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## Reflections on the NLRB's Labor Law Jurisprudence after Wilma Liebman

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## Essay

### Reflections on the NLRB's Labor Law Jurisprudence after Wilma Liebman

*David L. Gregory, \* Ian Hayes, \*\* and Amanda Jaret\*\*\**

In 2009, South Carolina was blessed to welcome a great American company that chose to stay in our country to continue to do business. That company was Boeing. Boeing started a new line for their 787 Dreamliner, creating 1000 new jobs in South Carolina, giving our state a shot in the arm when we truly needed it. At the same time, they expanded their job numbers in Washington State by 2000. Not a single person was hurt by their decision. Not one. And what did President Obama and his National Labor Relations Board do? They sued this iconic American company. It was shameful. And not worthy of the promise of America. But we did one of the things we do best in South Carolina. We got loud! We're fighters in South Carolina and as we fought we watched an amazing thing happen: you fought with us. And guess what, we won. A few months ago, I sat on the tarmac at the Boeing facility in North Charleston and watched as a new, mac daddy plane rolled onto the runway sporting a "Made with Pride in South Carolina" decal and surrounded by—get ready for it—6000 nonunion employees, cheering, smiling, and so proud of what they had built.<sup>1</sup>

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1. Nikki Haley, Governor of S.C., Remarks at the Republican National Convention (Aug. 28, 2012), *available at* <http://www.c-spanvideo.org/clip/3731656>.

## INTRODUCTION

From the National Labor Relations Board's ("NLRB" or "Board") so-called "September Massacre" in 2007,<sup>2</sup> to accusations of the Board's "Marxism on the march"<sup>3</sup> during President Obama's administration, the Board has been embroiled in significant political turmoil for over a decade.<sup>4</sup> Although the Board—the agency tasked with administering the National Labor Relations Act ("NLRA" or "Act")<sup>5</sup>—has, in its nearly eighty-year history, frequently been susceptible to shifting political winds,<sup>6</sup> many commentators have observed that the latest cycles of politicization have been particularly potent.<sup>7</sup> It is as though the cases before the NLRB were relegated to the sidelines, while the ideological blood sport of crushing the opposition took center stage.<sup>8</sup>

As the 2012 presidential election neared, the NLRB experienced one of the most politically turbulent years in its tumultuous history. Starting in late summer 2011, when Wilma Liebman's courageous tenure as Chairwoman of the NLRB ended,<sup>9</sup> the Board was thrust under the

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2. See Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 201–02, 225 (2010) (describing the "September Massacre"—the sixty-one decisions issued by the Board during September 2007 that substantially eroded protections for employees and unions under the National Labor Relations Act (NLRA)).

3. See Steven Greenhouse, *Labor Board's Exiting Leader Responds to Critics*, N.Y. TIMES, Aug. 29, 2011, at B1 [hereinafter Greenhouse, *Exiting Leader*] (discussing conservative politicians' reactions to the Board's recent reversals of several decisions made during George W. Bush's administration).

4. While the Board has been accused of political partiality since its inception, observers have recognized greater political tension in the Board's internal processes and in its interactions with the public during the George W. Bush Administration than during earlier periods in its history. See, e.g., James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 223 (2005) (discussing the Board's isolation in its decision-making and its partisan operation). For a discussion of the Board under Obama, see *infra* Parts I–II (discussing the ramification of the Board's complaint in April 2011 against the Boeing Company and the quandaries the Board under Obama faced, including operating as a two-member quorum in 2008 and an ethical violation by one of Obama's January 2012 Board recess appointments).

5. 29 U.S.C. §§ 151–69 (2006).

6. See Brudney, *supra* note 4, at 223 ("Attacks on Board objectivity were made as early as 1939 and have continued periodically for more than half a century. Still, the most recent pattern of pro-management decisions is sufficiently striking to warrant further exploration . . . ." (footnotes omitted)).

7. See, e.g., *id.* (detailing the Board's recent politicization); Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL'Y 83, 126 (2009) ("The NLRB has become politicized and its decisions swing to and fro with the changing political administrations.").

8. See generally David L. Gregory, Ian Hayes, & Amanda Jaret, *The Labor Law Jurisprudence of Wilma Liebman*, 30 HOFSTRA LAB. & EMP. L.J. (forthcoming 2012–2013) (providing a comprehensive analysis of the case law over the entire course of Liebman's service on the Board).

