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When One Board Reverses Another: A Chief Counsel's Perspective

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WHEN ONE BOARD REVERSES ANOTHER: A CHIEF COUNSEL'S PERSPECTIVE

HAROLD J. DATZ*

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I. INTRODUCTION

For 17 years (1990-2007), I was privileged to serve as chief counsel to a succession of five members of the National Labor Relations Board ("Board").[1] For more than six of those years, I was Chief Counsel to the Chairman.[2] From this unique perspective, I had an opportunity to observe first-hand the process of decision-making under our nation's principal labor law, the National Labor Relations Act ("Act").[3] This Article will address an important and controversial aspect of that process—the action of a given

1. I hold the record in this regard. The members and dates are as follows: John Randabaugh (1990-1994); Charles Cohen (1994-1996); John Higgins (1996-1997); Peter Hurtgen (1997-2002); Robert Battista (2002-2007). Prior to that service (1975-1990), I was head of the General Counsel's Division of Advice. That office advises the General Counsel and Regional Directors on novel and complex legal issues and on cases of major national importance.

2. I served as Chief Counsel to Chairman Peter J. Hurtgen from 2001 to 2002 and Chairman Robert J. Battista from 2002 to 2007.

3. *See* National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006) (declaring that the U.S. government will protect, inter alia, the right of employees to choose whether to unionize or not, under a policy of eliminating obstructions to the free flow of commerce).

set of Board Members to reverse the precedent of a prior set of Board Members.

Each of these reversals has given rise to howls of protest by the party who lost and stout defenses by the party who won. Often, the heat of the conflict between the two parties is a measure of the importance of the issue. In this Article, I have sought to shed objective light where there has been only partisan heat.

I shall begin, in Part III, with a discussion of the statutory basis for reversals. Part IV sets forth the arguments for and against the practice of reversing precedent. Part V will then list the most important recent reversals. Part VI will categorize these cases according to the basis for reversals. Finally, I will set forth my views concerning the circumstances under which reversals are appropriate or inappropriate.

II. BACKGROUND

As background, I note that the Board is composed of five Board Members, one of whom is designated as Chairman.[4] Each Member is appointed by the President, with the advice and consent of the Senate.[5] The Members serve for five-year terms.[6] Traditionally, the Board is composed of three Democrats and two Republicans when the President is a Democrat and three Republicans and two Democrats when the President is a Republican.[7] Thus, it is customary to speak of a "Democratic Board" and a "Republican Board."[8] It is not unusual for a "Democratic Board" to reverse important precedents of a "Republican Board," and vice-versa. However, in recent years, this practice has increased markedly. This Article will focus on these most recent years.

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4. *See* National Labor Relations Act § 3(a), 29 U.S.C. § 153(a) (2006) (stating that "[t]he President shall designate [one of the five members of the Board] to serve as Chairman of the Board.").

5. *Id.*

6. *Id.*

7. *See* ERIC N. WALTENBERG, CHOOSING WHERE TO FIGHT: ORGANIZED LABOR AND THE MODERN REGULATORY STATE, 1948-1987, at 19 (2002) (describing the political ideology of the Board as "tack[ing] back and forth . . . in response to presidential appointments").

8. *See, e.g.*, Steven Greenhouse, *Deadlock is Ending on Labor Board*, N.Y. TIMES, Mar. 31, 2010, at B1, *available* at http://www.nytimes.com/2010/04/01/business/01labor.html (assessing the changes that are likely to occur to Bush-era Board precedent with President Obama's recess appointments of two union lawyers to the NLRB to create a "Democratic Board").

III. THE STATUTORY BASIS FOR REVERSALS

The Board has wide discretion to interpret the Act as it wishes.[9] The Act is written in broad statutory terms.[10] Congress left it to the Board "to develop and apply fundamental national labor policy . . . . [T]he function of striking [the balance between competing interests] is often a difficult and delicate responsibility which the Congress committed primarily to the [Board]."[11] A court will uphold the Board's policy choice if it is "rational and consistent with the Act . . . even if [the court] would have formulated a different rule had [the court] sat on the Board."[12] In light of this degree of discretion, it is to be anticipated that a given Board will not necessarily agree with a prior Board. Further, as noted above, Board Members are appointed by the President with the advice and consent of the Senate.[13] Given political realities, it may be anticipated that a "Democratic Board" may disagree with the precedents set by a prior "Republican Board" and vice-versa. As noted above and discussed below, that process has been accentuated in recent years.

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9. *See* NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers (*Ironworkers*), 434 U.S. 335, 350 (1978) (noting that Congress delegated the task of effectuating labor policy to the Board and its decision-making is subject to "limited judicial review"); *see also* NLRB v. Ins. Agents Int'l Union, 361 U.S. 477, 499 (1960) ("We recognize without hesitation the primary function and responsibility of the Board to resolve the conflicting interests that Congress has recognized in its labor legislation."); NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957) ("The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.").

10. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–32 (1944) (reasoning that the Board, as a governmental agency, shall interpret the broad language of the Act to effectuate the policy and purposes of the Act), *superseded by statute*, Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 137 (1947), *as recognized in*, NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968).

11. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500–01 (1978) (citing *Truck Drivers*, 353 U.S. at 96).

Of course, if the Board acts contrary to a specific provision of the Act, a court will properly reverse the Board. *See, e.g.*, H.K. Porter v. NLRB, 397 U.S. 99, 107–08 (1970) (reversing both a decision of the Board and the Court of Appeals for the D.C. Circuit because, even though the Board has broad powers to enforce the Act, its powers do not extend to compelling parties to contract).

12. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (2001) (citations omitted).

13. *See* National Labor Relations Act § 3(a), 29 U.S.C. § 153(a) (2006).

IV. ARGUMENTS FOR AND AGAINST THE PRACTICE OF REVERSING PRECEDENT

A. Arguments For:

As discussed above, the practice of reversing precedent is consistent with, and indeed contemplated by, the broad language of the Act and by the appointment process of the Act. Further, a given Board Member is appointed with the expectation that she will vote on a case according to her conscience and her views as to what is best for national labor policy.[14] If those views are contrary to extant precedent, it is not unreasonable for the Board member to decline to follow the precedent.

In addition, industrial conditions can change through time, and today's economy may be quite different from that of yesterday. Thus, it may be prudent to change a precedent that was formulated at a different time under different conditions.

B. Arguments Against:

A reversal of precedent results in instability, unpredictability and uncertainty in the law. Employers, employees, and unions cannot act in reliance on the law, for it may change. What is lawful today may be unlawful tomorrow and vice-versa. Further, lawyers run the risk that their best advice will have disastrous consequences based on such reliance. Finally, our society prides itself on being a nation of laws. Where precedent changes simply because a different political group is in power, the public becomes cynical about our ideals and disrespectful of the law.

V. RECENT REVERSALS OF PRECEDENT

A. Brown University

A Board majority consisting of three Republicans held that graduate assistants who seek a degree at a university are students and not employees under the Act.[15] In so holding, the Board reversed a contrary policy in *New York University*.[16] It is interesting to note that *New York University*, had

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14. *See* NLRB v. West Tex Util. Co., 214 F.2d 732, 741 (5th Cir. 1954) (stating that the members of the Board are non-partisan and their purpose is to "sit as judges to hear the issues of fact and to apply the Act in matters of the highest importance to all concerned."), *denying enf.*, 106 N.L.R.B. 859 (1953).

15. *See* Brown Univ., 342 N.L.R.B. 483, 493 (2004) (diverging from prior Board precedent that graduate students fall within the definition of "employee" under Section 2(3) of the Act, and adopting the view that the collective-bargaining process would be counter to the educational process).

16. *See* New York Univ., 332 N.L.R.B. 1205, 1205–06 (2000) (finding that even

itself reversed a precedent.[17]

B. Harborside Healthcare, Inc.

A Board majority consisting of three Republicans held that a pro-union supervisory solicitation of union authorization cards from employees was inherently coercive, absent mitigating circumstances.[18] Under prior law, coercion was found only if there was a promise of benefit or threat of reprisal.[19]

C. Lutheran Heritage Village-Livonia

In this case, a Board majority consisting of three Republicans held that an employer rule prohibiting "abusive and profane" language was not unlawful on its face.[20] In a prior ruling, the Board had held to the contrary.[21] The D.C. Circuit Court of Appeals refused to enforce that prior ruling.[22] In *Lutheran Heritage Village-Livonia*, the Board acquiesced to the Court's view.[23] Under the Board's new view, the rule would be unlawful only if employees reasonably construed the words as prohibiting Section 7 activity—"[the right] to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[24] In addition, the rule is unlawful if the rule was discriminatorily motivated, or if the rule was actually applied to Section 7

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though graduate assistants were predominantly students, they remained employees within the meaning of Section 2(3) of the National Labor Relations Act).

17. *See id.* at 1217 (reasoning that physics graduate students who were receiving stipends for research were not employees under the Act (citing Leland Stanford, 214 N.L.R.B. 621 (1974))).

18. *See* Harborside Healthcare, Inc., 343 N.L.R.B. 906, 906 (2004) (reversing the prior law that "an explicit promise of benefits or threat of reprisal [was necessary] to find [the conduct] objectionable").

