

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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Dear Senators Murray and Isakson and Representatives Andrews and Kline:

On behalf of the U.S. Chamber of Commerce (Chamber), the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, I am pleased to submit this statement for today's joint hearing on the *National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights*.

The Chamber has numerous concerns with the National Labor Relations Act (NLRA or Act) and interpretations of the Act by the National Labor Relations Board (NLRB or Board) as they impact employees, employers, and labor organizations. For example, the way in which labor organizations can use "blocking charges," as permitted by the Board, is a serious delay tactic that labor unions have used to deny workers the ability to exercise their rights to decide whether or not to be represented by a labor organization in a federally-supervised private ballot election.

The Chamber would welcome an open discussion about the strengths and weaknesses of the NLRA and how it might be improved to achieve, in practice, the most appropriate balance of the rights of individual employees, employers, and labor unions. Unfortunately, based on history and press reports, it is unlikely such a discussion will take place today.

Instead, it appears that this hearing is designed to continue to propagate myths and half-truths about organizing in today's workplace, the state of U.S. labor law, and its interpretation and enforcement by the NLRB. The purpose of this statement is not to offer a complete rebuttal to these points, but rather to point out some more egregious examples where rhetoric has surpassed reason and to remind the Committee about this current Board's record on overturning precedent and issuing decisions.

However, before discussing the NLRB and recent cases, it is necessary to stress our objection to the Committee calling sitting board members to testify about recent decisions, many of which are still under appeal. While NLRB members are clearly not Article III judges, they do serve in a quasi-judicial role as offices of an independent agency. As such, they should be free of inappropriate influence by Congress or the Administration. While it is clearly appropriate for Congress and interested parties to agree, disagree, or be critical of specific Board decisions, it is

inappropriate to call sitting Board members to testify about specific cases (as opposed to the agency's budget, proposed reorganization, and the like) and the committee's actions today set a dangerous precedent. Board members will be less likely to responsibly carry out their duties in making decisions if they can expect to be summoned before Congress every time they issue an unpopular decision. We hope the Committee will reconsider this precedent.

Rhetoric Surpasses Reason

The NLRB, as the federal agency charged with implementing, interpreting, and enforcing the NLRA, is certainly open to criticism and, indeed, the Chamber has not hesitated to criticize the Board when it has disagreed with a decision. Indeed, an open and honest debate over the merits of Board decisions is a healthy exercise and should be encouraged. However, in recent years, we have seen a disturbing trend in the tone of the debate. Instead of disagreement, we have *ad hominem* attacks, instead of criticism, hyperbole, and instead of reasoned discussion, vitriolic rhetoric. Compounding this are reports based on shoddy research and half-truths that have been relied on by policy-makers, including members of this committee, in attacking the Board and its decision.

By way of example, consider the debate over the Board's decision last year in *Oakwood Healthcare, Inc.*¹ This decision involved the NLRB's determination of which employees are considered supervisors under the NLRA. This issue was before the Board because the Supreme Court had, twice, rejected the NLRB's prior attempts to apply the NLRA's supervisory exemption to certain health care providers.

The NLRB's decision was roundly condemned by unions and their allies. AFL-CIO President John Sweeney said the decision "welcomes employers to strip millions of workers of the right to have a union by reclassifying them as 'supervisors' in name only."² Anna Burger, Chair of the Change to Win Coalition, called the decision "illogical, dishonest, and anti-democratic" and said that the decision "created a blueprint for eliminating the right to organize for most professionals and from millions of leadpersons and employees who are currently represented."³

Earlier this year, the House Employer-Employee Relations Subcommittee held a hearing on this issue in which Chairman Andrews said that the decision "dramatically expanded the definition of supervisor far beyond the limits of the act intended and far beyond the limits of common sense. In so doing, it stripped an estimated 8 million workers – particularly skilled and professional employees – of the right to organize."⁴

These statements and many like them rely on a report by Ross Eisenbrey and Lawrence Mishel of the Economic Policy Institute entitled *Supervisors in Name Only: Union Rights of*

¹ 348 N.L.R.B. No. 37 (2006).

