242. *Id.*

work.[243] Did the employer's subcontracting involve a term and condition of employment covered by Section 8(d) of the Act?[244]

Answering this question in the affirmative, Chief Justice Warren opined that designating the at-issue subcontracting as a mandatory subject of bargaining "would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."[245] In his view, the facts illustrated the propriety of submitting the contracting dispute to collective bargaining between the employer and the union:

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.[246]

Chief Justice Warren also noted that the employer had been concerned about labor costs associated with its maintenance operation. The employer's decision to subcontract was induced by the independent contractor's assurances that savings could be achieved by reducing the number of employees and their fringe benefits and overtime.[247] Acknowledging that it was "not possible to say whether a satisfactory solution could be reached" in bargaining, he reasoned that "national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."[248] Expressly limiting the holding to the type of subcontracting before the Court, Warren emphasized that the Court's decision did not encompass other forms of

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243. *Id.* at 204-05.
244. *See supra* note 231 and accompanying text.
245. *Fibreboard*, 379 U.S. at 211.
246. *Id.* at 213.
247. *Id.* at 206.
248. *Id.* at 214.

subcontracting, contracting out, or other business arrangements.[249]

Justice Potter Stewart authored an influential concurring opinion best known for his discussion of three categories of managerial decisions.[250] The first category encompassed decisions involving matters which are by definition working conditions—hours of work, relief periods, safety practices, seniority rights, discharges—and therefore mandatory subjects of bargaining.[251] The second category included decisions such as advertising expenditures, product design, sales, and financing; in this category, the impact of such decisions on the job security of employees was "indirect and uncertain" and were permissive and not mandatory bargaining subjects.[252]

The third category consisted of management decisions that eliminated jobs or put job security at risk but also included "managerial decisions, which lie at the core of entrepreneurial control."[253] Justice Stewart stated that management decisions concerning the "commitment of investment capital and the basic scope of the enterprise," such as a decision to invest in labor-saving machinery or to liquidate assets and go out of business, should be excluded from the mandatory bargaining requirement.[254] Thus, "management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded."[255]

The issue of predecision bargaining in the context of a partial closing was before the Court in *First National Maintenance Corp. v. NLRB*.[256] After struggling with the performance of expensive maintenance work and an inability to successfully renegotiate fees charged to the customer, the employer discontinued its work at the customer's facility and discharged its employees who had been working at that location.[257] The employer did not bargain with the employees'

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249. *See id.* at 215, n.8; *see also* Mid-State Ready Mix, 307 N.L.R.B. 809 (1992) (holding that an employer had a duty to bargain with the union over the decision to subcontract unit work where the change in operations did not involve a change in the scope and operation of the business), *abrogated by* Furniture Rentors of Am., Inc. v. NLRB, 36 F.3d 1240 (3d Cir. 1994).

250. *See Fibreboard*, 379 U.S. at 218-26 (Stewart, J., concurring).

251. *Id.* at 222.

252. *Id.* at 223.

253. *Id.*

254. *Id.*

255. *Id.*

256. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981).

257. *Id.* at 669-70.

union about its decision or discuss the effect of terminating operations on employees.[258] The Court, in an opinion by Justice Harry Blackmun, held that the employer had no duty to bargain and did not violate Section 8(a)(5).[259] Examining the Act's bargaining framework and noting the requirement that parties must bargain over mandatory subjects, Blackmun stated that Congress did not intend to make unions "an equal partner in the running of the business enterprise in which the union's members are employed."[260] The Act's emphasis on collective bargaining is justified only where the subject of bargaining "is amenable to resolution through the bargaining process."[261] The Court formulated the following balancing test applicable to partial closing decisions: "bargaining . . . should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."[262]

Justice Blackmun then compared the interests of unions and management in being involved in or excluded from decisions to close part of a business.[263] He opined that a union would attempt to delay or prevent the closing and would offer "concessions, information, and alternatives" toward that end.[264] In his view, mandatory bargaining over the effects of an employer's decision,[265] taken together with the Section 8(a)(3) prohibition of partial closing motivated by an employer's anti-union animus,[266] adequately protects the union's interest.[267] Management's interests are more complex and varied, Blackmun continued.[268] If the decision to close failing operations stems in significant part from labor costs, management can "confer voluntarily with the union to seek concessions that may make continuing the business profitable."[269] At other times, management will be interested in "speed, flexibility, and secrecy in meeting business opportunities and exigencies" due to tax or securities law consequences

