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“WE’RE OFF TO SEE THE WIZARDS”

**A PANEL DISCUSSION ON THE BUSH II BOARD’S DECISIONS...AND THE
YELLOW BRICK ROAD BACK TO THE RECORD OF THE CLINTON BOARD**

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Recent verbal attacks on the National Labor Relations Board (“NLRB” or “Board” or “Agency”) and its decisions – 12 of which we are reviewing today – both are surprising and disappointing, especially given the harshness of certain of the rhetoric.¹ While both management and labor interests and their advocates certainly have the right to analyze, support or criticize Board decisions, certain of the recent verbal outcries regarding Board decisions are highly partisan, and have the appearance of being part of a coordinated effort to chill and discourage present Board members from addressing many of the important issues and cases before them. Further, an equally unfortunate ancillary part of this apparent coordinated campaign is the suggestion that the Board is no longer a legitimate part of the country’s administrative jurisprudence system. As set forth in the analysis below, it is submitted that such criticism and suggestion is factually unsupportable and ill advised.

A central theme in the many of the verbal attacks directed at the present Board is the suggestion that a disproportionate number of decisions have been issued by the Bush II Board overruling precedent. Five of the cases we are addressing today fall into this precedent reversal category. The latter part of this paper briefly discusses certain of these cases. The primary focus of this paper, however, is an analytical review of certain statistical characteristics of the Clinton Board compared to similar data from the Bush II Board. The rationale for this approach is an attempt to direct the discussion of the Bush II Board from heated partisan rhetoric to an examination of objective data.

¹ For example, AFL-CIO General Counsel Jonathan Hiatt has called the current Board, “the most nakedly anti-union and politically partisan in the history of the board.” John Herzfeld, *AFL-CIO Counsel, Management Attorney Both Fault New Direction of Labor Board*, 19 BNA Daily Labor Report A-7 (1/31/05). Mr. Hiatt is also reported as stating, “We are seeing much more than the pendulum effect correcting the excesses of a Clinton board.” Jane M. Von Bergen, *NLRB: helper or nemesis?*, Philadelphia Inquirer, Apr. 27, 2005. See also James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Policy J. 221 (2005).

A. Comparative Analytical Data – The Clinton Board and the Bush II Board Decisions

As noted above, a reoccurring premise of certain criticism directed to the Bush II Board is that it has been too aggressive in overturning Board precedent. To test the validity of such statements we first undertook a review of decisions issued by the Board when it was comprised of a majority of members nominated or appointed by former President William Clinton (“the Clinton Board”). The time frame we utilized for the Clinton Board started in March 1994 when William Gould became chair of the Board and concluded in December 2001. The following Board members participated in decisions during this timeframe: Richard Brame, Margaret Browning, Charles Cohen, Dennis Devaney, Sarah Fox, William Gould, Peter Hurtgen, John Higgins, Wilma Liebman, James Stephens, John Trusdale, and Dennis Walsh.²

We then undertook the same analytical approach for the present Bush II Board, which we defined as beginning in December 2002 when Robert Battista became chair of the Board and a majority of the members of the Board were nominated or appointed by President George Walker Bush (“the Bush II Board”). The time frame for review of the Bush II Board accordingly began in December 2002 and continues to present. The following Board Members have participated in Board decisions during this timeframe: Alex Acosta, Michael Bartlett, Robert Basitta, William Cowen, Wilma Liebman, Ronald Miesberg, Peter Schuamber, and Dennis Walsh.³

1. The Clinton Board.

From March 1994 until December 2001 the Clinton Board issued 3,458 reported decisions, a statistic that will be revisited later in this paper. Appendix A of the paper outlines with citation the 60 decisions issued during this time period which reversed Board precedent.

² Appendix C lists the names of all Board Members and General Counsel and their terms from March 1994 to the present.

Such Appendix also includes the name of each case and a brief note of the issue addressed or holding of same. In these 60 decisions 1,181 years of precedent was overturned, or “lost”.

Our next step was to identify cases that overturned precedent by a unanimous vote. Those cases on the Appendix are color coded in blue. We then subtracted such cases from the initial universe of precedent reversals. The rationale for specifically identifying these cases in the Appendix is based on the fact that a consensus was reached in the ultimate holding to overturn precedent.⁴ When these cases are subtracted from the initial list of cases the number of years of precedent lost during the Clinton Board era pursuant to this analysis is 628 years.

We next color coded, in green, decisions that were not unanimous, but had one or more Board members nominated or appointed as a Republican member of the Board voting in the majority to achieve a reversal of precedent (“crossover cases”) and subtracted these cases and the unanimous decisions previously color coded in blue, to arrive at a third net figure of precedent reversals. The rationale again for this approach is that individuals from varying backgrounds and policy perspectives came together to reach a decision that reversed Board precedent. The number of years of “precedent lost” and pursuant to this analysis is 444.

The concept of “years of lost precedent” it is suggested, however, should not be the only analytical approach utilized to compare the term of the Clinton and Bush II Boards as the time period of the Clinton Board includes a greater number of issued decisions compared to the term of the Bush II Board. Accordingly, another approach to the question of the frequency of reversal of precedent is to compare the number of precedent reversals during the term of a Board to the

(continued...)

³ Id.

total number of reported decisions issued by such Board during the same time period. Using this analytical approach to Appendix A yields a precedent reversal rate by the Clinton Board of 1.74 percent when all reported cases are included. When unanimous decisions are removed from the initial universe of cases a precedent reversal rate of .93 percent results. Finally, when both the unanimous decisions and “crossover” decisions are deducted from the universal list a precedent reversal rate of .61 percent results.

Further, while the underlying reasoning and rationale for a number of the cases reversing precedent during the Clinton Board can certainly be questioned, particularly from a management labor law prospective, such a discussion has the potential to only lead us back to the type of myopic partisan criticism we have observed regarding the Bush II Board. As an alternative, it is therefore suggested that another analytical approach that should be considered is a review during the term of the Clinton Board of the treatment of its decisions by the United States Circuit Courts of Appeal. Objective data is available to make such a measurement.⁵ During the Clinton Board years the affirmance rate of its decisions in whole or in part by United States Courts of Appeal is as follows:

Fiscal Year	1995	1996	1997	1998	1999	2000	2001
Court Decisions	120	149	166	144	133	99	118
Enforced in Full	73	98	116	94	93	73	73
...%	60.8	65.8	69.9	65.3	69.9	73.7	61.9
Enforced in whole or in part	87	125	139	120	112	84	90
...%	72.5	83.9	83.7	83.3	84.2	84.8	76.3

(continued...)

⁴ It should be noted, as footnoted in Appendices A and B, in certain decisions in which precedent was reversed, one or more Board Members voting in the majority stated in their concurring opinions that they did not believe precedent needed to be reversed in reaching the holding in the case.

⁵ National Labor Relations Board Annual Reports. Fiscal year 1994 data was omitted because a number of U.S. Circuit Court of Appeal decisions involving Board cases during that fiscal year involved Board decisions that were decided prior to the beginning of the Clinton Board term.