19. *See id.* at 911 (holding that supervisors' solicitations of authorization cards were acceptable because they were conducted without threat of reprisal, punishment or intimidation (citing Millsboro Nursing & Rehab. Ctr., Inc., 327 N.L.R.B. 879, 880 (1999))).

20. Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647 (2004).

21. *See* Adtranz, Inc., 331 N.L.R.B. 291, 293–94 (2000) (holding that the employer violated Section 8(a)(1) of the Act by maintaining a rule that prohibited abusive language unless the rule made it clear that the rule was not intended to bar lawful union organizing activity), *enf. denied*, F.3d 19 (D.C. Cir. 2001).

22. *See* Adtranz, Inc. v. NLRB, 253 F.3d 19, 22, 29 (D.C. Cir. 2001) (vacating the decision below because the Board failed to consider the Petitioner's evidence and cited no support for its contention that a contrary result could "chill" protected activity), *denying enf.*, 331 N.L.R.B. 291 (2000).

23. *See Lutheran Heritage Village-Livonia*, 343 N.L.R.B. at 647.

24. *Id.* at 648 (citing National Labor Relations Act § 1, 29 U.S.C. § 151 (2006)).

activity.[25]

D. Alexandria Clinic, P.A.

Under Section 8(g) of the Act, a union must give a health care institution ten days notice before striking.[26] In *Alexandria Clinic, P.A.*, the union gave the required notice of day and time, but later delayed the start time for four hours.[27] No new notice was sent.[28] Under *Greater New Orleans Artificial Kidney Center*, there would be no violation because there was "substantial compliance" with the ten-day rule.[29] In *Alexandria Clinic*, a Board majority consisting of three Republicans held that there must be strict adherence to the Act, and thus a new ten-day notice was required.[30]

E. Saint Gobain Abrasives, Inc.

In this case, a Board majority held that an employer is entitled to a factual hearing on whether unlawful conduct by the employer caused the employees to file a petition to decertify the union.[31] Under prior law, the Board would presume that there was a causal nexus, and would dismiss the petition without a hearing.[32] The new rule would result in a dismissal only if, after a hearing, a causal nexus was shown.[33]

F. Crown Bolt, Inc.

Under prior law, an employer threat to close a plant in the event of unionization was presumed to have been widely disseminated throughout the facility, and this would taint the election process.[34] In *Crown Bolt*, a Board majority consisting of three Republicans placed the burden of proof

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25. *See id.* at 647 (holding that a rule prohibiting abusive language is not a facial interference with Section 7 activity (citing Adtranz, 253 F.3d at 22 (D.C. Cir. 2001)).

26. *See* § 8(g), § 158(g).

27. *See* 339 N.L.R.B. 1262, 1262 (2003), *enfd. sub nom*. Minn. Licensed Practical Nurses Ass'n v. NLRB, 406 F.3d 1020 (8th Cir. 2005).

28. *Id.*

29. 240 N.L.R.B. 432 (1979).

30. *See id.* at 1263, 1266 (refusing to adopt the precedent of "substantial compliance").

31. *See* Saint Gobain Abrasives, Inc., 342 N.L.R.B. 434, 434–35 (2004).

32. *C.f. id.* at 435 (Liebman dissenting) (objecting to the Board's new rule, based on previous law where an evidentiary hearing was not necessary to determine causal nexus and that there was a presumption of such nexus (citing Priority One Servs., 331 N.L.R.B. 1527, 1527 n.2 (2000))).

33. *See id.* at 434 (majority opinion).

34. *See* Springs Indus., 332 N.L.R.B. 40, 40 (2000) (noting that it was the Board's traditional position to overturn an election, because of presumed dissemination of the most serious threats, such as plant closure).

on the union to show such dissemination.[35] In doing so, the Board returned to the rule of *Kokomo Tube Co.*[36]

G. IBM Corp.

In this case, a Board majority consisting of three Republicans held that *Weingarten* rights[37] do not apply to non-unionized employees.[38] In so holding, the Board reversed the prior holding of *Epilespy Foundation*.[39] The Board returned to the rule of *E.I. Dupont & Co.*[40]

H. Oakwood Care Center

Here, a Board majority consisting of three Republicans held that the employees of an employer (employer *A*) may not be placed, in a single unit, with employees who are jointly employed by *A* and another employer.[41] In so holding the Board overruled *Sturgis,*[42] and returned to *Greenhoot, Inc*.[43]

J. Oakwood Healthcare, Inc.

In this case a Board majority consisting of three Republicans revised the test for determining supervisory status under the Act.[44] The decision was

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35. *See* Crown Bolt, Inc., 343 N.L.R.B. 776, 779 (2004) (deciding to overrule *Springs Industries* and all other decisions that presume dissemination of plant-closure threats and requiring the objecting party to prove the dissemination and its impact on the election by direct and/or circumstantial evidence).