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258. *Id.*
259. *Id.* at 686.
260. *Id.* at 676.
261. *Id.* at 678.
262. *Id.* at 679.
263. *Id.* at 680-83.
264. *Id.* at 681.
265. *See supra* note 227.
266. *See* 29 U.S.C. § 158(a)(3) (2012); Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965).
267. *See First Nat'l Maint. Corp.*, 452 U.S. at 682.
268. *Id.*
269. *Id.*

dependent on the timing of a closure or reorganization.[270] Requiring the employer to bargain in that circumstance would grant the union the power to delay management's action even in the absence of "any feasible solution the union might propose."[271]

The Court held that the employer's interest in closing part of its business "purely for economic reasons outweigh[ed]" the marginal benefits to collective bargaining which could result were the union to participate in the decisionmaking.[272] Accordingly, bargaining was not mandatory, and the employer's conduct did not violate Section 8(a)(5).[273]

Whether decision-bargaining was required in other circumstances was a question for future cases, as the Court made clear that it was expressing "no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts."[274]

C. *The Board's Relocation Decision-Bargaining Jurisprudence*

As noted above, in *First National Maintenance* the Court restricted its holding to partial closing decisions and explicitly withheld ruling on other management decisions, including the decision to relocate business operations.[275] The NLRB has addressed the questions of whether and under what circumstances an employer is required to bargain with a union over the relocation decision in several significant rulings providing varying answers to the foregoing queries.

In 1975 United Technologies acquired Otis Elevator Co. and conducted a review of Otis' engineering organization and the state of the company's technological development.[276] Following that review, United Technologies determined that Otis' research and development operations in Parsippany, New Jersey and Mahwah, New Jersey should be terminated and consolidated at United Technologies' facility in East Hartford, Connecticut.[277]

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270. *Id.* at 682-83.

271. *Id.* at 683.

272. *Id.* at 686.

273. *Id.*

274. *See id.* at 689 n.22 (Brennan, J. dissenting). A dissenting Justice William Brennan, joined by Justice Thurgood Marshall, argued that the Court's balancing test "takes into account only the interests of *management*; it fails to consider the legitimate employment interests of the workers and their union." *Id.* at 689.

275. See supra notes 270-272 and accompanying text.

276. Otis Elevator Co., 255 N.L.R.B 235, 241 (1981).

277. *Id.* at 242.

Otis commenced construction of a research center in East Hartford and made a capital investment of between $2 million and $3.5 million in the new facility.[278] In December 1977, Otis management informed the Mahwah employees (who were represented by Local 989 of the United Auto Workers) of the aforementioned developments and advised them that by July 1979 a research and development center would be operating in East Hartford.[279] Seventeen Mahwah employees were transferred to East Hartford.[280] Otis did not bargain with the Mahwah employees' union concerning its decisions to discontinue the research and development work in Mahwah and to transfer those functions to the Connecticut facility.[281]

In the March 1981 *Otis I* decision (issued three months before the Supreme Court's ruling in *First National Maintenance*)[282] the Board held that Otis violated Section 8(a)(5) by refusing to bargain with the union over the company's decision to transfer the employees to East Hartford.[283] Chairman Fanning (RDG) and Members Jenkins (DRG) and Zimmerman (DIG) concluded that bargaining over the transfer of the seventeen Mahwah employees "would not have been a significant abridgement of [Otis'] prerogative to carry on its business activities,"[284] and that the capital investment for the new research facility, "a fairly large sum of money," was "not the type of shift of assets which we have found to be outside the scope of mandatory subjects of bargaining."[285] The employer's consolidation of its research and development function in one place was "hardly a major corporate reorganization," the Board opined, and the multimillion dollar investment "did not signal any change in the direction of [Otis'] activities or in the character of the enterprise."[286] Concluding that Otis "ha[d] not... undergone a basic capital reorganization whereby it has conveyed any portion of its assets or operations to some other

278. *Id.* at 236.
279. *Id.* at 242.
280. *Id.* at 236.
281. *See* Otis Elevator Co., 269 N.L.R.B. 891, 892 (1984).
282. *See* Otis Elevator Co., 255 N.L.R.B. 235 (1981); *see supra* notes 254-272 and accompanying text.
283. *See Otis Elevator Co.*, 255 N.L.R.B. at 235.
284. *Id.* at 236.
285. *Id.*
286. *Id.*

entity," the Board found that Otis unlawfully refused to bargain with the union concerning the transfer decision.[287]

