WORKERS' RIGHTS UNDER ATTACK BY BUSH ADMINISTRATION

President Bush's National Labor Relations Board Rolls Back Labor Protections

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INTRODUCTION

Over the past five years, President Bush has stacked the National Labor Relations Board with anti-union members – and American workers are paying the price. Millions of workers have seen their right to organize eliminated or severely restricted, their basic human rights have been trampled, and businesses have essentially been given free rein to make it as difficult as possible for their employees to organize.

Labor Protections Stolen From Large Categories of Workers
Some of the Bush Board's most egregious rulings have denied labor protections for wide swaths of workers.

- 45,000 disabled workers have lost their right to organize
- 51,000 teaching and research assistants have lost their right to organize
- 2 million temporary workers have had their right to organize severely limited
- 8 million workers, including 1.4 million charge nurses, leadmen and load supervisors, are currently facing the loss of their organizing rights

Human Rights Trampled
Workers' basic human rights have been undermined. The Bush Board undermined workers' fundamental right of association when it ruled that a company could impose a blanket ban on off-duty fraternizing by its employees in 2005. The company was effectively given license to punish workers simply for having a friendly gathering at the local pizza parlor, for example.

In another decision, the Bush Board denied nonunion workers the right to have a co-worker present during a disciplinary meeting, even though all workers – union and nonunion – have the same right to concerted activity under federal law. And in a particularly disturbing decision, the Bush Board ruled in 2004 that it was acceptable for a company to fire a female worker for asking a fellow employee to support her charges of sexual harassment in testimony before a state agency.

Hypocrisy and Unfairness Abound in Bush Board's Decisions
The Bush Board has shown its hypocrisy by applying double standards to supervisors' anti-union and pro-union conduct. When a supervisor campaigns against a union, the NLRB deems it "free speech." When a supervisor campaigns for a union, however, the Bush Board has, on occasion, overturned the entire union election.

In a 2004 decision, the Bush Board ruled that an election was fair even though the union did not receive a full list of workers' addresses, to which it is entitled by law. The company, of course, had access to 100 percent of the workers, had hired expensive anti-union consultants, and won the election, 161-121.

In two particularly petty decisions, the Bush Board allowed one employer to fire striking workers because the union started a strike four hours later than planned, and another to fire protesting employees for violating property rights after they left the company's parking lot 15 minutes late.

The examples go on. In addition to the instances detailed above, the Bush Board has allowed greater leeway for union-busting lockouts, weakened already weak remedies for NLRA violations, and underutilized the NLRB's strongest law enforcement tools.

And the rollback is not over. Several cases are currently pending before the Bush Board that pose a danger to workers' rights protections for millions of American workers and to the efficacy of the most successful worker organizing methods – voluntary union recognition.

DEVELOPMENTS IN LABOR LAW UNDER THE BUSH BOARD

I. THE ACT'S COVERAGE SHRINKS

One of the most significant developments in the Bush Board has been a trend of excluding large groups of workers from the protection of the Act. In a string of cases, with potentially more to come, the Bush Board has ruled that entire categories of workers do not constitute "employees" covered by the NLRA. Accordingly, these workers have no right to organize, collectively bargain, or otherwise engage in concerted activity. In 2004 alone, the NLRB denied NLRA coverage to graduate teaching assistants and many disabled workers, and sharply limited the ability of and temporary employees to exercise their rights under the Act.

The Act's definition of employee is broad. It covers "any employee," unless otherwise explicitly exempted. As commonly understood, an employee is one who provides services to another, under the other's control, and in return for compensation. Despite the wide breadth of this definition, the Bush Board has found ways to limit the meaning of "employee."

A. Disabled Workers Lose NLRA Protection

45,000 Disabled Workers Lose the Right to Organize

In *Brevard Achievement Center*, the NLRB ruled that disabled workers in rehabilitation programs do not constitute "employees" under the Act.[1] Here, a federal contractor provided janitorial services to Cape Canaveral Air Station. The janitors were a mix of disabled and non-disabled workers. The disabled workers were part of a special program that included additional training and outside-of-work counseling services. But all of the workers – disabled and non-disabled – had the same hours, performed the same tasks, and were paid the same wages. Thanks to the program, the contractor received special consideration from the government under the Javitz Wagner O'Day Act. The workers – disabled and non-disabled alike – attempted to organize a union.

The Board's majority decided that the disabled employees were not really employees and therefore did not have a right to organize. According to the majority, these workers' relationship with the employer was primarily rehabilitative, rather than economic.

Work programs for disabled individuals are designed to provide the disabled with the opportunity to be workers just as the non-disabled, which is why participating contractors receive special treatment from the federal government. However, the Bush Board finds otherwise: the disabled might be workers just like everyone else, *except they cannot join a union.*

Brevard Achievement Center resulted in the loss of the right to organize for more than 45,000 disabled employees participating in federal work programs like that used by the contractor at Cape Canaveral.

B. Graduate Teaching Assistants Lose NLRA Protection

51,000 Teaching and Research Assistants Lose the Right to Organize

In another 2004 case, *Brown University*, the Bush Board denied graduate research and teaching assistants and proctors the right to organize and collectively bargain.[2] Just as with *Brevard Achievement Center*, where the Board found the relationship to be "rehabilitative" rather than "economic," here the Board found the primary relationship between the TAs and the university to be "educational" rather than "economic."