9. See Greenhouse, *Exiting Leader*, *supra* note 3 (discussing Liebman's persistent defense of

public microscope and became a target for raw, polemical conservative attacks.<sup>10</sup> This Essay will trace the most recent, post-Liebman history of the NLRB, both jurisprudential and political. Part I of this Essay discusses the Board's infamous 2011 decision to issue a complaint alleging that the Boeing Company committed an unfair labor practice by transferring work to a non-union facility, and the subsequent settlement of the case. This Essay considers both the doctrinal and political ramifications of the Boeing debacle. Part II evaluates the state of the Board after Chairwoman Liebman's departure and discusses the controversy regarding President Obama's recess appointments to the Board. Part II also briefly discusses the leak of confidential Board information by, and subsequent resignation of, Republican Board Member Terence Flynn. Part III assesses the significance and likely ramifications of the most recent issues before the Board.

### I. THE BOEING DILEMMA

The Board's political dynamics, and the dramatic curtailment of crucial employee rights throughout the Bush II administration, spurred the Board under the Obama administration to attempt to ameliorate the anti-labor effects of many Board decisions. Although the Board issued a number of important decisions during Liebman's tenure as Chairwoman, nothing typifies the highly charged political and legal atmosphere surrounding the Board's recent history more clearly than the political firestorm that ignited when the Board issued a complaint against the Boeing Company on April 20, 2011.<sup>11</sup> When Liebman stepped down from her position as Chairwoman on August 27, 2011, the Board was steeped in controversy.<sup>12</sup> On the positive side, this conflict had the potential to settle lingering questions about when employers could move business away from a unionized context. However, the case settled long before the United States Supreme Court

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the Board throughout her time as Chairwoman until giving up the position upon expiration of her term).

10. Michael A. Fletcher, *Boeing Case Puts Spotlight on Little-Known NLRB Official*, SEATTLE TIMES, Sept. 5, 2011, [http://seattletimes.com/html/business/technology/2016119180\\_solomon06.html](http://seattletimes.com/html/business/technology/2016119180_solomon06.html).

11. Press Release, NLRB, National Labor Relations Board Issues Complaint against Boeing Company for Unlawfully Transferring Work to a Non-Union Facility (Apr. 20, 2011), available at <http://www.nlr.gov/news/national-labor-relations-board-issues-complaint-against-boeing-company-unlawfully-transferring->.

12. See Steven Greenhouse, *New Rules Seen as Aid to Efforts to Unionize*, N.Y. TIMES, Aug. 25, 2011, at B1 [hereinafter Greenhouse, *New Rules*] (discussing the Boeing controversy and criticism about the Board's proposed regulations to expedite unionization elections).

could rule on the matter.<sup>13</sup>

#### A. *The Boeing Case*

In 2009, Boeing decided to move production of its modern Dreamliner planes to a new factory in the right-to-work environment of South Carolina.<sup>14</sup> This choice surprised the International Association of Machinists and Aerospace Workers (“Machinists”), the union that represents production workers at Boeing’s facilities in Washington State (where the company’s planes have been built for decades). Taken alone, the company’s decision to open a new factory could have been within its rights under the NLRA. Following *First National Maintenance Corp. v. NLRB*,<sup>15</sup> the long-standing interpretation of the Act was that a company’s strategic, entrepreneurial decision is distinct from the obligation to bargain over the economically motivated decision to move business to a non-union setting legal, so long as the decision is not motivated by anti-union animus.<sup>16</sup> Thus, even if a company’s choice to move work is secretly motivated by a desire to avoid the power of a union among its employees, it could nevertheless dodge Board action by citing legitimate business reasons to transfer the work. If it remains silent regarding the question of a union, the employer may simply cast its strategic decision as being at the heart of entrepreneurial control and, therefore, not a subject for collective bargaining with the union.<sup>17</sup> Thus, Boeing’s decision to start

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13. Press Release, NLRB, Acting General Counsel Announces Close of Boeing Case (Dec. 9, 2011) [hereinafter Press Release, Close of Boeing Case], available at <http://www.nlr.gov/news/nlr-acting-general-counsel-announces-close-boeing-case>.

14. Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N.Y. TIMES, Apr. 20, 2011, at B1. South Carolina’s right-to-work law is typical of such laws. See S.C. CODE ANN. tit. 41, § 41-7-30 (2002) (detailing that an employer cannot require employees to join a labor organization or agency in order to be or remain employed). Right-to-work laws prohibit employers from requiring employees to join or pay dues or fees to a union as a condition or prerequisite for employment. See, e.g., *id.* (describing that it is unlawful for an employer to require an employee to affiliate, through membership or monetarily, with a labor organization or agency). The NLRA preserves states’ rights to enact such legislation. See 29 U.S.C. § 164(b) (2006) (“Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”).

15. 452 U.S. 666 (1981).