While the Board's decision was pending before the United States Court of Appeals for the District of Columbia Circuit, the agency successfully moved for remand for reconsideration in light of the Supreme Court's decision in *First National Maintenance*.[288] Chairman Dotson (RRM) and Members Zimmerman (DIG), Hunter (RRM) and Dennis (RDM) reconsidered the case and, in 1984, the Board issued its *Otis II* decision.[289] Chairman Dotson's and Member Hunter's plurality opinion held that Otis' decisions to discontinue the research and development work and to transfer the Mahwah employees were not restrained by Section 8(a)(5) as those decisions "constituted a managerial decision of the sort which is at the core of entrepreneurial control outside the limited scope of Section 8(d)."[290] Relying on the analysis set forth in Justice Stewart's concurrence in *Fibreboard*[291] and the Court's reasoning in *First National Maintenance*, Dotson and Hunter concluded that the employer's discontinuation and consolidation decision was the "type of decision beyond the reach of Section 8(d)."[292] That decision did not turn upon labor costs; rather, the employer acted because of its dated technology, noncompetitive product, duplicative operations, and the availability of a larger and newer research and development facility in East Hartford.[293] The "critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, *i.e.*, whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees or a union's ability to offer alternatives. The decision at issue here clearly

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287. *Id.* The Board also determined that Otis failed to bargain in good faith with regard to the effects of the transfer decision. *See id.* at 237.

288. *See* Otis Elevator Co., 269 N.L.R.B. 891 (1984) (discussing Board's motion and court's remand and citing First Nat'l Maint. Corp. v. N.L.R.B., 452 U.S. 666 (1981)).

289. *Id.* at 894.

290. *Id.* at 891.

291. *Id.* at 893; see *supra* notes 248-253 and accompanying text. The Board quoted Justice Stewart's statement that an employer had no duty to bargain with a union over "managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessary to terminate employment." Fibreboard Paper Products Corp v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

292. *See* Otis Elevator Co., 269 N.L.R.B. 891, 892 (1984).

293. *Id.* at 891.

turned upon a fundamental change in the nature and direction of the business, and thus was not amenable to bargaining."[294]

A concurring Member Dennis agreed with Dotson and Hunter that Otis did not violate the Act by refusing to bargain with the union over the company's relocation decision but did not adopt her colleagues' rationale.[295] In her view, and applying the analysis set out in *First National Maintenance*, none of the factors underlying Otis' decision was within the union's control.[296]

"There was nothing that the Union could have offered that reasonably could have affected management's decision. Even if the Union had offered pay or benefit cuts or proposed overtime work to increase productivity, such proposals would not have provided [Otis] with the upgraded technology it sought."[297] Thus, the relocation decision "was not amenable to resolution through collective bargaining."[298] While that finding concluded her analysis of the decision-bargaining issue, Dennis noted that a contrary finding—that a decision was amenable to bargaining—would not automatically lead to the conclusion that bargaining was mandatory.[299] For example, Dennis posited, where labor costs are a significant consideration in an employer's decision the benefits of bargaining for labor-management relations and the collective bargaining process must be balanced against the burden on the conduct of the business, with the General Counsel obligated to prove that the benefits outweighed the burden, *i.e.*, prove that the decision was amenable to collective bargaining.[300] That showing "would be difficult here because the burden elements are substantial" given Otis' "investment of a sizable amount of capital" and the significant change in the company's operations resulting from the at-issue consolidation decision.[301]

In a separate concurrence Member Zimmerman agreed that Otis did not violate Section 8(a)(5) and that a decision motivated by labor costs was a mandatory subject of bargaining.[302] But,

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294. *Id.* at 892-93. Included within Section 8(d) are all decisions which turn upon a reduction of labor costs. This is true whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, if the decision in fact turns on direct modification of labor costs and not a change in the basic direction or nature of the enterprise. *Id.*

295. *Id.* at 895.

296. *Id.* at 899.

297. *Id.* at 899 (Member Dennis, concurring).

298. *Id.* (Member Dennis, concurring).

299. *Id.*

300. *Id.* at 900.

301. *Id.*

302. *Id.* (Member Zimmerman, concurring in part and dissenting in part).

unlike Dotson and Hunter, he looked beyond labor costs. "A decision may be amenable to resolution through bargaining where the employer's decision is related to overall enterprise costs not limited specifically to labor costs."[303] In some circumstances union concessions could substantially mitigate an employer's concerns and cause the employer to rescind its decision.[304] The union had no such ability to affect or change Otis' mind, however, as the company's reasons for consolidating and relocating the at-issue work "were entrepreneurial in scope and not directly translatable into dollar figures . . . ."[305]