36. *See* 280 N.L.R.B. 357, 358 (1986).

37. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 256–57 (1975) (holding that a unionized employee under interrogation by an employer has a right—under Sections 7 and 8(a)(1) of the Act—upon request, to union representation).

38. *See* IBM Corp., 341 N.L.R.B. 1288, 1288 (2004) (reasoning that the purpose of the Act would be best preserved if the rights recognized in *Weingarten* do not extend to a workplace where, the employees are not represented by a union), *enfd. sub nom.* Schult v. NLRB, No. 04-1225, 2004 WL 259890 (D.C. Cir. 2004) (per curium).

39. *See* 331 N.L.R.B. 676, 676 (2000), *enfd. in part, enf. denied in part*, 268 F.3d 1095 (D.C. Cir. 2001). *Weingarten* should be extended to employees in nonunionized workplaces to afford them the right to have a coworker present at an investigatory interview. *Id.*

40. *See* E.I. Dupont de Nemours (*E.I. Dupont & Co.*), 289 N.L.R.B. 627, 630 (1988) (limiting *Weingarten* rights to unionized workplaces under the analysis that it best effectuates the purposes of the Act and achieves the "fair and reasoned" balance between the conflicting interests of labor and management).

41. *See* Oakwood Care Center, 343 N.L.R.B. 659, 663 (2004) (permitting collective bargaining units of solely and jointly employed employees only by consent).

42. *See* M.B. Sturgis, Inc., 331 N.L.R.B. 1298, 1308 (2000) (rejecting consent requirements for such units and adopting a policy that hinges on the presence of a "community of interest").

43. *See* Greenhoot, Inc., 205 N.L.R.B. 250, 251 (1973) (holding that a multi-employer unit is not permitted unless there is a consensual basis for such a unit).

44. *See* Oakwood Healthcare, Inc., 348 N.L.R.B. 686, 686 (2006) (following criticism of the Board's prior interpretation of Section 2(11) and refining its analysis of

significant, because only employees and not supervisors are protected by the Act.[45] In general, the Board made it easier to show supervisory status.[46] In revising the test, the Board was influenced by the fact that, in two prior decisions, the Supreme Court had disagreed with Board tests under which the Board had declined to find supervisory status.[47]

K. Toering Electrical Co.

A Board majority consisting of three Republicans set forth a new requirement for determining that an applicant is an employee entitled to the protection of the Act.[48] The case arose in the context of a "salting" campaign, i.e., the process in which a union sends union members to at job site with the open and express purpose of unionizing the employer's work force at that site.[49] Prior to *Toering*, it was not necessary for the General Counsel to establish prima facie that the union member was genuinely interested in seeking to establish an employment relationship.[50] Under *Toering*, that fact becomes a necessary part of the General Counsel's prima facie case.[51]

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assessing supervisory status (citing NLRB v. Ky. River Cmty. Care, 532 U.S. 706 (2001))).

45. *See* 348 N.L.R.B. at 687 (explaining that supervisors are excluded from the Act's definition of "employee" after Congress amended the Act to include Section 2(11) in response to the Supreme Court's decision that held that supervisors were employees for purposes of Section 2(3) (citing Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947))).

46. *See id.* at 688–89 (reasoning that because the putative supervisors practiced independent judgment and regularly delegated tasks to subordinate employees, such as nurses assistants, registered nurses are considered supervisory and thus not covered under the Act).

47. *See* NLRB v. Ky. River Cmty. Care, 532 U.S. 706, 706 (2001), *aff'g*, 193 F.3d 444 (6th 1999). Persons are supervisors according to the Act, "if (1) they hold the authority to engage in any [one] of the [twelve] listed supervisory functions, (2) their 'exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.' and (3) their authority is held 'in the interest of the employer.'" *Id.* (quoting NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573–74 (1994)).

48. Toering Elec. Co., 351 N.L.R.B. 225, 225, 234 (2007).

49. *See id.* at 225 n.3 (defining salting as "the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees." (internal quotation marks omitted) (citing Tualatin Elec., 312 N.L.R.B. 129, 130 n.3 (1993))).

50. *See, e.g.*, Progressive Elec., Inc. v. NLRB, 453 F.3d 538, 551–53 (D.C. Cir. 2006) (upholding the NLRB's decision by rationalizing that it was not necessary to first show that the union member was trying to seek an employment relationship before finding that the employer had engaged in an unfair labor practice by failing to consider to hire a group of union members), *enfg*., Progressive Elec., Inc., 344 N.L.R.B. 426 (2005).