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Finally, it is interesting to note in 16 decisions of the Clinton Board that involved an overruling of precedent, and which were subsequently reviewed by a U.S. Court of Appeals, 9 cases were enforced in full and 2 cases were enforced in whole or in part.⁶ Four decisions of the Board were not enforced. This analysis yields a rate of 69 percent enforcement.

2. The Bush II Board

As noted above, the timeframe we utilized for review of reported Bush II Board decisions began in December of 2002 and continues to present. During this timeframe, the Bush II Board issued 1,037 reported decisions. Appendix B follows the same approach we undertook with the Clinton Board and outlines with citation the 9 decisions issued during this time period which reversed precedent. The Appendix also follows the same outline approach undertaken for Appendix A of the Clinton Board and includes the name of each case and a brief note of the issue addressed or holding of same. When all cases decided by the Bush II Board which reversed precedent are included 146 years of precedent was “lost”. Following again the same approach taken for the Clinton Board, we next identified by color code blue those cases which were unanimous decisions. When such decisions are subtracted from the initial universe of cases the number of years of precedent lost during the Bush II Board era is 92.

⁶ The Daily News of Los Angeles, 315 NLRB 1236 (1994), enf’d. 73 F.3d 406 (D.C. Cir. 1996); Leslie Homes, Inc., 316 NLRB 123 (1995), enf’d. 68 F.3d 71 (3d Cir. 1995); White Oak Coal Co., Inc., 318 NLRB 732 (1995), enf’d 81 F.3d 150 (Table) (4th Cir. 1996); Frontier Hotel & Casino, 318 NLRB 857 (1995), enf’d in relevant part 118 F.3d 795 (D.C. Cir. 1997); McClatchy Newspapers, Inc., 321 NLRB 1386 (1996), enf’d. 131 F.3d 1026 (D.C. Cir. 1997); Lee Lumber and Building Material Corp., 322 NLRB 175 (1996), enf’d. in part, remanded in relevant part 117 F.3d 1454 (D.C. Cir., 1997); Matthews Readymix, Inc., 324 NLRB 1005 (1997), enf. denied on other grounds 165 F. 3d 74 (D.C. Cir. 1999); Lafayette Park Hotel, 326 NLRB 824 (1998) enf’d. 203 F.3d 52 (Table) (D.C. Cir. 1999); Nicks’, 326 NLRB 997 (1998), enf. denied on other grounds 222 F.3d 1030 (D.C. Cir. 2000); TNT Skypak, Inc., 328 NLRB 468 (1999), enf’d. 208 F. 3d 362 (2d Cir. 2000); Randell Warehouse of Arizona, Inc., 328 NLRB 1034 (1999), review granted and remanded on different grounds by 252 F.3d 445 (D.C. Cir. 2001); Ross Stores, Inc., 329 NLRB 573 (1999), enf. denied in relevant part 235 F.3d 669 (D.C. Cir. 2001); Plumbers Local 342 (Contra Costa Electric), 329 NLRB 688 (1999), enf. denied and remanded by 233 F.3d 611 (D.C. Cir. 2000); FES, 331 NLRB 9 (2000), enf. 301 F.3d 83 (3rd Cir. 2002); Chelsea Industries, Inc., 331 NLRB 1648 (2000), enf’d. 285 F.3d 1073 (D.C. Cir. 2002); Allegheny Ludlum Corp., 333 NLRB 734 (2001), enf. 301 F.3d 167 (3rd Cir. 2002).

Next, we identified by color code green those decisions which were not unanimous and had one or more Board members nominated or appointed as a Democrat member of the Board voting in the majority to achieve a reversal of precedent. When these “crossover” cases are subtracted along with the unanimous decision cases, the number of precedent years lost is 64.

We next used the same approach taken for the Clinton Board and compared the number of precedent reversals during the Bush II Board era to the total number of decisions issued by such Board during the same time period. Using this analytical approach when all precedent reversal cases are included, a precedent reversal rate of .87 percent results; when unanimous Board decisions are subtracted from the initial list a precedent reversal rate of .77 percent results; and when both unanimous decisions and “crossover” decisions are both deducted from the initial list a precedent reversal rate of .68 percent results.

We also reviewed the treatment of Bush II Board decisions by the Circuit Courts of Appeal.⁷ The number of Circuit Court of Appeal decisions reviewing Bush II Board decisions and the enforcement in full or the enforcement in whole or in part of such decisions is outlined below:

Fiscal Year	2003	2004	2005
Court Decisions	115	62	73
Enforced in Full	87	46	57
...%	75.7	74.2	78.1
Enforced in whole or in part	100	49	70
...%	87.0	79.0	95.9

⁷ Consistent with the approach taken for the Clinton Board regarding U.S. Court of Appeal enforcement, we also excluded the first fiscal year of the Bush II Board term as a number of U.S. Circuit Court of Appeals decisions involving Board cases that were issued during this time period were not the product of the Bush II Board.

Finally, there has been only one U.S. Court of Appeals decision involving a Bush II Board reversible of precedent, Minnesota Licensed Practiced NWCS Ass'n. v. NLRB, 406 F.3d 1020 (8th Cir. 2005). In that case the Board's decision was enforced in full.

3. Comparison of the Clinton Board to the Bush II Board.

Initially, it is interesting to note the number of cases and years of precedent lost during the Clinton Board era. Sixty cases reversing precedent and one thousand plus years of precedent lost are high figures under any standard of analysis. Such high numbers may be attributable in part to the activist approach taken during such time period by former Board Chairmen William Gould and John Truesdale and the General Counsel of the Board during such time period, Fred Feinstein. It should be noted however, the precedent reversal rate from a total number of reported decisions issued perspective yields of a relatively low percentage reversible rate, especially when unanimous decisions and crossover decisions are deducted from the initial universe of precedent reversals. Correspondingly however, the Clinton Board did not fare particularly well in the Circuit Courts of Appeal and had enforcement figures as noted above only average in the 60 percent range for enforcement in full of its cases and in the 70 percent to low 80 percent range for enforcement by the Circuit Courts in whole or in part.

Comparing the data from the Bush II Board to the Clinton Board shows a markedly fewer number of "precedent years lost". It should be noted, however, that the Bush II Board has issued a lower number of decisions to date.⁸ Accordingly, in comparing the total number of decisions issued by the Bush II Board to the number of its decisions reversing precedent is perhaps a more valid comparative tool. As the statistics establish, however, there is not much difference

⁸ It also should be noted, however, that the case intake of the Board has declined in recent years. According to the NLRB's own statistics, in 2001, the Board's case intake was 841, then 784 in 2002. In 2003, that number was 818, which declined to 754 in 2004 and 601 in 2005.

between the Bush II Board and the Clinton Board with respect to precedent reversal percentages, with the figured for the Bush II Board ranging from .87 percent to .68 percent. Therefore, it would be inaccurate to conclude that there is an inordinately high number of Bush II Board decisions reversing precedent, from either a total number of decisions reversing precedent or on a percentage basis when compared to the Clinton Board term.

Additionally, the Bush II Board has achieved a higher affirmance rate of its decisions in the Court of Appeals than the Clinton Board. Indeed, as noted above, the affirmance rate has been quite high, including in 2005 a 95.9 percent affirmance rate of Board decisions in whole or in part, one of the highest affirmance rates of Board decisions in the history of the Agency.