Otis II was not the Board's last statement on an employer's statutory obligation to bargain with a union over the decision to relocate bargaining unit work.[306] The agency subsequently considered that issue in a case involving Dubuque Packing Company's decision to relocate its hog kill and cut operation from Dubuque, Iowa to a newly purchased plant in Rochelle, Illinois.[307]

In March 1981 Dubuque Packing, experiencing financial difficulties and having concluded that it was not able to remain competitive, notified the United Food and Commercial Workers of the company's intention to close its hog kill and cut operations in Dubuque, Iowa.[308] Thereafter, in June 1981, the company announced that it was contemplating relocating and not closing that facility. The union requested financial information from the company; refusing to provide that information, the company informed employees that approval of a wage freeze could save their jobs.[309] The wage freeze proposal was submitted to the employees with a union recommendation that the freeze be rejected until the company's books were opened.[310] When the employees rejected the freeze, the company advised the union that the decision to close the hog kill and cut department was irreversible.[311] In October 1981 a new hog kill and cut operation was opened by the company in Rochelle, Illinois; two days later, over 500 jobs were eliminated at the Dubuque facility.[312] Subsequently, the company was unable to obtain new financing

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303. *Id.* at 900-01.

304. *Id.* at 901.

305. *Id.*

306. *See id.* at 891; Dubuque Packing Co., 287 N.L.R.B. 499 (1987), *remanded*, 880 F.2d 1422 (D.C. Cir. 1989).

307. *Dubuque*, 287 N.L.R.B. at 500.

308. *Id.* at 507.

309. *Id.* at 510.

310. *Id.* at 514-15.

311. *Id.* at 515.

312. *Id.* at 525.

for its operations and closed the Dubuque and Rochelle plants in October 1982.[313]

In its 1987 *Dubuque Packing I* decision the Board (Chairman Dotson (RRM) and Members Babson (RDM) and Stephens (RRG)) concluded, in a five-paragraph opinion, that the employer had no duty to bargain over the relocation decision.[314] A footnote in that opinion stated that Members Babson and Stephens found that "under any of the views expressed in" *Otis II* the employer "was not obligated to bargain with the Union over its decision to relocate unit work from its Dubuque plant to its Rochelle plant."[315]

The union sought review of the Board's decision. In *UFCW, Local 150-A v. NLRB*[316] the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board.[317] The court noted that in cases decided after *Otis II* the Board had declared that the company had satisfied all or none of the tests set out in the Dotson-Hunter, Dennis, and Zimmerman opinions in *Otis II*,[318] and that in *Dubuque Packing I* two members decided that the employer had no obligation to bargain under any of the *Otis II* views.[319] After examining the Supreme Court's analysis in *First National Maintenance*, the District of Columbia Circuit concluded that "the broad legal views outlined in *Otis II* are reasonably defensible approaches for determining when plant relocations are mandatory bargaining subjects under the NLRA."[320] The decision to close a plant and open operations elsewhere "is analytically close to *First National Maintenance*."[321] The Supreme Court's "sensitivity to management prerogatives" made it "difficult to maintain that the Board was *required* by that opinion to come up with an approach to relocations that would even insist on bargaining *anytime* labor costs were 'a factor,' no matter how small, so long as the decision was a close enough one that labor costs might have tipped the scales. Rather, it is simply to say that this is not the only permissible approach under *First National Maintenance*."[322]

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313. *Id.* at 529.
314. *Id.* at 499.
315. *Id.* at 543 n.1.
316. United Food & Commercial Workers Int'l Union v. NLRB, 880 F.2d 1422 (D.C. Cir. 1989).
317. *Id.*
318. *Id.* at 1431-32.
319. *Id.* at 1432.
320. *Id.* at 1430, 1433.
321. *Id.* at 1433.
322. *Id.*

In the District of Columbia Circuit's view, the Board's "decision in this case falls short of the standards of reasoned decisionmaking that we customarily require in judicial review."[323] The Board did not indicate what was in the minds of those who made the decision to relocate the hog kill and cut operations at the time of or before that decision was made; did not identify the factors the agency considered in ascertaining the employer's contemporaneous motive for that decision; and (if the Board decided to apply a new approach in which it sought the justification for and not the genesis of the decision) did not explain the change in its approach or the factors controlling its determination.[324]

In addition, the court was troubled by the Members Babson's and Stephens' conclusion that under any of the views expressed in *Otis II* the employer had no duty to bargain, noting that the "various *Otis II* opinions . . . share certain common understandings" and "contain some very significant differences."[325] The court urged the Board "to look seriously at the present case on remand and to attempt to articulate a majority-supported statement of the rule that the Board will be applying now and in the future in determining whether a particular decision is subject to mandatory bargaining."[326] In the alternative, the Board would have "to explain how it arrived at the conclusion that the *Otis II* opinions could all yield the same result in this case. Members Babson's and Stephens' bare assertion that their outcome conforms to all three *Otis II* opinions stands naked before us, without any elaboration whatsoever."[327]

On remand in *Dubuque Packing II*, the full Board (Chairman Stephens (RRG) and Members Cracraft (RDM), Dennis Devaney (RDG), Clifford Oviatt (RRM), and John Raudabaugh (RRM)), adopted a new test to be applied in cases presenting the question whether decision-bargaining is required over a relocation decision.[328]

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic

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323. *Id.* at 1434.