16. See *First Nat’l Maint. Corp.*, 452 U.S. at 676 (“Despite the deliberate open-endedness of the statutory language [of the NLRA], there is an undeniable limit to the subjects about which bargaining must take place . . .”). See also *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991), enforced *sub nom.* *United Food & Commercial Workers Int’l Union, Local No. 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993) (holding that the relocation of a plant was a mandatory subject of bargaining and that the NLRB’s test for determining this was valid).

17. See *First Nat’l Maint. Corp.*, 452 U.S. at 680–86 (discussing the balancing of legitimate

production in South Carolina might have been valid if it had simply announced its decision and carried it out.

Instead, several Boeing executives made public statements that the decision was made to avoid the Machinists' influence, since the union had previously carried out several successful strikes at the company's Washington facilities.<sup>18</sup> One Boeing executive told the *Seattle Times* that the "overriding factor . . . was that we can't afford to have a work stoppage every three years."<sup>19</sup> Incensed by what seemed to be an arrogant disregard for the rights of unionized workers, the Machinists filed a charge with the NLRB, and Acting General Counsel of the Board, Lafe Solomon, filed a complaint against the company for anti-union retaliation.<sup>20</sup> Solomon argued that Boeing was moving its operations in response to protected strikes by its union workers, thus violating labor law. While the business had other reasons for opening its new factory, the executives' public statements led many to believe that the Board's complaint would result in a definitive statement about whether such a nakedly anti-union decision violated the NLRA.<sup>21</sup>

### *B. The Boeing Fallout*

Although the Boeing case eventually settled,<sup>22</sup> its ramifications will likely continue to cause ripples for two main reasons. First, although all parties involved recognized that it was beneficial to settle the case,<sup>23</sup> there is still a jurisprudential vacuum that may mislead employees and employers who face similar conflicts because the courts have given no guidance as to the correct balance between employees' and management's rights in the context of transferring work to non-union facilities. Without a clear statement about the lawfulness of an employer's decision to relocate work under circumstances that suggest retaliation against employees who have engaged in concerted, protected activity (such as a strike), businesses may be less confident about changing the nature of their operations or opening new facilities due to a fear that doing so will trigger a federal investigation. Similarly,

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business reasons and mandatory collective bargaining).

18. Fletcher, *supra* note 10.

19. *Id.*

20. *Id.*

21. *See, e.g.*, Editorial, *Boeing and the N.L.R.B.*, N.Y. TIMES, Apr. 25, 2011, at A24 (observing that the Boeing case presented an opportunity to resolve "an ambiguity in the nation's labor protections").

22. Press Release, Close of Boeing Case, *supra* note 13.

23. *See* Fletcher, *supra* note 10 ("Solomon . . . wanted to settle the case and had no intention of seeing the South Carolina plant shut. But he said he saw no option other than to file the complaint.").

employees may fear retaliation and decline to engage in federally protected conduct if they believe their employer can legally relocate its operations if it is frustrated by their union activities. Second, the political upheaval and scathing attacks following the Board's attempt to faithfully enforce the Act suggests a new kind of politicization that may impede the Board's ability to adequately defend employees' rights and police unfair labor practices.

### 1. Doctrinal Confusion

The Boeing case exposed a substantial disagreement about the Board's precedent regarding the extent of a company's right to move its operations to another state.<sup>24</sup> Despite the political tension that the Boeing case generated and the potentially cataclysmic effects of pursuing the case upon all parties involved, a definitive Supreme Court decision would have substantially clarified most, if not all, of the doctrinal confusion in this area of the law. Meanwhile, it remains unclear whether the Board would regard Boeing's conduct as an unfair labor practice.<sup>25</sup>

The core of the doctrinal puzzle lies in the appropriate relationship between two conflicting, but equally well-supported labor law concepts: employees' rights to engage in concerted protected activity<sup>26</sup> and employers' rights to make managerial decisions.<sup>27</sup> The Boeing case presented a unique combination of facts that made it especially difficult to precariously balance, let alone fully harmonize, these competing interests.

From the perspective of Boeing employees in Washington State, the transfer of work was clearly in retaliation for their strikes. In a call to

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24. See *supra* Part I.A (raising the issue of whether the Boeing decision to move production to a new factory was in violation of the NLRA).

25. See Kate Bronfenbrenner, *A Good Case against Boeing*, WASH. POST (June 22, 2011), [http://articles.washingtonpost.com/2011-06-22/opinions/35235600\\_1\\_dreamliner-labor-board-jim-albaugh](http://articles.washingtonpost.com/2011-06-22/opinions/35235600_1_dreamliner-labor-board-jim-albaugh) (describing how plant closing threats are frequently used to deprive employees of their statutory right to unionize).