51. *See Toering Elec. Co.*, 351 N.L.R.B. at 231 (requiring that the General Counsel prove that the union member who is claiming an unfair labor practice first prove that

L. Register-Guard

A Board majority consisting of three Republicans ruled, inter alia, that in order to show employer discrimination in the administration of a computer-use policy, the General Counsel must show that the employer engaged in disparate treatment of similar activity, i.e., the employer permitted some of these activities and prohibited others simply because of the Section 7 nature of the latter.[52] For example, an employer could draw a line "between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature . . . and solicitation for the commercial sale of a product . . . between solicitation and mere talk, and between business-related use and non business-related use."[53] In each of these examples, the Board held that "the fact that union solicitation would fall on the prohibited side of the line [would] not establish" unlawful discrimination.[54] In reaching this conclusion, the Board overruled *Fleming Co.*[55] and *Guardian Industries Corp.*[56]

M. Anheuser-Busch, Inc.

A Board majority consisting of three Republicans held that employer discipline imposed after an unlawful *Weingarten* interrogation was nonetheless legal.[57] The employer interrogated an employee without observing the requirements of *Weingarten*.[58] The employer thereby gleaned evidence that the employee had engaged in misconduct, and the employer disciplined the employee for this misconduct.[59] Under some prior law the discipline would be unlawful because it was based on evidence that was

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she was legitimately seeking employment).

52. Register-Guard, 351 N.L.R.B. 1110, 1118 (2007) (placing the burden on the General Counsel when proving discrimination to show such disparate treatment), *enfd. in part, enf. denied in part, remanded sub nom.* Guard Publ'g Co. v. NLRB, 571 F.3d 53 (D.C. Cir. 2009).

53. *Id.*

54. *Id.* Of course, if the employer was motivated by the desire to assure that the union solicitations would be on the prohibited side of the line, that would be unlawful.

55. 338 N.L.R.B. 192 (2001), *enf. denied*, 349 F.3d 968 (7th Cir. 1995).

56. 313 N.L.R.B. 1275 (1994), *enfd. in part, enf. denied in part,* 49 F.3d 317 (7th 1995). On review, the D.C. Circuit denied enforcement of the Board's decision in *Register-Guard* on the ground that the employer did not actually show the distinctions suggested by the Board. Guard Publ'g Co. v. NLRB, 571 F.3d 53, 60 (D.C. Cir. 2009).

57. Anheuser-Busch, Inc., 342 N.L.R.B. 560, 560 (2004), *enfd. in part, enf. denied in part sub nom.* Brewers and Maltsters, Local Union No. 6 v. NLRB, 414 F.3d 36 (D.C. Cir. 2005).

58. *See id.* at 561.

59. *See id.* at 562 n.9 (stating that the discipline imposed on sixteen employees was for unprotected conduct that was in clear violation of plant rules and regulations).

unlawfully gathered.[60] However, under conflicting precedent, the Board had upheld the discipline on the ground that it was for cause.[61] The Board majority in *Anheuser-Busch* overruled *Tocco*[62] and *Great Western*,[63] applied *Taracorp,*[64] and thereby upheld the discipline despite the fact that the employee was not allowed to be accompanied by a union representative.[65]

N. St. George Warehouse

In discriminatory discharge cases, the dischargee has the duty to mitigate damages, i.e., to search for interim work and thereby reduce the back pay award.[66] Prior to *St. George*, the Board placed on the employer the burden of going forward with evidence to show that there was substantially equivalent work in the area and that the employee failed to seek it.[67] In *St. George*, the Board majority consisting of three Republicans placed on the General Counsel the duty to show affirmatively that the employee searched for relevant work.[68]

O. Dana Corp.

Under *Keller Plastics*, the Board held that where an employer has voluntarily and legally recognized a union as the representative of employees, the union's majority status could not be questioned for a

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60. *See* Tocco, Inc., 323 N.L.R.B. 480, 480 (1997).

61. *See* Taracorp, Inc., 273 N.L.R.B. 221 (1984) (overruling prior decisions such as Kraft Foods, 251 N.L.R.B. 598 (1980) and refusing to award reinstatement and backpay to an employee despite *Weingarten* violations, reasoning that doing so would violate the policy of the Act and would constitute bad policy).

62. 323 N.L.R.B. 480.

63. Great Western Produce Inc., 282 N.L.R.B. No. 17 (1986), *enfd.* 839 F.2d 555 (9th Cir. 1988).

64. 273 N.L.R.B. 221.

65. Anheuser-Busch, Inc., 342 N.L.R.B. 560, 561 (2004),), *enfd. in part, enf. denied in part sub nom.* Brewers and Maltsters, Local Union No. 6 v. NLRB, 414 F.3d 36 (D.C. Cir. 2005).

66. *See, e.g.*, NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2d Cir. 1965) ("It is accepted by the Board and reviewing courts that a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason."), *enf.* 140 N.L.R.B. 1710 (1964).