324. *See id.* at 1435.

325. *Id.* at 1436.

326. *Id.* at 1436-37.

327. *Id.* at 1437.

328. *See* Dubuque Packing Co., Inc., 303 N.L.R.B. 386 (1991), *enforced*, 1 F.3d 24 (D.C. Cir. 1993).

> change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established *prima facie* that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the *prima facie* case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that would have changed the employer's decision to relocate.[329]

Where a relocation decision is a mandatory bargaining subject, the employer must negotiate with the union to agreement or to impasse.[330] In the event a relocation decision has to be made or implemented quickly the Board will take those circumstances "into account in determining whether a bargaining impasse has been reached on the relocation question."[331]

Applying its new test, the Board concluded, first, that the General Counsel had established a *prima facie* case that the employer's decision involved a mandatory subject of bargaining and was not a decision accompanied by a basic change in the nature of operations.[332] That showing shifted the burden to the employer to establish that labor costs were not a factor in the

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329. *Id.* at 391 ("The first prong of the employer's burden is self-explanatory: If the employer shows that labor costs were irrelevant to the decision to relocate unit work, bargaining over the decision will not be required because the decision would not be amenable to resolution through the bargaining process . . . . Under the second prong, an employer would have no bargaining obligation if it showed that, although labor costs were a consideration in the decision to relocate unit work, it would not remain at the present plant because, for example, the costs of modernization of equipment or environmental controls were greater than any labor cost concessions the union could offer.").

330. *Id.* at 392; on impasse in bargaining, see Stone *supra* note 236, at 87 and accompanying text.

331. *Dubuque*, 303 N.L.R.B. at 392.

332. *Id.* at 393.

decision or, if labor costs were a factor, the decision could not have been changed by labor cost concessions offered by the union.[333] Moving to the second prong of the test, the Board concluded that the employer did not establish that the union could not have offered labor cost concessions that could have changed the decision.[334] Among other things, the Board noted, the employer had informed the union and employees that labor cost reductions were needed to ensure the continued operations of the Dubuque facility.[335]

The employer having failed to rebut the General Counsel's *prima facie* case, the Board held that Dubuque Packing's failure to bargain over the relocation decision violated Section 8(a)(5).[336] The remedy: cease and desist from engaging in such conduct and take specific affirmative actions to effectuate the policies of the Act, including making whole employees who were terminated or laid off as a result of the relocation decision with backpay and fringe benefits (minus interim earnings) from the date of their termination of layoff through October 15, 1982, the date on which Dubuque Packing closed the Dubuque and Rochelle plants.[337]

Consider the Board's changing and unstable relocation bargaining jurisprudence in the ten-year period between *Otis I* and *Dubuque Packing II*. *Otis I*, decided in 1981, held that the employer acted illegally in not bargaining over its relocation decision.[338] *Otis II*, decided three years later and by a Board dominated by Republican appointees with management backgrounds, ruled that the very same conduct by the employer did not violate the Act.[339] The Board's 1987 decision in *Dubuque Packing I* held that the employer had no duty to bargain over the relocation decision the employer made in 1981 (when *Otis I* was still good law).[340] Finally, in *Dubuque Packing II*, the Board, responding to the District of Columbia Circuit's criticism of the agency's application of *Otis II*, articulated a new test governing

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333. *Id.*

334. *Id.*

335. *See id.* at 396.

336. *Id.* at 396-97.

337. *See id.* at 398-99. The United States Court of Appeals for the District of Columbia Circuit enforced the Board's remedial order. *See* UFCW, Local 150-A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993); *see also* Vico Products Co., Inc. v. NLRB, 333 F.3d 198 (D.C. Cir. 2003) (applying *Dubuque Packing II* and holding that employer unlawfully failed to bargain with union over relocation decision); *but see* Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831, 844 (4th Cir. 2000) (refusing to apply *Dubuque Packing II* to an employer's relocation decision).