Finally, it is interesting to note that there have been distinctly different approaches taken by the Clinton Board and the Bush II Board in overturning precedent. In virtually all reversals of precedent that occurred during the Clinton Board, with few exceptions, (i.e. Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000)) precedents simply were overturned and new statements of law or Board procedures established. By way of contrast, the Bush II Board in 5 of the 9 cases in which it has overturned precedent, the majority holding has been to return to long established Board precedent--IBM Corp., 341 NLRB No. 148 (2004); Brown University, 342 NLRB No. 42 (2004); Oakwood Care Center, 343 NLRB No. 76 (2004); Crown Bolt Inc., 343 NLRB No. 86 (2004); and Harborside Healthcare, Inc., 343 NLRB No. 100 (2004). To further refine the above analysis, when the number of years of precedent lost by these decisions is deducted from the figures outlined above for the Bush II Board an even lower number of “years of lost precedent” results with a correspondingly lower percentage rate of reversal of precedent.

The figures pursuant to this analysis are as follows:

Number of precedent years lost after removing return to precedent cases	Percentage of precedent reversal rate compared to all reported decisions after deduction of return to precedent case
All cases: 125	All cases: .48%
All cases less unanimous decisions: 71	All cases less unanimous decisions: .39%
All cases less unanimous decisions and cross-over decisions: 43	All cases less unanimous decisions and cross-over decisions: .29%

We acknowledge that in conducting the above analyses many additional questions could have been asked and additional approaches undertaken, i.e., different time periods or different Board terms coinciding with presidential appointments and nominations could have been utilized, and certain types of cases overruling precedent excluded (e.g. cases that change Agency procedural rules--North American Health Care Facility, 315 NLRB 359 (1994)). Further, we are quite aware of the fact that any Board, with a few exceptions in the representation case area, does not control its agenda and the cases that do come before it, or often the type of legal argument and policy questions presented in such cases. Indeed, the General Counsel to the Board has considerable influence with respect to the Board’s agenda and the types of arguments and cases presented for decision. In fact, the General Counsel in many respects has more influence in shaping national labor policy than members of the Board. We are also well aware of the Board’s unwritten policy and tradition of generally not reversing president unless at least three Board members agree or the Board has a full complement of members. Finally, we are also well aware of the fact that an individual Board member – at least historically – could cause a delay of the issuance of a Board decision by not “moving” the draft decision from her or his desk until the composition of the Board has changed.

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Notwithstanding the above factors, we submit that the utilization of verifiable objective data should be included in any analysis of the present or past Boards. Applying such objective data to the record of the Bush II Board, it is, therefore, clear that much of the recent criticism directed at the Board simply is not supportable.

4. Analyses of Selected Bush II Board Decisions

The panelists have been requested to discuss 12 pre-selected decisions of the present Bush II Board⁹. Our colleague, John Irving, has done an excellent job in reviewing these cases and we will not repeat his points in this paper. Three cases, however, from the pre-selected cases merit from our perspective additional comment.

- Crown Bolt, 343 NLRB No. 86 (2004). This decision is a 3-1 holding with Chairman Battista and Members Shamberg and Meisberg in the majority with Member Liebman dissenting. The majority in Crown Bolt reinstated long-standing board president (Kokomo Tube Co., 280 NLRB 357 (1986)) and required a party seeking to set aside a Board election on a dissemination of plant closure theory to establish that such threat was communicated to a sufficient number of voters to potentially change the results of a Board election. The majority's decision reflects the well-established basic legal tenet that a party asserting a position or a proposition should have the burden of proving same. This basic black letter law approach is well engrained in our jurisprudence system in many areas of the law including under the National Labor Relations Act (the "Act"). For example, the United States Supreme Court restated this basic proposition in its decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711 (2001) when it held that a party asserting that an employee is a supervisor under § 2(11) of the Act has the burden of proof to establish this position. It is difficult to understand how this basic burden of proof concept can be the basis for any type of harsh attack on the Board, especially since the holding in Crown Bolt re-established long-accepted Board law on this point.
- Harborside Healthcare, Inc., 230 F.3d 206 (6th Cir. 2000) and Harborside Healthcare Inc., 343 NLRB No. 100 (2004). A considerable amount of criticism from organized labor representatives have been directed at the Bush II Board

⁹ Bath Iron Works, 345 NLRB No. 33 (2005); Brevard Achievement Center, Inc., 342 NLRB No. 101 (2004); Bunting Bearings Corp., 343 NLRB No. 64 (2004); Midwest Generation, EME, LLC, 343 NLRB No. 12 (2004); Crown Bolt, 343 NLRB No. 86 (2004); Harborside Healthcare, Inc. v. NLRB, 230 F.3d 206 (6th Cir. 2000); Harborside Healthcare, Inc., 343 NLRB No. 100 (2004); IBM, 341 NLRB No. 148 (2004); Martin Luther Memorial Home, 343 NLRB No. 75 (2004); IHS Care, 343 NLRB No. 76 (2004); Brown University, 342 NLRB No. 42 (2004); San Manuel Indian Bingo and Casino, 341 NLRB No. 138 (2004).

regarding its decision in this case. This case was on remand for the United States Circuit Court of Appeals for the Sixth Circuit with Chairman Battista and Members Shamburg and Meisberg voting in the majority and Members Liebman and Walsh dissenting. The basic issue in Harborside was whether the pro-Union conduct of a supervisor was sufficient grounds to set aside the Board election. The majority essentially adopted a two-part test which focused (1) on the conduct in question, and (2) on the application of traditional board criteria in charge and election objection cases to determine whether the election results should be set aside – e.g. (i) the margin of victory in the election, (ii) whether the conduct at issue was widespread or isolated, (iii) the timing of the conduct, (iv) the extent to which the conduct became known, and (v) the lingering effect of the conduct. This decision also returns to well-established Board precedent. Dissenting Members Liebman and Walsh would require an explicit threat or promise by a supervisor acting in a pro-union manner before they would proceed to determine whether the election in questions should be set aside. It is submitted such a position is not consistent with well-established Board law as numerous Board decisions in the election challenge area do not require explicit threats or promises by supervisors opposing unionization to set aside election results. (e.g. Smithers Tire, 308 NLRB 72 (1992)).

- Martin Luther Memorial Home, 343 NLRB No. 75 (2004). The basic issue in this case is whether an employer rule which specifically prohibited harassment, profanity and abusive language in the workplace constituted a violation of employee § 7 rights under the Act. The majority, Chairman Batista and Members Shamburg and Meisberg, consistent with recently decided circuit case law,¹⁰ concluded that this employer rule did not chill or restrict § 7 rights by adopting these rules. Further, the majority stated it would interpret and apply such rules in a common sense and reasonable manner to maintain decorum and appropriate conduct in the workplace. It is suggested that this holding properly reflects the reality of the modern day workplace and is indeed a common sense approach to the question of the reasonableness of employer policies and procedures and handbook language. Further, not only is this holding consistent, as noted above with recent circuit case law, but hopefully indicates a direction for the future for the General Counsel of the Board to not force the Board to become a “handbook policemen” and, therefore, permit the Office of General Counsel to invest valuable Board resources and time in areas that certainly should be given higher priority.