² Michelle Amber and Michael R. Triplett, *Long-Awaited Ruling on Supervisors Prompts Flood of Reaction from Unions, Management*, DAILY LABOR REPORT (BNA), Oct. 4, 2006.

³ *Id.*

⁴ Prepared statement of Rep. Robert Andrews, *Are NLRB and Court Rulings Misclassifying Skilled and Professional Employees as Supervisors*, May 8, 2007, retrieved online at <http://edlabor.house.gov/statements/050807RAHearingStatement.pdf>.

Eight Million Workers at Stake in Labor Board Ruling. The report was issued on July 12, 2006, more than two months **before** the NLRB issued the *Oakwood* decision. The EPI report was not and could not be based on the NLRB's decision. Instead, it was based upon pure conjecture and fear that they NLRB would adopt an "extreme employer-centric position" on *Oakwood* and all similar cases pending before the Board.⁵

In reality, the NLRB did not issue an extreme employer-centric position. Instead, of the more than 180 employees at issue in *Oakwood*, the Board found a mere 12 to be supervisors. In addition, in the 15 months since the *Oakwood* decision was issued, we are not aware of a single Board decision relying on the reasoning in *Oakwood* that found even a single employee to be a supervisor.

However, in spite of the fact that millions of workers have not lost their rights, critics of *Oakwood* continue to propagate this myth, relying on a so-called analysis that came out before the decision was known. They have even relied on it to push legislation through changing the NLRA. While reasonable people can certainly disagree over the precise tests used to determine whether or not an individual qualifies as a supervisor, the rhetoric used by labor union officials as well as some in Congress clearly is beyond the pale and only serves to demonize the NLRA and the Board.

A more recent example is the characterization of the NLRB's decisions issued in September, 2007. Union leaders⁶ have dubbed these decisions the "September Massacre," arguing that the majority of decisions issued in September stripped workers of their rights to organize. The hyperbole invoked by the phrase "massacre" aside, the assertion simply does not hold. Indeed, of the 61 decisions the Board issued in September, 2007, the majority were unanimous and were not the least bit controversial. In fact, Democratic NLRB Members Liebman and Walsh only offered a dissenting opinion in about one-third of the cases. Also of note is that in a majority of decisions, the NLRB ruled against the employer in question. Looking at the Board's September decisions as a whole, they can hardly be characterized as a "kangaroo court"⁷ or as the "Chamber of Commerce Board"⁸ as some have alleged.

Considering the specific cases decided in September, perhaps the most controversial case was the Board's decision in *Dana Corp. and Metaldyne Corp.*,⁹ where the Board held that when an employer and union attempt to evade the NLRA's provisions to let workers decide whether or not to be represented by a union by secret ballot, the workers have a right to be told about the pending recognition and an opportunity to request a private-ballot election. This is arguably the single most pro-worker decision the Board issued all month, as it provides a mechanism to let employees intervene when unions and employers conspire to deprive them of an opportunity to

⁵ EPI Report at 2.

⁶ Thousands of Workers Rally to Condemn the Bush Labor Board's Massive Assault on Workers, Change to Win Press Release, Nov. 15, 2007 (quoting Greg Tarpinian, Executive Director of Change to Win).

⁷ Activists Protest Anti-Labor Labor Board, IBEW Press Release, Nov. 15, 2007 (quoting AFL-CIO Voice@Work Director Fred Azcarate). Retrieved from http://www.ibew.org/articles/07daily/0711/071115_ActivistsProtest.htm.

⁸ *Id.* (quoting United Mine Workers President Cecil Roberts).