67. *E.g.*, Woonsocket Health Ctr., 263 N.L.R.B. 1367, 1370 (1982) (stating that the "burden is on the respondent to demonstrate . . . backpay liablity"); Steve Aloi Ford, Inc., 190 N.L.R.B. 661, 662 (1971) (noting that even though the General Counsel was not required to produce an employee for examination, the Trial Examiner should have examined witnesses and reviewed evidence in order to render her decision).

68. St. George Warehouse, 351 N.L.R.B. 961, 961 (2007).

reasonable period of time.[69] In *Dana*, the Board majority consisting of three Republicans imposed additional requirements.[70] The parties must give notice to employees that recognition has occurred and that employees can file petitions, within forty-five days, seeking an election to decertify the recognized union or to select another union.[71] If such a petition is filed, an election will be held.[72]

P. Tru-Serv Corp.

Under prior law, an employer settlement of an unfair labor practice case that contained a recognition clause would result in the dismissal of a decertification petition, where the alleged unlawful conduct occurred prior to the petition.[73] In *Tru-Serv*, a Board majority consisting of three Republicans held that the decertification petition and election could still be held, absent an admission of a violation by the employer in the settlement agreement.[74] In so ruling, the Board returned to the rule of *Passavant*.[75]

Q. MV Transportation

Under prior law, where a successor employer recognized the union representing the predecessor's employees, the union's majority status would not be challenged for a reasonable period of time.[76] In *MV Transportation*, a Board majority of three Republicans and two Democrats ruled that the union was not entitled to such immunity.[77] The reasonable period of time was deemed to have expired under the predecessor.[78] In so

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69. Keller Plastics E., Inc., 157 N.L.R.B. 583, 586 (1966).

70. Dana Corp., 351 N.L.R.B. 434, 435 (2007) (modifying the Board's extant precedent "[i]n order to achieve a 'finer balance' of interests that better protects employees' free choice").

71. *Id.*

72. *Id.*

73. *See* Douglas-Randall, Inc., 320 N.L.R.B. 431, 431 (1995) (affirming the dismissal of a petition on the grounds that the showing of interest was tainted by the employer's unfair labor practices).

74. Truserv Corp., 349 N.L.R.B. 227, 227 (2007).

75. *See id.* at 228 (returning to the rule of prior precedent—a settlement agreement cannot be construed as an admission that the employer's actions constituted an unfair labor practice, unless an admission is an express part of the agreement (citing Passavant Health Ctr., 278 N.L.R.B. 483 (1986))).

76. *See* St. Elizabeth Manor, Inc., 319 N.L.R.B. 341, 341 (1996) (holding that once a successor employer recognizes an incumbent union, "the union is entitled to a reasonable period of time for bargaining without challenge to its majority status").

77. *See* MV Transp., 337 N.L.R.B. 770, 770 (2002) (reverting to a standard where the union's presumption of majority status with the successor employer is rebuttable).

78. *Id.*

ruling, the Board returned to the rule of *Southern Moldings*.[79]

R. Allegheny Ludlum II

Under prior law, an employer had to obtain explicit employee consent if the employer wished to include images of the employee in an anti-union campaign video.[80] The Board applied this rule in *Allegheny Ludlum I*.[81] The D.C. Circuit denied enforcement because the act of seeking consent might itself be unlawful interrogation under Section 8(1)(a).[82] On remand, a Board majority of three Republicans and two Democrats held that the employer can make a general announcement which discloses that the pictures will be used, that participation is voluntary, that participation will not result in a benefit and that non-participation will not result in reprisal.[83] The pictures can then be used in the video, provided that the atmosphere is free from unfair labor practices.[84]

S. BE & K Construction Co. II

In *BE & K Construction I*, the Board dealt with a completed lawsuit that an employer had lost.[85] The Board held that the lawsuit was unlawful if it was filed for an illegal motive.[86] On review, the Supreme Court remanded for the Board to determine whether the lawsuit was nonetheless reasonably based and, if so, whether that would preclude the finding of a violation.[87]

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79. *See id.* (holding that unless the successor employer adopts the existing contract, a union only has a rebuttable presumption of continuing majority status (citing S. Moldings, 219 N.L.R.B. 119, 119–20 (1975))).

80. *See* Sony Corp. of Am., 313 N.L.R.B. 420, 420 (1993) (upholding the finding of the Administrative Law Judge that photographing employees and including their photographs in an anti-union video without their informed consent constitutes an unfair labor practice under the Act).

81. *See* Allegheny Ludlum Corp. (*Allegheny Ludlum I*), 320 N.L.R.B. 484, 484 (1995), *enf. denied in part*, *enfd. in part*, 104 F.3d 1354 (D.C. Cir. 1997).