B. The Future of the Board

As stated at the outset of this paper, the highly partisan and harsh rhetoric recently directed at the Board also appears to have as an objective to bring into question the legitimacy of

the Agency as an integral part of our administrative jurisprudence system in this country. While all of us that practice before the Board certainly from time to time have our disagreements with Board decisions and practices (e.g., the Board's blocking charge procedure), this type of Board bashing is not constructive. We also have noted statements for a number of years by certain leaders of organized labor that have blamed the Board for low union membership in the country. This type of criticism, of course, ignores, among other relevant factors, such realities as the movement of thousands of traditional manufacturing jobs overseas, and the enactment of numerous Federal and state statutes protecting worker rights. Indeed, it is difficult to understand such criticism given consistent fiscal year data showing that the union win rate in Board elections is in excess of 50 percent, and in certain industries such as health care, approaching 70 percent. Further, Board conducted elections continue to be expeditiously held with the average time between petition pre-election filings and the election itself in the 40-day range. Instead of placing "blame" on the Board, its critics should review recent statements by a number of other labor leaders, including Andrew Stern of the Service Employees International Union, that essentially state that organized labor need look no further than their own organizations' issues to find the root causes of low membership.

Irrespective of one's viewpoint (and bias), it is submitted that recent attempts to marginalize the Board are ill-advised. Many outstanding and highly productive individuals have served and continue to serve this Agency. Hundreds of workplace questions are dealt successfully with by the Board on a daily basis in its various regional offices throughout the

(continued...)

¹⁰ See Adtranz ABB Daimler-Benz Transportation, R.A. Inc. v. NLRB, 253 Fed. 3d 19 (D.C. Cir. 2001), concluding that employer rules prohibiting abusive language in the workplace are not unlawful on their face under the Act.

Jones Day

country, whether it be a contact with the Board's "officer of the day," to representation elections, to charge cases.¹¹ Indeed, a very high percentage of such contacts result in resolution before a hearing is ever scheduled or litigation commenced.¹² Further, the efficiency and productivity of the Board continues to serve as a role model for many Federal agencies. The inescapable conclusion by any objective measurement standard is that the Board has been and continues to be a considerable positive influence in establishing and reinforcing a stable labor relations climate in this Country.

Board precedent from time to time no doubt will continue to be reversed in the future – which is not necessarily bad. The Board after all is a creature and captive of the statute creating it, which by its very structure and tradition maintains a political balance in Board member composition. Further, the regularity established by the statute for Presidential nominations and appointments ensures to a certain extent that political policy will dictate change in Board law. In lieu of continuing to direct harsh criticism to the Board, perhaps management, labor, employee and academic interests should consider coming together to find common ground for a new structure for the Agency. Such reforms as longer terms for Board members and its General Counsel, increased compensation for individuals serving in such capacities, greater legal resources and staff for the Board's administrative law judges, and a host of other reforms that have been publicly advanced over the years should be reconsidered. Unless or until such reforms occur, however, the present Board would be well-advised to continue to decide cases before it on a thoughtful and productive basis.

¹¹ According to the NLRB, in FY 2005, the NLRB's Field Offices received 216,723 public inquiries, and the NLRB as a whole provided 441,494 responses to public inquiries, thanks in large part to inquiries using the Board's toll free number and the website.

¹² For example, in FY 2005, in unfair labor practices cases where merit was found, 97.2 percent of cases were settled without formal litigation.

APPENDIX A

Precedent Overruling Cases During The Clinton Board (March 1994 through January 2002)*

Case Name	Year Case Decided Overruling Precedent	Case Overruled Name	Year Case Overruled Decided	Number of Years Precedent Lost	Majority**	Dissent**	Issue Overruled
North Macon Health Care Facility, 315 NLRB 359	1994	St. Francis Hospital, 249 NLRB 180	1980	14	Gould-D Devaney-D Stephens-R	Cohen-R ¹	Providing less than full first and last names on an Excelsior list is not “substantial compliance” with the requirements of Excelsior rule.
J.E. Brown Electric, Inc., 315 NLRB 620	1994	Wayne Electric, 226 NLRB 409	1976	18	Gould-D Devaney-D Browning-D Concurring: ² Cohen -R Stephens-R		A reinstatement order is a necessary part of the remedy in cases involving an employer’s unlawful repudiation of a hiring hall provision.
Concordia Electric Cooperative, Inc., 315 NLRB 752	1994	Fayette Electrical Cooperative, 308 NLRB 1071	1992	2	Gould-D Devaney-D Browning-D Cohen-R Stephens-R		Whether an employer is a “state or political subdivision,” the Board will not rely on the fact that the employer is exempt from state and federal taxes or that it is regulated by a state public service commission.
Custom Deliveries, Inc., 315 NLRB 1018	1994	Rheingold Breweries, 162 NLRB 384	1966	28	Gould-D Devaney-D Browning-D Cohen-R Stephens-R		A recognition agreement between an employer and a union that would normally constitute a bar to an election will not do so where, as of the date of recognition, 30 percent or more of the recognized unit consists of employees previously represented by the petitioning union.
Edward J. DeBartolo Corp., 315 NLRB 1170	1994	American Printers & Lithographers, 275 NLRB 1490 ³	1985	9	Gould-D Browning-D Cohen-R Stephens-R		The “certification bar” does not apply following the Board’s certification in a self-determination proceeding.

¹ Member Cohen did not reach the merits of the issue because he opposed the retroactive application of a new rule.

² Members Stephens and Cohen agreed with result but would not create a broad new rule.

³ Decision also discusses and overrules Raytheon Co., 296 NLRB No. 162 (1989).

Unanimous • Crossover

*The time frame used for the "Clinton Board" begins March of 1994, when William Gould was appointed Chairman by President Clinton.

**Where a Member both concurred and dissented, the designation is based on members’ treatment of the case overruled.

The Daily News of Los Angeles, 315 NLRB 1236	1994	Anaconda Ericsson, Inc., 261 NLRB 831	1982	12	Gould-D Browning-D <u>Concurring:</u> ⁴ Cohen-R Stephens-R		An employer violates section 8(a)(5) by unilaterally discontinuing an annual, discretionary wage increase before reaching impasse.
Leslie Homes, Inc., 316 NLRB 123	1995	Loehmann's Plaza I, 305 NLRB 663	1991	4	Cohen-R Stephens-R <u>Concurring:</u> Gould-D	Truesdale-D Browning-D	<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527 (1992) applies to area standards activity.
Management Training Corp., 317 NLRB 1355	1995	Res-Care, 280 NLRB 670	1986	9	Gould-D Browning-D Truesdale-D Stephens-R	Cohen-R	In deciding whether to exercise jurisdiction over an employer with close ties to an exempt governmental entity, the Board will only consider whether the entity is an “employer” under section 2(2) and the applicable monetary jurisdictional standard.
Management Training Corp., 317 NLRB 1355	1995	Ohio Inns, Inc., 205 NLRB 528	1973	22	Gould-D Browning-D Truesdale-D Stephen-R	Cohen-R	It would effectuate the policies of the Act to assert jurisdiction over a private employer even though the state is a joint employer.
White Oak Coal Co., Inc., 318 NLRB 732	1995	Riley Aeronautics, 178 NLRB 494	1969	26	Gould-D Browning-D Truesdale-D Cohen-R Stephens-R		The Board will pierce the corporate veil when (1) the entity and the individuals are virtually indistinct (based on a nine-factor test) and (2) not piercing the veil would sanction fraud, injustice or evasion of a legal obligation.
Laborers (Capitol Drilling Supplies, Inc.), 318 NLRB 809	1995	Sheet Metal Workers Local 107 (Lathrop Co.), 276 NLRB 1200 ⁵	1985	10	Gould-D Browning-D Stephens-R	Truesdale-D Cohen-R	A union’s filing of an arguably meritorious claim against a general contractor under a lawful signatory clause is not a 10(k) claim to the work of the subcontractor unless the union encourages or engages in strikes, picketing, or boycotts.