26. 29 U.S.C. § 157 (2006). Broadly speaking, concerted protected activity includes many types of employee speech or conduct undertaken with the goal of improving terms and conditions of employment. See, e.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962) ("Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions . . . are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.").

27. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (applying a balancing test between the benefit of bargaining and the burden that such bargaining would place on management and holding that an employer's need to decide to shut down part of its business for economically prudent reasons outweighed the benefit of collective bargaining).

shareholders, a Boeing executive expressly noted employees' strikes as a motivating factor in the decision to relocate Dreamliner production to South Carolina.<sup>28</sup> Moreover, the employees would likely have had a strong claim that the transfer of work evinced discrimination on the basis of their union activity, which would violate section 8(a)(3) of the Act.<sup>29</sup>

Conversely, Boeing maintained it was justified in transferring the work. The company could have argued that the core of fundamental managerial rights that the Supreme Court reserved for employers in *First National Maintenance* shielded its decision.<sup>30</sup> However, this argument would likely be difficult to defend, given Boeing executives' public statements regarding the employees' strikes.<sup>31</sup>

## 2. Political Aftermath

Because the Acting General Counsel issued the complaint against Boeing, Liebman shouldered immense political pressure and became the personal target for irate pro-business Republicans.<sup>32</sup> Republican politicians, including South Carolina U.S. Senator Lindsey Graham, threatened to block new appointments to cripple the agency.<sup>33</sup> Others, like Michele Bachmann, a member of the House of Representatives who sought the 2012 Republican presidential nomination, vocally vowed to shut down the agency if elected.<sup>34</sup> Commentators agreed that even in the sometimes vituperative political climate in Washington, "[r]arely has a federal agency been attacked with as much vitriol as the National Labor Relations Board now faces."<sup>35</sup>

Even Liebman herself, no stranger to controversy during her tenure as a Member and then Chairwoman of the NLRB,<sup>36</sup> reported her

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28. Bronfenbrenner, *supra* note 25.

29. 29 U.S.C. § 158(a)(3).

30. *First Nat'l Maint. Corp.*, 452 U.S. at 676–77.

31. *See* Wright Line, 251 N.L.R.B. 1083 (1980) (outlining the Board's methods of determining whether an employer had exhibited anti-union animus), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

32. *See* Greenhouse, *Exiting Leader*, *supra* note 3 (describing the reaction of Republicans to the Board's Acting General Counsel's issuance of the complaint in Boeing).

33. *See* Melanie Trottman, *Labor Board Races to Make Rulings*, WALL ST. J., Aug. 10, 2011, <http://online.wsj.com/article/SB10001424053111903885604576490422803847328.html> (“I’m going to create a high bar for any future [Board] nominees,” [Senator] Lindsey Graham said in an interview.”).

34. Greenhouse, *Exiting Leader*, *supra* note 3.

35. *Id.*

36. *See, e.g., id.* (“She said numerous law firms, business associations and partisan groups were forever warning about how dangerous the N.L.R.B. was . . . . She said that as soon as

surprise and dismay to the public reaction. Liebman observed that while she knew the Board was “going to have a boxing match,” she “didn’t expect [its] opponents to come in with a baseball bat.”<sup>37</sup> Acting General Counsel Lafe Solomon expressed similar surprise, musing that he could not “have possibly predicted that [he] would become part of the Republican platform for president.”<sup>38</sup>

Yet, Liebman was well prepared to defend the agency against external criticism<sup>39</sup> after her experience as an often lone voice of dissent during the Bush II Administration.<sup>40</sup>

## II. THE NLRB AFTER WILMA LIEBMAN: QUORUM AND LEAK PROBLEMS

### A. *Quorum Problems*

#### 1. *New Process Steel* and the Two-Member Board

Congressional inaction and a tumultuous political environment have made the Board’s membership a recurring problem.<sup>41</sup> Because appointing new Board members to fill vacancies is fraught with political implications, Congress has preferred to allow the Board to languish rather than to allow potentially unfriendly Board members to take power.<sup>42</sup>

Although the full Board has five members, this political brinkmanship left the Board with only two members in early 2008.<sup>43</sup> The Board attempted to continue its operations during this period by claiming that two members could operate as a quorum.<sup>44</sup> The Supreme

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President Obama was elected, such groups began sending out alarmist warnings about all the evil the ‘Obama board’ would do.”).

37. Greenhouse, *Exiting Leader*, *supra* note 3 (internal citations omitted).

38. Fletcher, *supra* note 10 (internal citations omitted).

39. See Greenhouse, *Exiting Leader*, *supra* note 3 (detailing how Liebman constantly defended the Board in her position as Chairwoman).