82. *See* Alleghany Ludlum Corp. v. NLRB, 104 F.3d 1354, 1363–64 (D.C. Cir. 1997), *denying enf. in part*, *enfg. in part*, *Allegheny Ludlum I*, 320 N.L.R.B. 484 (1995).

83. *See* Alleghany Ludlum Corp. (*Alleghany Ludlum II*), 333 N.L.R.B. 743, 745 (2001) (clarifying when employers may lawfully include visual images of employees in campaign presentations), *enfd.*, 301 F.3d 167 (3d Cir. 2002).

84. *See id.* at 745 (specifying that an employer may not, however, lawfully include employee images where the video tends to indicate that employee's position on union representation, without the employee's consent).

85. *See* BE & K Constr. Co. (*BE & K I*), 329 N.L.R.B. 717, 717–18 (1999), *enfd.*, 246 F.3d 619 (6th Cir. 2001), *rev'd*, 536 U.S. 516 (2002).

86. *See id.* at 726 (holding that the identical claims brought by the company lacked merit and had a retaliatory motive in violation of Section 8(a)(1)).

87. *See* BE & K Constr. Co. v. NLRB, 536 U.S. 516, 536 (2002) (invalidating the Board's standard for imposing liability under the Act to penalize any reasonably based, yet unsuccessful, suits filed with retaliatory purpose).

On remand, a Board majority consisting of three Republicans held that the suit was reasonably based and that a reasonable lawsuit could not be condemned as unlawful, even if it was motivated by anti-union considerations.[88]

T. Levitz Furniture Co.

In this case, the Board majority held that an employer could unilaterally withdraw recognition from a union only upon a showing that the union had actually lost majority status.[89] Prior to that, the Board had said that the employer could unilaterally withdraw recognition from a union upon a showing that there was reasonable good-faith doubt of majority status.[90]

In *Levitz*, the Board was influenced by the Supreme Court's decision in *Allentown Mack v. NLRB*.[91] In that case, the Court had expressed misgivings about the Board having a single standard for withdrawal of recognition, the filing of a petition, and employer polling.[92] However, the Court upheld the Board's decision in this regard.[93]

VI. CATEGORIZING THE REVERSALS: COMMENTS AND CONCLUSIONS

In this Part, I will categorize the above reversals, and I will then make comments and reach conclusions as to the propriety of reversal for each category.

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88. *See* BE & K Constr. Co. (*BE & K II*), 351 N.L.R.B. 451, 459 (2007) (adopting a standard that requires more than just circumstantial proof of retaliatory motive (quoting BE & K Constr. Co. v. NLRB, 536 U.S. 451, 539 (2002) (Souter, J., concurring))).

89. *See* Levitz Furniture Co., 333 N.L.R.B. 717, 717 (2001).

90. *See, e.g.,* Celanese Corp. of Am., 95 N.R.L.B. 664, 674 (1951) (concluding that in light of the totality of the circumstances, the employer was not required to avail itself of its right to file a petition with the Board to ascertain the Union's actual representative status in order to demonstrate its good faith).

91. *See Levitz Furniture*, 333 N.L.R.B. at 717 (acquiescing to the Supreme Court's decision in *Allentown Mack* in order to "avoid the confusion over terminology . . . in [applying] the good faith doubt standard." (citing Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 365–66, 373–74 (1998))).

92. *See* Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 365–66, 373–74 (1998) (allowing an employer to act when it has "reasonable uncertainty" of union's majority status).

93. *See id.* at 364 (observing that the Board's single standard for polling and withdrawals of recognition is a "puzzling policy," but not so puzzling as to be "arbitrary or capricious"); *Levitz Furniture*, 333 N.L.R.B. at 717 (holding that an employer may only withdraw recognition when the incumbent union has lost the support of a majority of employees and proposes that "an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.").

A. Acquiescing to Adverse Court Precedent

As discussed above, some of the reversals are because of adverse court precedent. In a situation where the Board loses before a circuit court, the Board has three options: it can seek certiorari in that case;[94] it can adhere to the rejected precedent in another case and seek a favorable result in a different circuit;[95] or it can acquiesce to the view of the adverse court decision and make that the new position of the Board. Only the latter involves a reversal of precedent.

In cases where a circuit court has disagreed with Board precedent, it may be reasonable and prudent to adopt the court's view, particularly if the court has a sound basis for its view. This becomes even more compelling if the Board loses in circuit after circuit. Of course, it may also be reasonable for the Board to stick to its guns. In my view, the Board's choice should turn on the importance of the issues to national labor policy.