⁴ Members Cohen and Stephens concurred in the result but would not overrule precedent

⁵ Decision also discusses and overrules *Slattery Associates*, 151 NLRB 947 (1990).

Frontier Hotel & Casino, 318 NLRB 857	1995	M.A. Harrison Mfg. Co., 253 NLRB 675	1980	15	Gould-D Browning-D Truesdale-D		Reimbursement of negotiating expenses is an appropriate remedy in cases of unusually aggravated misconduct where unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies.
Scolari's Warehouse Markets, Inc., 319 NLRB 153	1995	Hall's Super Duper, 281 NLRB 1116	1986	9	Gould-D Browning-D Truesdale-D Cohen-R ⁶		The Board will consider the actual work performed by "boxed meat" meatcutters to determine whether they constitute a separate unit from traditional meatcutters.
O.E. Butterfield, Inc., 319 NLRB 1004	1995	Pacific Tile & Porcelain Co., 137 NLRB 1358	1962	33	Gould-D Browning-D Truesdale-D <u>Concurring:</u> ⁷ Cohen-R		Replacements for economic strikers are presumptively temporary and thus ineligible to vote in representation elections - the employer bears the burden in R and C cases of showing that replacement workers are temporary employees.
Sunrise Rehabilitation Hospital, 320 NLRB 212	1995	Young Men's Christian Association, 286 NLRB 1052	1987	8	Gould-D Browning-D Truesdale-D	Cohen-R	It is objectionable conduct for an employer to offer two hours' pay to employees to vote on their day off.
Douglas-Randall, Inc., 320 NLRB 431	1995	Passavant Health Center, 278 NLRB 483	1986	9	Gould-D Brame-D Truesdale-D	Cohen-R	A Board-approved ULP settlement bars a decertification petition filed after the unlawful actions but before the execution of the settlement agreement.
Smith's Food & Drug Centers, Inc., 320 NLRB 844	1996	Rollins Transportation System, 296 NLRB 793 ⁸	1989	7	Browning-D Cohen-R <u>Concurring in relevant part:</u> Gould-D		Where an employer voluntarily recognizes a union, a competing petition by another union will be barred without a 30 percent showing of interest that predates the recognition.

⁶ Member Cohen found it unnecessary to overrule precedent.

⁷ Member Cohen concurred in result but would not overrule precedent.

⁸ The decision in this case says it is a "modification" of Rollins but that modification effectively makes a new rule.

Carpenters Local 1031, 321 NLRB 30	1996	Mike O'Conner Chevrolet, 209 NLRB 701	1974	22	Gould Browning-D Fox-D Concurring: ⁹ Cohen-R		Unilaterally changing the terms and conditions of work for a single employee is a violation of 8(a)(5).
Kalin Construction Co. Inc., 321 NLRB 649	1996	Montrose Hanger Company, 120 NLRB 88	1958	38	Gould-D Browning-D Fox-D	Dissent in relevant part: Cohen-R	An employer may not make changes to the paycheck process during the period beginning 24 hours before the opening of the polls and ending with the closing of the polls.
McClatchy Newspapers, Inc., 321 NLRB 1386	1996	Presto Casting, Corp., 262 NLRB 289	1982	14	Gould-D Browning-D	Cohen-R	Implementation of a wholly discretionary merit pay proposal after impasse is a violation of section 8(a)(5).
Lee Lumber and Building Material Corp., 322 NLRB 175	1996	Brennan's Cadillac, 231 NLRB 225	1977	19	Gould-D Browning-D Fox-D		Where the Board issues a bargaining order, progress toward reaching agreement and absence of impasse may not be used to indicate that a "reasonable time" for bargaining has elapsed.
I.O.O.F. Home of Ohio, Inc., 322 NLRB 921	1997	McAlester General Hospital, 233 NLRB 589	1977	20	Gould-D Browning-D Fox-D Higgins-R ¹⁰		Where an employer stipulates to the supervisory status of some employees in a representation proceeding, he may not litigate the issue of the supervisory status of those employees in a unit clarification election.
Service Employees Local 87 (Cresleigh Management), 324 NLRB 774	1997	Best Lock Corp., 305 NLRB 648	1991	6	Gould-D Fox-D	Higgins-R	All closely-related cases do not have to be consolidated into one complaint to be viable.
Matthews Readymix, Inc., 324 NLRB 1005	1997	Hearst Corp., 281 NLRB 764	1986	11	Gould-D Fox-D	Partial dissent: ¹¹ Higgins-R	An employer's unlawful conduct, even if not designed to undermine union support and cause a decertification petition, may be an unfair labor practice.

⁹ Member Cohen agreed with the result but would not overrule precedent

¹⁰ In a personal footnote, Member Higgins found it unnecessary to overrule precedent.

¹¹ Member Higgins found it unnecessary to reach the issue of whether Hearst should be overruled.

Enrichment Services Program, Inc., 325 NLRB 818	1998	Woodbury County Community Action Agency, 299 NLRB 554	1990	8	Liebman-D Brame-R <u>Concurring in relevant part:</u> Gould-D Fox-D <u>Concurring:</u> ¹² Hurtgen-R		Where a majority of an entity's directors are not elected by the general electorate, it will not be found to be a "state of political subdivision" and thus excluded from the Act.
Iron Workers Local 377 (Alamillo Steel Corp.), 326 NLRB 375	1998	Rubber Workers Local 250 (Mack-Wayne Closures II), 290 NLRB 817	1988	10	Fox-D Liebman-D <u>Concurring in relevant part</u> Gould-D <u>Concurring together in relevant part:</u> ¹³ Hurtgen-R Brame-R		In order to find a union responsible for backpay where an employee has alleged an unlawful refusal to process a grievance, the General Counsel must prove that the employee would have prevailed in the grievance; the propriety of the underlying grievance will be litigated at the compliance stage.
Lafayette Park Hotel, 326 NLRB 824	1998	Cincinnati Suburban Press, 289 NLRB 966	1988	10	Hurtgen-R Brame-R <u>Concurring in relevant part:</u> Gould-D	Dissent in relevant part: Fox-D Liebman-D	Merely having a rule prohibiting "unlawful, improper, or unseemingly (sic) conduct" without evidence of context, is not a violation of the Act.
Nicks', 326 NLRB 997	1998	Montgomery Ward & Co., 288 NLRB 126	1988	10	Gould-D Hurtgen-R Brame-R	Fox-D Liebman-D	<i>Lechmere</i> permits employers to exclude nonemployee union organizers from a restaurant, even if their conduct is similar to other patrons.