⁹ 351 N.L.R.B. No. 28 (2007)

make this important decision in private and free from coercion. Nevertheless, the Board's decision has been cast as shameful by organized labor.¹⁰

In another of the more controversial decisions, *Anheuser-Bush, Inc.*,¹¹ the Board refused to grant reinstatement to a group of employees who were discharged after their illegal conduct was discovered by the employer's use of surveillance cameras. While the Board made clear that the employer should have bargained with the union over the use of cameras, that was not at issue in the case. The sole issue was whether or not the employees, who were discovered to be sleeping on the job, urinating on the employer's roof, and using illegal drugs, were entitled to get their jobs back. Most Americans would probably agree with the Board's decision – that such conduct does not warrant a federally-protected right of reinstatement.

Certainly, some of the Board's decisions issued in September, such as *Dana / Metaldyne*, are significant and worthy of debate. However, many other of the so-called controversial cases produced common sense results.¹² Whatever one thinks of *Dana / Metaldyne* or any of the other 60 cases issued by the Board in September, these decisions cannot justify closing the Board down as many in the labor movement have suggested.¹³ Indeed, such a ploy would stop the Board from issuing the many routine decisions that are critical to ensuring workers, union, and employer rights are respected, not to mention the fact that it would dramatically increase the backload of cases.

Current NLRB's Record

The Bush-NLRB has a surprising record when it comes to overturning precedent – in fact, it has overturned precedent far fewer times than its predecessor Clinton-NLRB and the decisions the Bush Board have overturned were of newer, less well-established, cases. For a comprehensive analysis of these cases, the Committee should review the paper prepared by G. Roger King for an American Bar Association meeting last year.¹⁴

King notes in his paper that the Clinton Board issued 3,458 reported decisions and of those, 60 overturned precedent. In these 60 decisions 1,181 years of precedent was lost.¹⁵ When subtracting out decisions that were unanimous or in which the majority dissented, the number is reduced to 444 years of precedent lost.¹⁶

The Bush Board, by contrast, has issued 1,037 reported decisions in which 9 reversed precedent. In these 9 cases, 146 years of precedent was lost. When subtracting out unanimous

¹⁰ See Statement by AFL-CIO President John Sweeney on Latest NLRB Decision to Undermine Workers, Oct. 3, 2007.

¹¹ 351 N.L.R.B. No. 40 (2007).

¹² *Anheuser-Bush*, for example.

¹³ See Michelle Amber, *Labor Unions Protest NLRB Decisions Demand Agency 'Close for Renovations'*, DAILY LABOR REPORT (BNA), Nov. 16, 2007 (quoting Fred Azcarate, director of the AFL-CIO's Voice@Work campaign).

¹⁴ G. Roger King, *We're Off to See the Wizards: A Panel Discussion on the Bush Board's Decisions...and the Yellow Brick Road Back to the Clinton Board* (2006).

¹⁵ *Id.* at 2-3.

¹⁶ *Id.*

decisions or those in which the majority dissented, the number is reduced to 64 years of precedent lost.¹⁷

King also examines the rate at which courts of appeals overturn the NLRB to give some indication as to whether its decisions are consistent with the NLRA. By his assessment the Clinton Board was upheld in full, depending on the year, between 60 and 70 percent of the time. By contrast, the Bush Board has been upheld in full between 74 and 78 percent of the time. When considering cases upheld in full or in part, the Clinton Board rate was between 72 and 85 percent, while the Bush Board was between 79 and 96 percent.¹⁸

While King's data is from last year, it is certainly illustrative of the fact that the current NLRB has not perpetrated a long drive against worker rights. To the contrary, in a purely statistical sense, its record is on par with and, in some cases, better than the prior Board's.

In short, the Chamber hopes that the committee will push aside the shrill rhetoric surrounding the NLRB's recent decisions and instead look at the Board's decisions in a measured and reasoned way. Having an oversight debate based on fictitious analyses and half-truths will do little to ensure that the NLRA is appropriately enforced.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Randel K. Johnson', with a large, sweeping flourish at the end.

Randel K. Johnson
Vice President,
Labor, Immigration and Employee Benefits

¹⁷ *Id.* at 5-6. Our understanding is that when this data is updated to the present time, the bush Board has issued 21 decisions overturning precedent for 343 years of precedent lost.

¹⁸ *Id.* at 4, 6.