B. Sharing the Misgivings of a Court

As discussed above, there are cases where the reviewing court has expressed misgivings about the Board's position, but ultimately upholds the position of the Board as within the Board's discretion.[96] In these cases the Board may come to share the court's misgivings and thus overrule its own precedent.[97]

In cases where a court has simply expressed misgivings about a Board position, it would seem that the Board can reasonably adhere to its position particularly when no other court has expressed such misgivings. However, in doing so, the Board may wish to set forth its reasons for not sharing the misgivings of the one court.

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94. *See, e.g.*, NLRB v. Magnavox Co. of Tenn., 415 U.S. 322, 326 (1974) (reversing a Sixth Circuit decision and upholding the NLRB's initial decision because the Board's ruling was consistent with the right of employees embodied in Section 7 of the Act).

95. If the Board prevails in another circuit, there would be a conflict of circuits, thereby enhancing the prospects for Supreme Court review. This is what occurred with favorable results in NLRB v. Magnavox Co. of Tenn., 415 U.S. 322 (1974).

96. *See* Alleghany Ludlum v. N.L.R.B., 104 F.3d 1354, 1358 (D.C. Cir. 1997) (noting that the D.C. Circuit will set aside the Board's decision only when the Board has "acted arbitrarily or otherwise erred in applying established law to the facts" (citing Int'l Union of Elec. (*Electronic Workers*) v. NLRB, 41 F.3d 1532, 1536–37 (D.C. Cir. 1994))), *denying enf. in part*, *enfg. in part*, *Allegheny Ludlum I*, 320 N.L.R.B. 484 (1995).

97. *C.f.* Oakwood Healthcare Inc., 348 N.L.R.B. 686, 687, 687–88 (2006) (changing Board precedent to coincide with warnings received in two different cases from the Supreme Court that the Board was construing "supervisory status" too narrowly).

C. Conflict in Board Precedents

As also discussed above, there are some cases where there is a conflict in the Board's precedent.[98] In that situation, the Board can adopt one line of cases and overrule the other or it can overrule both and adopt a third view.

Where there is a conflict in the Board's precedents and they cannot be reconciled, the Board has little choice but to overrule one line and adopt the other, or overrule both and adopt a third line.

D. Restoring an Older Precedent

As discussed above, there are cases where the Board reverses precedent in order to return to an even older precedent.[99] In those cases, the Board can claim that it is simply restoring the law to what it once was.[100]

If the original precedent lasted for many years without court disapproval, it may be reasonable to reverse the recent precedent and return to the prior one. However, in doing so, there is a danger that a subsequent Board may reverse it again. The ping-pong match and the instability would continue. The best result is for the Board to frankly acknowledge the pro's and con's of each approach, conclude, on balance, why one is better than the other, and express the hope that this will finally settle the matter.

E. Opting for a Different Rule

Finally, as discussed above, there are cases where the Board simply concludes, on its own, that the precedent does not make sense and opts for a different rule.[101] In these cases—where none of the elements set forth in A through D above are present—the Board simply disagrees with the precedent of a prior Board.[102] As stated at the outset, changes like these lead to instability, unpredictability, and disrespect for the law. Thus, in my view, the burden is on the reversing Board to justify the change.

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98. *See, e.g.*, *Alleghany Ludlum*, 104 F.3d at 1356 (determining that the Board's precedents regarding "polling," videotaping, and free speech created "conflicting mandates" and remanding for resolution).

99. *E.g.*, Crown Bolt, Inc., 343 N.L.R.B. 776, 776 (2004) (abandoning the precedent of *Springs Industries* and adopting the prior precedent established in *Kokomo Tube Co.* requiring that an objecting party must prove the impact on the election by direct and circumstantial evidence).

The chain of reversals may go back even further. Trying to resolve who made the first change is a bit like trying to determine "who started it" in a school-yard fight.

100. *See, e.g.*, Brown Univ., 342 N.L.R.B. 483, 489–90 (2004) (stating that "the concerns expressed by the Board in *St. Claire's Hospital* [twenty-five] years ago are just as relevant today.").

101. *E.g.*, Toering Elec. Co., 351 N.L.R.B. 225, 228 (2007) (grounding the Board's decision in statutory policy).

102. *See* Anheuser-Busch, Inc., 357 N.L.R.B. 644 (2007).

Ideally, one would hope for empirical data showing that the precedent has had undesirable economic consequences or has had results that are inconsistent with the policies of the Act. However, under Section 4(a) of the Act, the Board is forbidden to hire staff persons to perform "economic analysis."[103] Notwithstanding this, there is nothing to preclude the Board from relying on academic or other studies, or to receive and rely upon *Brandeis* briefs. Absent such empirical support, it is my view that the Board should be reluctant to reverse precedent in this situation.

103. *See* 29 U.S.C. § 154(a) (2006).