¹² Member Hurtgen agreed with result but would not overrule precedent.

¹³ Members Hurtgen and Brame would also overrule Salt River Project, 231 NLRB 11 (1977), and Electrical District No. 2, 224 NLRB 904 (1976).

E.S.P. Concrete Pumping, Inc., 327 NLRB 711	1999	Garman Construction Co., 287 NLRB 88 ¹⁴	1987	12	Truesdale-D Fox-D Hurtgen-R ¹⁵ Brame-R		An employer may adopt an 8(f) contract by its conduct alone.
TNT Skypak, Inc., 328 NLRB 468	1999	Driftwood Convalescent Hospital, 312 NLRB 247	1993	6	Truesdale-D Fox-D Liebman-D		Where an employer unlawfully rescinds a contract proposal, the proper remedy is an order requiring the employer to execute the contract and to give it retroactive effect.
Mississippi Power & Light Co., 328 NLRB 965	1999	Big Rivers Electric Corp., 266 NLRB 380	1983	16	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	Dispatchers in the electric power industry are not statutory supervisors.
Deposit Telephone Co., 328 NLRB 1029	1999	Red Hook Telephone Co., 168 NLRB 260	1967	32	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	A small number of employees and a small geographic area along with a high level of functional integration are not controlling factors in determining a proper bargaining unit.
Randell Warehouse of Arizona, Inc., 328 NLRB 1034	1999	Pepsi-Cola Bottling Co., 289 NLRB 736	1988	11	Truesdale-D Fox-D Liebman-D Concurring in relevant part: Brame-R	Dissent in relevant part: Hurtgen-R	It is not objectionable conduct for a union to photograph its agents distributing union literature to employees outside the employer's facility.
Chicago Truck Drivers Local 101 (Bake-Line Products), 329 NLRB 247	1999	Hospital 1115 Joint Board (Pinebrook Nursing Home), 305 NLRB 802	1991	8	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	A union may lawfully tell members that it will disclaim representation if it loses a decertification election.
St. Elizabeth Manor, Inc., 329 NLRB 341	1999	Southern Moldings, Inc., 219 NLRB 119	1975	24	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	An incumbent union in a successorship situation is entitled to an irrebuttable presumption of continuing majority status for a "reasonable period."
A. Russo & Sons, Inc., 329 NLRB 402	1999	Napa Columbus Parts Co., 269 NLRB 1052	1984	15	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	A "community of interest" test is the proper gauge for determining whether a separate warehouse unit in a combined retail and wholesale operation is proper.

¹⁴ The overruled portion of Garman was dicta but it had been relied on by at least one court.

¹⁵ Member Hurtgen noted that he would not overrule Garman.

Albertsons/ Max Food Warehouse, 329 NLRB 410	1999	City Markets, Inc., 266 NLRB 1020	1983	16	Truesdale-D Hurtgen-R Brame-R	Fox-D Liebman-D	Where a state department of labor conducts an election, it is still not the proper forum in which to file a deauthorization petition.
Ross Stores, Inc., 329 NLRB 573	1999	Nippondenso Mfg. U.S.A., 299 NLRB 545	1990	9	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	Where two alleged violations occur in the same organizational campaign and are part of the employer's efforts to resist the campaign, they are sufficiently factually related to overcome a 10(b) challenge to one if the other is timely filed.
Plumbers Local 342 (Contra Costa Electric), 329 NLRB 688	1999	Iron Workers Local 118 (California Erectors), 309 NLRB 808	1992	7	Truesdale-D Fox-D Liebman-D Hurtgen-R	Brame-R	Negligence in failing to refer an applicant from an exclusive hiring hall is not a failure to represent - willful or arbitrary conduct is required to find a violation of the Act.
The Sun, 329 NLRB 854	1999	Scrantonian Publishing Co., 215 NLRB 296	1974	25	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	When determining whether employees should be accreted into units that are defined by the type of work performed, the Board will presume that if new employees perform similar job functions, they should be accreted, but this presumption can be rebutted by a showing that the new group is sufficiently dissimilar.
Purolite, 330 NLRB 37	1999	Crown Paper Board Co., 158 NLRB 440	1966	33	Truesdale-D Fox-D Hurtgen-R		Peerless Plywood rule against electioneering 24 hours before the polls open also applies to pro-union songs broadcast from sound truck.
Boston Medical Center Corp., 330 NLRB 152	1999	Cedars-Sinai Medical Center, 223 NLRB 251 ¹⁶	1976	23	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	Medical interns, residents and fellows are employees, even though they are also students.

¹⁶ Decision also discusses and overrules St. Clare's Hospital & Health Center, 229 NLRB 1000 (1997).

FES, 331 NLRB 9	2000	Big E's Foodland, Inc., 242 NLRB 963	1979	21	Truesdale-D Liebman-D <u>Separately concurring:</u> ¹⁷ Hurtgen-R Brame-R <u>Concurring in part, dissenting in part:</u> ¹⁸ Fox-D		The Board will follow a new standard in refusal-to-hire and refusal-to-consider cases.
Premier Living Center, 331 NLRB 123	2000	Times-World Corp., 151 NLRB 947 ¹⁹	1965	35	Fox-D Liebman-D Hurtgen-R		Where an employer stipulates to the supervisory status of some employees in a representation proceeding, he may not file an election objection challenging the supervisory status of those employees.
Epilepsy Foundation of Northeast Ohio, 331 NLRB 676	2000	Sears, Roebuck & Co., 274 NLRB 230 ²⁰	1985	15	Truesdale-D Fox-D Liebman-D	<u>Separately dissenting in relevant part:</u> Brame-R Hurtgen- R	Employees not represented by a union are entitled to Weingarten rights.
Family Service Agency, San Francisco, 331 NLRB 850	2000	Plant City Welding & Tank, 119 NLRB 131	1957	43	Fox-D Liebman-D Brame-R Hurtgen-R	Truesdale-D	Neither the union nor an employer may use a supervisor as an election observer.

¹⁷ Member Brame agreed but found it necessary to provide more clarification; Member Hurtgen agreed but would require proof of hiring practices before finding that there was a violation where there are no openings.

¹⁸ Member Fox agreed with most, but excepted to placing the burden on the General Counsel to prove the applicant was qualified or that the required qualifications were pretext.

¹⁹ The Board felt that I.O.O.F. Home of Ohio, Inc. had implicitly overruled cases to the contrary like Times-World Corporation.

²⁰ Decision also discusses and overrules E.I. DuPont & Co., 289 NLRB 627 (1988).