40. See generally David L. Gregory et al., *supra* note 8 (analyzing the case law for the duration of Liebman’s service on the Board).

41. See generally John Sanchez, *Two Is Company but Is It a Quorum?*, 5 F.I.U. L. REV. 715 (2010) (discussing and analyzing what constitutes a quorum of the NLRB).

42. Cf. *id.* at 715–16 (noting that the Board is typically composed of two Republicans, two Democrats, a Chair who belongs to the President’s party, and Board vacancies are common).

43. See *id.* (explaining that the appointments of two members expired at the end of 2007); Greenhouse, *Exiting Leader*, *supra* note 3 (recalling the twenty-six month period beginning in 2008 when the Board was composed of only two members because members of Congress continued to block each other’s appointments).

44. E.g., Hercules Drawn Steel Corp., 352 N.L.R.B. 53, 53 n.3 (2008) (“Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Schaumber and Liebman constitute a quorum of the

Court disagreed and invalidated nearly 600 decisions that were issued by the two-member Board in *New Process Steel v. NLRB*.<sup>45</sup>

When an employer challenged the Board's authority to issue decisions with only two members in *New Process Steel*, the Supreme Court found that the Board did not have quorum power with only two members, even if a three-member quorum had authorized such power.<sup>46</sup> The majority opinion relied on the Taft-Hartley Act's change to a five-member Board and its requirement of a three-member quorum.<sup>47</sup> While the Board had interpreted Taft-Hartley to allow a three-member quorum to authorize two members of that quorum to continue acting with full authority once one of the three left the Board, the Court interpreted the statute as requiring the Board to maintain a three-member quorum to exercise its authority.<sup>48</sup> The Taft-Hartley's amendments to the NLRA require that three members of the Board participate "at all times."<sup>49</sup> Allowing two members to act with the full authority of the Board, the Court held, would undermine the statute's three-member requirement.<sup>50</sup> Given that Taft-Hartley did not explicitly authorize two members to act as a quorum, as Liebman and Schaumber had been acting, it would be improper to read such an allowance into the statute's language.<sup>51</sup> Finally, the Court relied on the fact that the Board had only allowed two members to act with full authority in rare cases when one member of a three-member quorum had been excused.<sup>52</sup> The Supreme Court's holding rendered the 600 decisions made while the Board consisted of only Liebman and Schaumber invalid, and established that the Board has no decision-making authority without at least a three-member quorum.<sup>53</sup>

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three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases." (citing 29 U.S.C. § 153(b) (2006)).

45. 130 S. Ct. 2635 (2010).

46. *Id.* at 2645.

47. *Id.* See 29 U.S.C. § 153(b) (2006) ("The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.").

48. *New Process Steel*, 130 S. Ct. at 2640.

49. *Id.* (citation omitted).

50. *Id.* at 2640–41.

51. *Id.* at 2641.

52. *Id.*

53. *Id.* at 2645.

## 2. Challenges to President Obama's 2012 Recess Appointments

In *Center for Social Change, Inc. v. NLRB*, the Board responded to an employer's challenge to its quorum to render binding decisions.<sup>54</sup> The employer mounted a constitutional challenge to the Board's quorum pursuant to Article II, Section 2, Clause 2 of the U.S. Constitution.<sup>55</sup> It claimed that the recess appointments of Members Richard Griffin, Terence Flynn, and Sharon Block were improper because President Obama made them while the Senate was in session, but without seeking the advice and consent of the Senate.<sup>56</sup> The employer also challenged the Acting General Counsel's appointment, contending that the unfair labor practice complaint was issued *ultra vires*.<sup>57</sup>

The Board declined to resolve the merits of the employer's challenges to its quorum.<sup>58</sup> Citing its long-standing practice of refraining from determining the merits of attacks on the validity of presidential appointments, it applied the presumption of regularity of the official acts of public officers.<sup>59</sup> In subsequent cases, employers have continued to challenge the Board's authority to render decisions, but the Board has only cited its previous decision in deference to the presumption of regularity.<sup>60</sup>

### B. Leak Problems

Republican Member Terence F. Flynn was one of President Obama's January 2012 recess appointments.<sup>61</sup> In early May, the NLRB's Inspector General, David P. Berry, determined that Flynn committed ethical violations by leaking early drafts of NLRB decisions and

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54. *Ctr. for Soc. Change, Inc.*, 358 N.L.R.B. No. 24, 2012 WL 1064641, at \*1 (Mar. 29, 2012).