338. Otis Elevator Co., 255 N.L.R.B. 235, 235 (1981).

339. Otis Elevator Co., 269 N.L.R.B. 891, 900 (1984).

340. *See* Dubuque Packing Co., Inc., 287 N.L.R.B. 499, 540 (1987).

an employer's obligation to bargain with a union over management's decision to relocate bargaining-unit work, and held that the employer's conduct violated Section 8(a)(5).[341] One can imagine and easily see the ways in which employers seeking to comply with this repeatedly changing decision-bargaining regime operated in a world of great uncertainty and legal exposure, while unions and employees saw victory turn into defeat and defeat turn into victory. That uncertainty and roller coaster ride flowed from and was a consequence of ideological voting on the NLRB.

It should be noted that the Board has continued to apply the *Dubuque Packing II* test and has not returned to the flip-flopping behavior noted above.[342] In *Embarq Corporation*,[343] for example, the Board (Chairman Liebman (DDU) and Members Craig Becker (DDU) and Hayes (DRM)) held that the employer did not violate Section 8(a)(5) by refusing to bargain with the union over the decision to close a call center in Las Vegas, Nevada and relocate that work to Altamonte Springs, Florida.[344]

Noting that the employer failed to rebut the General Counsel's *prima facie* case that the relocated unit work was unaccompanied by a basic change in the employer's operations and that the employer failed to prove that labor costs were not a factor in the decision, the Board concluded that the union "could not have offered labor-cost concessions sufficient to alter the [employer's] decision to relocate."[345] More recently, in *El Paso Electric Co.*, the Board (Chairman Pearce (DDU) and Members Becker (DDU) and Hayes (DRM)) held that the employer's non-bargained relocation decision did not violate the Act because the record evidence did not establish that the employer's decision

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341. *See* Dubuque Packing Co., Inc., 303 N.L.R.B. 386, 389 (1991).

342. In a concurring opinion in a 1997 case Chairman Gould (DDA) argued that the Board should overrule *Dubuque Packing* "to the extent that it restricts the analysis of a relocation decision to labor costs." *See* Q-1 Motor Express, Inc., 323 N.L.R.B. 767, 769-70 (1997) (Chairman Gould, concurring). In his view, the "fact . . . that labor costs are a factor in a decision is hardly dispositive of the question of whether the dispute between the parties is . . . 'amenable' to the bargaining process." *Id.* at 771. Whether labor costs are implicated "will be learned only after time consuming, lengthy litigation" and "in the bargaining which precedes litigation, there will be an incentive not to share information which might establish the wrong motivation in ensuing NLRB proceedings." *Id.* In Gould's view, the *Dubuque Packing* analysis "promote[s] wasteful litigation in a manner which erodes some of the Act's purposes" and should be jettisoned and replaced by an "amenable to bargaining" standard not grounded in "the erroneous assumption that a union could not contribute anything to negotiations over an employer's decision that does not implicate labor costs." *Id.* at 772. The Board did not adopt his position.

343. Embarq Corp., 356 N.L.R.B. No. 125, 1 (March 31, 2011).

344. *Id.*

345. *Id.* at 1.

to close was motivated by labor costs.[346] This area of the law thus serves as an exemplar of the Board's ability to announce and adhere to tests and rules which will be recognized and applied by all members without regard to ideology.

V. CONCLUSION: ISSUES AND CONCERNS

The Board's flip-flops, seesaws, and policy oscillations in cases involving the critical question of whether employers are statutorily required to bargain with unions over decisions to relocate bargaining unit work, and in the other areas noted in Part III, are matters of great significance. As previously noted, the Board has relied on case-by-case adjudication in deciding claims that certain conduct violates the NLRA and has only rarely resorted to substantive rulemaking[347] which could provide the means and prospects of definitive rules and governing standards not subject to the swings in the pendulum of policies discussed in the preceding pages.

That a number of Board decisions have been decided by the votes of members which are consistent with their ideology raises the concern and can give the impression that a particular ruling is not an impartial application of law to facts expected by those who believe in a "rule of law" under which all are subject to the same legal mandates and "like cases should be treated alike."[348] Writing in 1939, one commentator stated that the Board "serves the purpose of the rule of law" by the "working out of principles which are generally applied to similar situations," thereby "enabling those governed by the Act to predict, with some degree of close approximation, the course enforcement will take."[349] Ideological voting on the NLRB suggests that cases are being decided, not by dispassionate and impartial adjudicators who are and must be indifferent to the identity of the parties, but by members "act[ing] like politicians carrying out their electoral mandate to favor labor or to favor management."[350] If this is true, the Board's institutional conduct and the outcomes in some

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346. In re El Paso Electric Co., 357 N.L.R.B. No. 186 (Jan. 3, 2012); *see also* Mercy Health Partners, 358 N.L.R.B. No. 69 (June 26, 2012) (finding that relocation bargaining with the union was not required as labor costs were not a factor in the employer's decision).