Atlantic Limousine, Inc., 331 NLRB 1025	2000	Hollywood Plastics, Inc., 177 NLRB 678	1969	31	Truesdale-D Fox-D Liebman-D	Hurtgen-R Brame-R	Employer-sponsored raffles are per se objectionable conduct if eligibility is tied to voting or being at election site or if conducted anytime within 24 hours of the opening of the polls.
M.B. Sturgis, Inc., 331 NLRB 1298	2000	Greenhoot, Inc., 205 NLRB 250 ²¹	1973	27	Truesdale-D Fox-D Liebman-D	Brame-R	Employer consent is not required to combine in one unit employees who are jointly employed by a supplier employer and a user employer with employees who are employed solely by the user employer.
Office Employees Local 251 (Sandia National Laboratories), 331 NLRB 1417	2000	Carpenters Local (Graziano Construction Co.), 195 NLRB 1	1972	28	Truesdale-D Fox-D Liebman-D <u>Concurring in relevant part:</u> Hurtgen-R	Dissent in relevant part: Brame-R	The union did not violate 8(b)(1)(A) when it imposed internal union discipline against members for opposing policies of the union president.
Chelsea Industries, Inc., 331 NLRB 1648	2000	Vulcan Steel Tank Corp., 106 NLRB 1278	1953	47	Truesdale-D Fox-D Liebman-D	Hurtgen-R	An employer cannot premise a withdrawal of recognition after the certification year on evidence gathered during the certification year.
Springs Industries, Inc., 332 NLRB 40	2000	Kokomo Tube Co., 280 NLRB 357	1986	14	Truesdale-D Fox-D Liebman-D	Hurtgen-R	Where some employees have been threatened with plant closure, there is a rebuttable presumption that the threats have been widely disseminated.
St. Mary's Duluth Clinic Health System, 332 NLRB 149	2000	Levine Hospital of Hayward, Inc., 219 NLRB 327	1975	25	Truesdale-D Fox-D Liebman-D	Hurtgen-R	A nonincumbent union can represent a unit consisting of all residual employees in an acute care hospital.
Woodman's Food Markets, Inc., 332 NLRB 503	2000	Kentfield Medical Hospital, 219 NLRB 174	1975	25	Truesdale-D Fox-D Liebman-D Hurtgen-R		Where names have been omitted from an Excelsior list, the Board will consider factors other than the percentage of the electorate excluded.

²¹ Decision also discusses and overrules Lee Hospital, 300 NLRB 947 (1990).

New York University, 332 NLRB 1205	2000	Leland Stanford Junior University, 214 NLRB 621	1974	26	Truesdale-D Liebman-D <u>Concurring:</u> ²² Hurtgen-R	Graduate research assistants are employees for the purposes of the Act.
Levitz Furniture, 333 NLRB 717	2001	Celanese Corp., 95 NLRB 664	1951	50	Truesdale-D Liebman-D Walsh-D <u>Concurring:</u> ²³ Hurtgen-R	An employer may not withdraw recognition of a union unless that union has, in fact, lost majority support.
Levitz Furniture, 333 NLRB 717	2001	Hart Motor Express, 164 NLRB 382	1967	34	Truesdale-D Liebman-D Walsh-D <u>Concurring:</u> Hurtgen-R	An employer does not violate section 8(a)(2) by continuing to recognize a union despite evidence that the union lacks majority support so long as the employer files an RM petition.
Allegheny Ludlum Corp., 333 NLRB 734	2001	Sony Corp. of America, 313 NLRB 420	1993	8	Truesdale-D Liebman-D Walsh -D <u>Concurring in relevant part:</u> Hurtgen-R	An employer may use images of its employees in a campaign video without their consent so long as the employees are not misled about the use of their images, the video contains a disclaimer stating that the employees in it do not necessarily share the employer's views, and that disclaimer is not at odds with the video itself.
Morgan's Holiday Markets, 333 NLRB 837	2001	Brown & Sharpe Mfg. co III, 321 NLRB 924 ²⁴	1996	5	Truesdale-D Liebman-D Hurtgen-R	A dismissed charge may be reinstated under the fraudulent concealment exception to section 10(b) of the Act if the addition of evidence previously concealed, as an objective matter, makes a critical difference in determining whether or not there was reasonable cause to believe the Act was violated.

²² Member Hurtgen agreed with the result but only because working as a graduate assistant is not a requirement for completing graduate education

²³ Member Hurtgen concurred with the result but expressly rejected the Board's overruling of Celanese.

²⁴ In Brown & Sharpe Mfg Co III, the Board accepted D.C. Circuit Court's analysis as the law in its decision.

Lee Lumber & Building Material Corp., 334 NLRB 399	2001	Brennan's Cadillac, 231 NLRB 225	1977	24	Truesdale-D Liebman-D Walsh-D Hurtgen-R		In determining whether a reasonable time had elapsed since the employer remedied its refusal to bargain, the Board will consider the amount of time since bargaining commenced and the number of bargaining session.
Staunton Fuel & Material, Inc., 335 NLRB 717	2001	J&R Tile, 291 NLRB 1034	1988	13	Truesdale-D Liebman-D Walsh-D Hurtgen-R		An agreement that the union represent a majority of employees, without more, will not establish 9(a) status.
Kolkka Tables & Finnish-American Saunas, 335 NLRB 844	2001	Kerrigan Iron Works, 108 NLRB 933	1954	47	Truesdale-D Liebman-D Walsh-D	Hurtgen-R	An employer's intent in threatening to discharge striking employees is irrelevant - at issue is whether a reasonable striker would interpret the threat as terminating his employment.
Teamsters Local 282 (E.G. Clemente Contracting), 335 NLRB 1253	2001	Laborers Local 652 (Throner & Birmingham Construction Corp.), 238 NLRB 1456	1978	23	Truesdale-D Liebman-D Walsh-D Hurtgen-R		It is not a violation of section 8(b)(1)(B) for a union to strike an independent employer to demand that the employer agree to the terms of a multiemployer bargaining agreement.
Total Number of Cases	60	Total Number of Years of Lost Precedent:		1181			

COI-1336594v1

APPENDIX B

Precedent Overruling Cases During The Clinton Board (December 2002 to Present)*

Case Name	Year Case Decided Overruling Precedent	Case Overruled Name	Year Case Overruled Decided	Number of Years Precedent Lost	Majority**	Dissent**	Issue Overruled
Alexandria Clinic, P.A., 339 NLRB 1262	2003	Greater New Orleans Artificial Kidney Center, 240 NLRB 432	1979	24	Battista-R Schaumber-R <u>Concurring:</u> Acosta-R	Liebman-D Walsh-D	A union may not unilaterally extend the date or time at which it will strike once it has submitted a 8(g) notice.
Fessler & Bowman, Inc., 341 NLRB No. 122	2004	Pacific Gas & Electric Co., 89 NLRB 938	1950	54	Leibman-D Walsh-D <u>Concurring in relevant part:</u> Battista-R Schaumber-R		Neither union agents nor employer supervisors may collect mail ballots and forward them to the Regional Director.
San Manuel Indian Bingo and Casino, 341 NLRB No. 138	2004	Fort Apache Timber Co., 226 NLRB 503	1976	28	Battista-R Liebman-D Walsh-D	Schaumber-R	The NLRA applies to Indian gaming casinos.
IBM Corp., 341 NLRB No. 148	2004	Epilepsy Foundation of Northeast Ohio, 331 NLRB 676	2000	4	Battista-R Meisburg-R <u>Concurring:</u> Schaumber-R	Liebman-D Walsh-D	Employees who are not represented by a union are not entitled to Weingarten rights.
Saint Gobain Abrasives, Inc., 342 NLRB No. 39	2004	Priority One Services, 332 NLRB 1527	2000	4	Battista-R Schaumber-R Meisburg-R	Liebman-D Walsh-D	A decertification petition cannot be dismissed because of employer taint without an evidentiary hearing to establish a causal nexus between the employer's action and the employee disaffection.
Brown University, 342 NLRB No. 42	2004	New York University, 332 NLRB 1205	2000	4	Battista-R Schaumber-R Meisburg-R	Liebman-D Walsh-D	Graduate student assistants are not "employees" and thus are not covered by the Act.
Oakwood Care Center, 343 NLRB No. 76	2004	M.B. Sturgis, 331 NLRB 1298	2000	4	Battista-R Schaumber-R Miesburg-R	Liebman-D Walsh-D	Employer consent is required to combine in one unit employees who are jointly employed by a supplier employer and a user employer with employees who are employed solely by the user employer.