55. *Id.*

56. *Id.*

57. *Id.* (noting the Respondent's argument that the President's appointment of the Acting General Counsel "lapsed on July 31, 2010—40 days after his appointment—because no nomination had yet been submitted to the Senate to fill the position of General Counsel pursuant to 29 U.S.C. § 153(d)"). Agency action is "*ultra vires*" when it is "[u]nauthorized; beyond the scope of power allowed or granted by . . . law." BLACK'S LAW DICTIONARY 1662 (9th ed. 2009).

58. *Ctr. For Soc. Change, Inc.*, 2012 WL 1064641, at \*1.

59. *Id.* (citing *Lutheran Home at Moorestown*, 334 N.L.R.B. 340, 340–41 (2001)). Government agencies' actions are entitled to a presumption of regularity, which is an assumption that all agency proceedings are fair and adequate. *See, e.g., U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001).

60. *See, e.g., Coastal Sunbelt Produce, Inc.*, 358 N.L.R.B. No. 135, 2012 WL 4320840, at \*2 n.1 (Sept. 20, 2012) (citing its previous decision in *Center for Social Change, Inc.*); *Nestle-Dreyer's Grand Ice Cream, Inc.*, 358 N.L.R.B. No. 45, 2012 WL 183147, at \*1 n.1 (May 18, 2012) (also relying on the decision in *Center for Social Change, Inc.*).

61. *See* Steven Greenhouse, *Labor Board Member Resigns over Leak to G.O.P. Allies*, N.Y. TIMES, May 28, 2012, at B3.

information about the Board's deliberations to former Chairman Peter Schaumber<sup>62</sup> and to Peter Kirsanow.<sup>63</sup> Flynn resigned shortly thereafter despite denying wrongdoing.<sup>64</sup>

### III. THE BOARD NOW

Perhaps because of the publicity surrounding the complaint against Boeing and its internal politics, the NLRB's other attempts to protect workers' rights have become points of controversy both before and after Liebman's departure. The Board's attempts to modernize decades-old rules governing representation elections and notice of workers' rights have been met with indignation among politicians and commentators.<sup>65</sup> At the same time, the Board's treatment of mandatory arbitration and its struggle to adapt the NLRA to twenty-first century technology has developed with little mainstream interest.

#### A. Notice Postings

Shortly before Liebman stepped down from her position as Chairwoman, the Board issued a set of regulations that required employers to display posters in the workplace informing workers of their rights under the NLRA.<sup>66</sup> The rule would have made an employer's failure to display the notice an automatic Unfair Labor Practice under the Act, and allowed the Board to toll the statute of limitations for other violations by the same employer.<sup>67</sup> The business community's horrified reaction became part of the widespread controversy surrounding the Board, and attempts were made to extinguish the rule immediately thereafter.

When the National Association of Manufacturers challenged the rule in the U.S. District Court for the District of Columbia, the court held that the Board had the authority to find that an employer had violated workers' rights under the Act, and that the NLRB had acted with proper

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62. Peter Schaumber was then serving as co-chairman of 2012 presidential candidate Mitt Romney's labor committee. *Id.*

63. Peter Kirsanow is a former Board member who also served as counsel for the National Association of Manufacturers. *Id.*

64. *Id.*

65. See, e.g., William Kilberg, *What I Learned Fighting the NLRB*, WALL ST. J., July 12, 2012, at A17 (criticizing the NLRB's case against Boeing and describing it as an unprecedented antibusiness stance); Peter Roff, *Obama's Renegade NLRB Is Disrupting the Recovery*, U.S. NEWS & WORLD REPORT (Apr. 20, 2012), <http://www.usnews.com/opinion/blogs/peter-roff/2012/04/20/obamas-renegade-nlr-is-disrupting-the-economy> (arguing that the NLRB has been a disruptive force against economic recovery and calling the board a "shill" for unions).

66. Greenhouse, *New Rules*, *supra* note 12, at B1.

67. See *id.* (explaining the specifics and rationale of new employer requirements).

authority in issuing the rule.<sup>68</sup> However, the court also held that the Board could not deem an employer's failure to post the notice an *automatic* violation, and it could not toll the statute of limitations for other violations by an employer that fails to post.<sup>69</sup> In a similar case a month later, the U.S. District Court for the District of South Carolina held that the Board lacked the authority to issue the rule.<sup>70</sup> Subsequently, the Court of Appeals for the District of Columbia enjoined the rule from being implemented, pending the court's decision.<sup>71</sup> The Court of Appeals heard oral argument for the case in September 2012.<sup>72</sup>

### B. Updated Election Rules

In 2011, the Board also implemented a new procedure for representation elections, where employees vote on whether to elect a union as their representative in collective bargaining with the employer.<sup>73</sup> The new procedures were designed to substantially reduce the amount of time between the filing of a petition for election with the Board and the date of the election.<sup>74</sup> The crucial period between a petition and election has long been seen as a period in which employers are most likely to intensify anti-union campaigns.<sup>75</sup> The Board intended for the new procedure to lessen such interference with employees' exercise of their right to elect collective bargaining representatives.<sup>76</sup>

However, like the Board's notice-posting rules, court action soon halted the new election procedures. In July 2012, the U.S. District Court for the District of Columbia held that the Board did not have authority to implement the new election rules because it lacked a quorum when it voted to approve the rules.<sup>77</sup> The court held that the

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68. Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 38 (D.D.C. 2012).