347. *See* Befort, *supra* note 23; MORRIS, *supra* note 25; *See also supra* text accompanying note 25.

348. Peter Ingram, *Maintaining the Rule of Law*, 35 PHIL. Q. 359, 361 (1985).

349. Harvey Pinney, *Administrative Discretion and the NLRB*, 18 SOC. F. 275, 277-78 (1939).

350. Charles Fried, *Five to Four: Reflections on the School Voucher Cases*, 116 HARV. L. REV. 163, 179 (2002).

cases can fairly be viewed as the result of biased and ideological and inclinational decisionmaking and not as the reasoned, disinterested, and evenhanded application of the pertinent legal rule and precedent. Where a Board member favors labor over management or vice versa, the agency may justifiably be viewed as an institution engaged in law-as-ideology decisionmaking favoring the members' preferred sides of a labor-management dispute.

In making these points I note that it has been argued that viewing the Board as a court-like body may unfairly subject the agency to the foregoing rule-of-law critique. One commentator has urged that the Board performs "functions not generally attributed to common-law courts" and "acts collegially—that is, it adjudicates . . . by majority vote of a panel or of the entire membership—rather than as adjudicators in the fashion of trial judges."[351] As a policymaking institution the Board makes rules "in a broadly legislative sense" and "can pronounce rules, watch them in operation, and modify or abandon them as their impact is shown to be undesirable. The Board is thus distinguished from a court not only in its superior ability to learn relevant facts, but also in its relative freedom from the doctrine of *stare decisis* and from the need to appear to have found the one correct rule of law every time it adjudicates."[352]

The proposition that the Board should not be viewed as a court is a plausible one given the agency's role and function. But, when viewed from the position of those who rely on the Board for the adjudication of cases and the resolution of disputes, the ideological voting of Board members can have profound consequences. In a number of areas of labor law it is a reality that the governing rules have been subject to change based on the outcomes of presidential elections and appointments to the NLRB. With regard to some (not all) issues, Republican administration Boards have ruled in favor of management and Democratic administration Boards have ruled in favor of unions and/or employees.[353]

Given the "extraordinary vagueness of the NLRA"[354] and the strongly held and differing views of those appointed to the Board, the reality of ideological voting should not be surprising and

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351. Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and The Court*, 1968 SUP. CT. REV. 53, 54.

352. *Id.* at 55, 63.

353. *See* Moe, *supra* note 44, at 1102 ("A change in presidential administration from Republican to Democrat gives rise to a pro-labor shift in NLRB performance.").

354. Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 393 (1995).

must be recognized. But that reality is and remains problematic for those who attempt to comply with the NLRA in those areas of labor law destabilized and unsettled by ideological voting "based more on political/personal viewpoints rather than a measured view of the law."[355] Moreover, such voting and decisionmaking calls into question the Board's presumed expertise in interpreting and applying the NLRA. If vote-predictive Board member ideology leads to changes in well-established precedent by pro-union and pro-employer Boards, any presumption of Board expertise becomes questionable to Board litigants, the public, and courts engaged in the judicial review of Board decisions.

With respect to judicial review of NLRB rulings, the Supreme Court has noted that the NLRA "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms."[356] Where the agency's findings of fact are supported by substantial evidence on the record as a whole,[357] the Court has made clear that "a rule that is rational and consistent with the Act . . . is entitled to deference from the courts."[358] This deferential standard of review may not provide the appropriate degree of rigor where a Board ruling is or appears to be the product of management-inclined members favoring management or union-inclined members favoring unions or employees. In that circumstance, a reviewing court should take a hard look at the basis or bases for the agency's ruling and scrutinize, skeptically and not deferentially, the Board's legal analysis and reasoning.[359] Such review may but will not necessarily lead to judicial invalidation of flip-flopping Board decisions, for courts may still be reluctant to undo or intrude into

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355. Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative*, 16 LAB. LAW. 75, 99 (2000).

356. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

357. *See* 29 U.S.C. § 160(e) (2013); Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).

358. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987); *see also* Allentown Mack & Sales Serv., Inc. v. NLRB, 522 U.S. 359, 364 (1998); ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994); NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786 (1990). The Court has also cited Chevron U.S.A. Inc. v. N.R.D.C., Inc., 467 U.S. 837 (1984), in its decisions reviewing NLRB rulings. *See, e.g.*, NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706 (2001); Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996); NLRB v. Town & Country, Inc., 516 U.S. 85 (1995).