*The time frame used for the "Bush II Board" begins December of 2002, when Robert Battista was appointed Chairman by President Bush.

APPENDIX B

Precedent Overruling Cases During The Clinton Board (December 2002 to Present)*

Crown Bolt, Inc., 343 NLRB No. 86	2004	Springs Industries, 332 NLRB 40	2000	4	Battista-R Schaumber-R Miesburg-R	Liebman-D Walsh-D	Plant closure threats are not presumed to be disseminated.
Harborside Healthcare, Inc., 343 NLRB No. 100	2004	Millsboro Nursing, 327 NLRB 879	1999	5	Battista-R Schaumber-R Miesburg-R	Liebman-D Walsh-D	Absent mitigating circumstances, supervisory solicitation of authorization cards has an inherent tendency to interfere with employee choice of representative.
Harborside Healthcare, Inc., 343 NLRB No. 100	2004	B.J. Titan, 296 NLRB 668	1989	15	Battista-R Schaumber-R Miesburg-R	Liebman-D Walsh-D	A pro-union supervisor's linking of job security to supporting the union can be objectionable.
Total Number of Cases:	9	Total Number Years of Lost Precedent:	146				

*The time frame used for the "Bush II Board" begins December of 2002, when Robert Battista was appointed Chairman by President Bush.

APPENDIX C

I. Board Membership Since March 1994

Name	Dates of Office	Additional Information
James M. Stephens (R)	10/16/85 - 08/27/95	Chairman from 12/17/87 - 03/06/94.
Dennis M. Devaney (D)	11/22/88 - 12/16/94	Served under recess appointment by President Reagan from 11/22/88 - 11/22/89, when he was confirmed by Senate for term expiring 12/16/89. Received second recess appointment from President Bush from 12/17/89 until 08/03/90, when he was confirmed by Senate for term ending 12/16/94.
William B. Gould IV (D)	3/07/94 - 8/27/98	Chairman from 3/07/94 - 8/27/98.
Margaret A. Browning (D)	3/09/94 - 2/28/97	Ms. Browning died in office. Her term was to expire on 12/16/97.
Charles I. Cohen (R)	3/18/94 - 8/27/96	
John C. Truesdale (D)	12/23/94 - 1/03/96 12/04/98 - 10/01/01	Chairman from 12/04/98 - 5/14/01. Mr. Truesdale has served as a Member under recess appointments from: 10/23/80 - 1/26/81 (by President Carter), 1/24/94 - 3/3/94, 12/23/94 - 1/3/96, 12/4/98 - 11/19/99 (by President Clinton). He was confirmed by the Senate on 11/19/99 and retired 10/01/01.
Sarah M. Fox (D)	2/06/96 - 12/15/00	Served under recess appointment by President Clinton from 2/6/96-11/8/97, when she was confirmed by Senate for term expiring 12/16/99. Served under second recess appointment by President Clinton from 12/17/99 - 12/15/00.
John E. Higgins, Jr. (R)	9/03/96 - 11/13/97	Recess appointment by President Reagan from 8/29/88 - 11/22/89. Mr. Higgins subsequently received a recess appointment by President Clinton from 9/3/96 - 11/13/97.
J. Robert Brame III (R)	11/17/97 - 8/27/00	Confirmed by Senate on 11/8/97.
Peter J. Hurtgen (R)	11/14/97 - 8/01/02	Chairman from 5/15/01 - 8/01/02. Confirmed by Senate on 11/8/97 for a term that expired 8/27/2001. Served under recess appointment by President Bush from 8/31/01 - 8/01/02.
Wilma B. Liebman (D)	11/14/97 -	Confirmed by Senate on 11/8/97 for first term that expired 12/16/02. Confirmed on 11/22/02 for second term expiring 8/27/06.
Dennis P. Walsh (D)	12/30/00 - 12/20/01 12/17/02 - 12/16/04 1/17/06 -	Served under recess appointment by President Clinton from 12/29/00 - 12/20/01. Confirmed by Senate on 11/22/02 for term expiring 12/16/04. Now serving under recess appointment by President Bush.
Michael J. Bartlett (R)	1/22/02 - 11/22/02	Served under recess appointment by President Bush.
William B. Cowen (R)	1/22/02 - 11/22/02	Served under recess appointment by President Bush.
R. Alexander Acosta (R)	12/17/02 - 08/21/03	Confirmed 11/22/02 for term that expired on 8/27/03.
Robert J. Battista (R)	12/17/02 -	Confirmed by Senate on 11/22/02 for term expiring

		12/16/07.
Peter C. Schaumber (R)	12/17/02 - 8/27/05 8/31/05 -	Confirmed 11/22/02 for term that expired on 8/27/05. Now serving under recess appointment by President Bush.
Ronald E. Meisburg (R)	1/12/04 - 12/08/04	Served under recess appointment by President Bush.
Peter N. Kirsanow (R)	1/04/06 -	Serving under recess appointment by President Bush.

II. General Counsel Since March 1994

Name	Dates of Office	Additional Information
Frederick L. Feinstein (D)	3/03/94 - 11/19/99	Upon expiration of term on 3/2/98, President Clinton appointed Mr. Feinstein Acting General Counsel. On 10/22/98, he received a recess appointment to serve as General Counsel.
Leonard R. Page (D)	11/29/99 - 4/20/01	Served under a recess appointment by President Clinton from 11/29/99 to 12/15/00. He was designated Acting General Counsel on 12/19/00.
John E. Higgins, Jr. (R)	5/16/01 - 6/03/01	Appointed Acting General Counsel by President Bush on 5/16/01.
Arthur F. Rosenfeld (R)	6/04/01 - 6/03/05	Nominated by President Bush on 5/24/01 for a 4-year term. Confirmed by Senate 5/26/01.
John E. Higgins, Jr. (R)	6/04/05 - 6/30/05	Acting General Counsel.
Arthur F. Rosenfeld (R)	7/01/05 - 1/04/06	Appointed Acting General Counsel by President Bush.
Ronald Meisburg (R)	1/04/06 -	Serving under a recess appointment by President Bush.