69. *Id.*

70. Chamber of Commerce v. NLRB, 856 F. Supp. 2d 778, 797 (D.S.C. 2012).

71. Nat'l Ass'n Mfrs. v. NLRB, No. 12-5068, 2012 WL 4328371, at \*1 (D.C. Cir. Apr. 17, 2012) (per curiam).

72. See Abigail Rubenstein, *NLRB's Rulemaking Power Hinges on Union Poster Case*, LAW360 (Sept. 10, 2012, 10:36 PM), <http://www.law360.com/articles/376777/nlr-s-rulemaking-power-hinges-on-union-poster-case>.

73. See Press Release, NLRB, Board Adopts Amendments to Election Case Procedures (Dec. 21, 2011), available at <https://www.nlr.gov/news/board-adopts-amendments-election-case-procedures> (announcing the implementation of the procedure).

74. Steven Greenhouse, *Labor Board Approves Faster Vote on Unions*, N.Y. TIMES, Dec. 1, 2011, at B4.

75. See *id.* ("Unions strongly backed the proposed rules, arguing that lengthy delays gave employers too much time to press employees to vote against unionizing.")

76. *Id.*

77. See Chamber of Commerce v. NLRB, Civil Action No. 11-2262 (JEB), 2012 WL

Board failed to present timely evidence that Member Hayes voted to approve the rule, and that the evidence it eventually presented did not establish that Hayes, or one of his authorized staff, had been present for the specific vote on the new election rules.<sup>78</sup>

### C. Collective Action in Legal Claims

In early 2012, the Board issued a decision holding that companies cannot preclude workers from joining together to bring legal claims against an employer.<sup>79</sup> In *D. R. Horton, Inc. v. NLRB*, the employer had required employees to sign an agreement that limited their legal recourse against the employer to individual arbitration claims.<sup>80</sup> In other words, employees signed away their right to join in a class action suit against the employer or to pursue any other collective legal action against the company.<sup>81</sup> In its decision, the Board held that the employer's policy stopped workers from exercising their right to protected concerted activity under section 7 of the NLRA.<sup>82</sup> Thus, the employer was ordered to change its policy to allow for such collective legal action.<sup>83</sup>

With mandatory arbitration provisions widely used by U.S. employers,<sup>84</sup> the Board's decision in *D. R. Horton* could drastically change the landscape of labor and employment law. With the decline of unionization in the private sector and the political vacillations of labor law, workers are left with fewer means to exercise power against their employers. With *D. R. Horton*, the NLRB has propped open a door to collective action that had been closing steadily. Yet, given the Court's recent decision in *AT&T Mobility LLC v. Concepcion* that mandatory individual arbitration provisions in cell phone providers' contracts are valid,<sup>85</sup> the legal ground beneath *D. R. Horton* is ripe for challenge.

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1664028, at \*16 (D.D.C. May 14, 2012). See also *supra* Part II.A (describing the political difficulty of appointing new board members and how this led to a board with only two members).

78. See *Chamber of Commerce*, 2012 WL 1664028, at \*15 ("In sum, then, even if Hayes's deputy's opening the voting task could be taken as Hayes's participation and subsequent abstention, the agency has not shown that this purported abstention occurred prior to publication, let alone that Hayes was given a reasonable amount of time to cast a vote.").

79. *D. R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, at \*1 (Jan. 3, 2012).

80. *Id.* at \*1.

81. See Steven Greenhouse, *Labor Board Backs Workers on Joint Arbitration Cases*, N.Y. TIMES, Jan. 7, 2012, at B1 [hereinafter Greenhouse, *Labor Board*] (stating that the NLRB held that employers could not prevent employees from filing class actions).

82. *D. R. Horton*, 2012 WL 36274, at \*13.