359. *See generally* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 820 (arguing that "the hard look doctrine guards against the exercise of naked preferences in the political process by requiring consideration of all of the relevant reasons as well as deliberation about the public good.").

the realm of the agency's interpretation of the NLRA and policymaking. However, as illustrated by the District of Columbia Circuit's review of the Board's *Dubuque Packing I* decision,[360] the prospect of a skeptical and more rigorous judicial review of its work could serve as a catalyst for the Board to identify the agency's ideology-based changes in the law[361] and the consequential impact of those changes on those subject to its regulation.[362]

360. *See supra* notes 314-325 and accompanying text.

361. *See* Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FIU .L. REV. 437 (2010) (calling for the Board to adequately explain its reasoning and discussing other strategies which could improve the agency's rate of success in the federal courts of appeals).

362. *See* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 B.U. L. REV. 189, 191, 195 (2009) ("[C]ourts . . . can require the Board to explain how . . . new doctrine better advances goals and interests accommodated by the Labor Act, in light of the actual contemporary reality regulated by the doctrine . . . . [C]ourts can require [the Board] to consider all important aspects of the policy decision that its construction addresses, including the impact the decision may have on the world the agency regulates . . . .").

APPENDIX*

Board Member	Appointing President	Member's Party	Member's Background
Fanning (1957-82)	Eisenhower (Republican)	Democrat	Government
Jenkins (1963-83)	Kennedy (Democrat)	Republican	Government
Brown (1961-71)	Kennedy (Democrat)	Democrat	Government
McCulloch (1961-70)	Kennedy (Democrat)	Democrat	Government
Penello (1972- 81)	Nixon (Republican)	Democratic	Government
Walther (1975-77)	Ford (Republican)	Republican	Management
Murphy (1975-79)	Ford (Republican)	Republican	Management
Truesdale (1977-81)	Carter (Democrat)	Democratic	Government
Zimmerman (1980-84)	Carter (Democrat)	Independent	Government
Van de Walter (1981-82)	Regan (Republican)	Republican	Management
Hunter (1981-85)	Regan (Republican)	Republican	Government
Dotson (1983-87)	Regan (Republican)	Republican	Management

* Sources: JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994 23, 92, 245, 247, 249 (1995); Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1405 tbl. 1, 1408 tbl. 2 (2000); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & Emp. L. 707, 763-64 (2006); *Board Members Since 1935*, nlrb.gov, http://www.nlrb.gov/who-we-are/board-members-1935 (last visited Nov. 22,2013).

Board Member	**Appointing President**	**Member's Party**	**Member's Background**
Dennis (1983-86)	Regan (Republican)	Democrat	Management
Stephens (1985-95)	Regan (Republican)	Republican	Government
Johansen (1985-89)	Regan (Republican)	Republican	Government
Babson (1985-88)	Regan (Republican)	Democrat	Management
Cracraft (1986-91)	Regan (Republican)	Democrat	Management
Devaney (1988-93)	Regan (Republican)	Democrat	Government
Oviatt (1989-93)	Bush (Republican)	Republican	Management
Raudabaugh (1990-93)	Bush (Republican)	Republican	Management
Gould (1994-98)	Clinton (Democrat)	Democrat	Academia
Truesdale (1998-2001)	Clinton (Democrat)	Democrat	Government
Fox (1996-2000)	Clinton (Democrat)	Democrat	Union
Liebman (1997- 2011)	Clinton (Democrat) Bush (Republican) Obama (Democrat)	Democrat	Union

Board Member	**Appointing President**	**Member's Party**	**Member's Background**
Hurtgen (1997-2002)	Clinton (Democrat)	Republican	Management
Brame (1997-2000)	Clinton (Democrat)	Republican	Management
Battista (2002-07)	Bush (Republican)	Republican	Management
Schaumber (2002-05)	Bush (Republican)	Republican	Management
Meisburg (2004-04)	Bush (Republican)	Republican	Management
Walsh (2002-04)	Bush (Republican)	Democrat	Government
Kirsanow (2007-07)	Bush (Republican)	Republican	Management
Becker (2010-12)	Obama (Democrat)	Democrat	Union
Pearce (2010-)	Obama (Democrat)	Democrat	Union
Hayes (2010-12)	Obama (Democrat)	Democrat	Government
Griffin (2012-)	Obama (Democrat)	Democrat	Government
Block (2012-)	Obama (Democrat)	Republican	Union