83. *Id.*

84. See Greenhouse, *Labor Board*, *supra* note 81, at B1.

85. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (rejecting a California law declaring class-action waivers in consumer contracts to be unconscionable as

#### D. Social Media

Finally, the application of the NLRA to social media use in the workplace has continued to oscillate. For several years now, the Board has wrestled with the question of what activity on social media sites should be considered “protected concerted activity” under the Act.<sup>86</sup> Recent cases have centered around two factual contexts: situations where employers maintain policies against the use of social media, and ones where specific employees have discussed terms and conditions of employment on social media sites available to the public.<sup>87</sup>

In early 2012, Acting General Counsel Solomon released a memorandum outlining recent developments of the application of the NLRA to social media.<sup>88</sup> While cautioning that the law is in flux, the memorandum emphasized two main points. First, employers cannot maintain overly broad policies against the use of social media by their workers.<sup>89</sup> If employees perceive a social media policy to limit their ability to discuss terms and conditions of their employment, it could constitute a limitation on their ability to engage in protected concerted activity under section 7 of the Act. Second, employees’ comments on social media sites must rise above the level of “mere gripes.”<sup>90</sup> Comments must exhibit some sign of being a part of group activity among employees.

Recently, the Board confirmed both of these general rules while also demonstrating the current uncertainty about the law.<sup>91</sup> In *Knauz BMW*, the Board held that an employee’s Facebook posting of disparaging comments and photos relating to his employer were not considered protected concerted activity.<sup>92</sup> The employee’s post was not protected because it was made “without any discussion with any other employee” and “had no connection to any of the employees’ terms and conditions

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contrary to, and preempted by, the Federal Arbitration Act).

86. See 29 U.S.C. § 157 (2006) (providing that employees “have the right to self-organization, . . . to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining”).

87. See generally Memorandum OM 12-31 from Ann Purcell, Assoc. Gen. Counsel, NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers, NLRB (Jan. 24, 2012) (describing recent cases that fit into these two categories).

88. *Id.* at 1.

89. See *id.* at 5 (stating that the NLRB “recently held that ‘discipline imposed pursuant to an unlawfully overbroad rule violates the Act’” (citation omitted)).

90. See *id.* at 7 (stating that in a particular case, the “Charging Party’s Facebook postings were merely an expression of an individual gripe”).

91. See *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, 358 N.L.R.B. No. 164, 2012 WL 4482841, at \*1 (Sept. 28, 2012) (affirming both of these general rules).

92. *Id.* at \*1.

of employment.”<sup>93</sup> However, the Board also ordered the employer to remove its communication policy, which prohibited “‘disrespectful’ conduct and ‘language which injures the image or reputation of the Dealership.’”<sup>94</sup> While Chairman Pearce and Member Block viewed the policy as a potential chill on workers’ ability to engage in section 7 activity, Member Hayes dissented, arguing that the rule was merely a codification of common decency.<sup>95</sup>

A predictable and coherent application of the NLRA to social media is yet to be established. Other social media cases are pending,<sup>96</sup> and their outcomes will likely be determined as much by the Board’s members’ politics as by the language and meaning of the Act.

#### CONCLUSION

No one is sanguine about the future of the NLRA. A review of the current state of the Board’s politics, and its treatment of important legal issues, further fosters an ethos of indeterminacy. The outcome of the 2012 presidential election will obviously affect the agency’s course. If Republican presidential nominee Mitt Romney had been elected, his appointments to the Board would likely have eliminated the new notice posting and election process rules, and the application of current Board law regarding social media and mandatory arbitration clauses would have undoubtedly swung back in favor of business interests. Even with four more years of a Democratic administration under President Obama, the future of labor law appears shrouded. Federal courts will decide the fate of notice posting and election rules. Federal judges will also inevitably scrutinize Board cases concerning mandatory arbitration and social media, with such important issues eventually reaching the Supreme Court.

Election politics marches on. During the Republican National Convention in 2012, South Carolina Governor Nikki Haley bitterly denounced the NLRB for its complaint against Boeing, saying that when the company “blessed” her state with a new factory, “President Obama and his National Labor Relations Board . . . sued this iconic American company.”<sup>97</sup> Haley went on to describe how the company

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93. *Id.* at \*18.

94. *Id.* at \*1.

95. *Id.* at \*1, \*5.

96. Press Release, NLRB, NLRB Finds Facebook Posting that Caused Salesman’s Discharge at Chicago-Area BMW Dealership was Not Protected (Oct. 1, 2012), *available at* <http://www.nlr.gov/news/nlr-b-finds-facebook-posting-caused-salesman's-discharge-chicago-area-bmw-dealership-was-not-pro>.

97. Haley, *supra* note 1.

won the dispute to thundering cheers. Public and political opposition to the Board will exist for as long as it attempts to enforce and bolster workers' rights. The agency's role in labor law will continue to evolve throughout the twenty-first century, and with it, the rights of millions of workers and their employers.