The dissent pointed out that the majority was "woefully out of touch with contemporary academic reality." According to the dissent, "the Board's ruling is harsh. Not only can universities avoid dealing with graduate student unions, they are also free to retaliate against graduate students who act together to address their working conditions." A Brown University graduate student pointed out the "contemporary academic reality" to the *Yale Daily News*, "We are teaching classes, grading papers, advising students and performing work which is critical to the educational mission of this institution. And we're entitled to the same rights as any other group of workers."[3]

But the Bush Board saw it differently. While the Act they were charged with enforcing was designed to promote collective bargaining, the majority found that "the collective-bargaining process will be detrimental to the educational process."

Brown University has deprived more than 51,000 graduate teaching assistants, research assistants, and proctors at 1,561 private universities of the right to form a union.

The Bush Board's ruling in *Brown University* stands in stark contrast to its ruling in *St. Joseph News-Press*, wherein the Bush Board ruled that newspaper carriers were independent contractors, not employees, and therefore had no Section 7 rights.[4] The majority dismissed the dissent's point that the carriers' economic dependence on the newspaper and the extreme imbalance in bargaining power should render the carriers employees. Instead, the majority applied a strict common-law test of employee status. As the dissent put it: "It is hard to reconcile the majority's approach here with the Board's recent decision in *Brown University* . . . There, the majority asserted that the 'issue of employee status' is 'not to be decided purely on the basis of common-law concepts.'"

Brown University also stands in stark contrast to the ruling in *San Manuel Indian Bingo and Casino*.[5] There, the Bush Board overturned precedent and announced a new test for applying the NLRA to tribal enterprises. Instead of looking to the location of an enterprise (on or off tribal lands), the Bush Board now looks to the function of the enterprise (commercial or governmental). Importantly, the Bush Board held that the

definition of "employer" is broad and any exemptions "are to be narrowly construed." The same narrow reading of exemptions did not hold true for the graduate teaching assistants in *Brown University* or the disabled workers in *Brevard Achievement Center*.

C. Temps' NLRA Protections Severely Limited

Another 2004 case, *Oakwood Care Center*, effectively stripped workers supplied by temporary staffing agencies of the right to organize.[6] Unlike the disabled workers and graduate workers cases, which used the definition of "employee" to deny workers the right to organize, this case turned on who the employer was.

The Right to Organize of 2 Million Temps Is Severely Limited

In this case, a temporary staffing agency provided 45 percent of a nursing home's workers. The question was whether these temporary workers could join a union with the nursing home's permanent workers. The Board ruled that they could not, unless both the staffing agency and the nursing home consented to the arrangement. That is, if the temps wish to join a union with the permanent employees, the employers must give them permission to do so first. Not surprisingly, they did not.

The dissent explained that the decision "effectively bars yet another group of employees – the sizeable number of workers in alternative work arrangements – from organizing labor unions, by making them get their employers' permission first. That result is surely not what Congress envisioned when it instructed the Board, in decided whether a particular bargaining unit is appropriate, 'to assure to employees the fullest freedom in exercising the rights guaranteed by the Act.'"

The core promise of the NLRA is that the choice of whether to organize a union rests solely with employees. *Oakwood Care Center*, however, gives employers the final say on whether temporary employees can join a union. The decision confounds effective collective bargaining. It gives employers a veto over whether a union may represent both permanent and temporary employees. Employers are unlikely to allow a union to do so. Thus, in the same working group, an employer might have unionized permanent employees and nonunion temps. The nonunion temps can be used to undercut the terms and conditions of employment for the unionized workers, undermining and ultimately destroying the workers' union.

The number of workers affected by *Oakwood Care Center* is staggering. There are 813,000 workers employed by contract firms similar to that at issue in this case. Another 1.2 million workers are employed via temporary help agencies. In total, over 2 million temporary workers find their right to organize severely limited under the Bush Board.

D. Looming Threats To NLRA Coverage

Several cases pending before the Bush Board pose a further threat to the right to organize for as many as 8 million American workers.[7] *Oakwood Healthcare Inc.*, *Golden Crest*

Healthcare Center, and *Croft Metals, Inc.* could directly render 1.4 million skilled, professional workers in health care and other industries, such as construction, unprotected by the Act. As many as 8 million workers across all occupations, however, could lose their right to organize under these forthcoming decisions.

Eight Million Nurses and Other Workers Face Loss of Organizing Rights

In these cases, the Board is apparently considering the possibility that a worker who holds a minimal amount of authority should be considered a "supervisor" and not an employee. The Board could rule that occasional exercises of independent judgment in directing the work of less experienced or less skilled co-workers destroy a worker's "employee" status. In the health care industry, experienced "charge" nurses are at risk of losing their right to organize. In the construction industry, experienced "leadmen" and even journeymen who guide apprentices on the job could lose their rights as well.

Despite the potential magnitude of the impact on workers' rights, the Bush Board has refused to hear oral arguments in the supervisor cases. In fact, the Bush Board has not heard a single oral argument during its tenure thus far.

II. DOUBLE-STANDARDS APPLIED TO SUPERVISORS' ANTI-UNION AND PRO-UNION CONDUCT

Under federal labor law, management and supervisors may campaign against a union. Under Section 8(c) of the Act, an employer may express views and opinions so long as they do not contain threats of reprisal or force or promises of benefits. Section 8(c), however, does not require that those employer opinions be only anti-union opinions. Yet the Bush Board has applied a double standard in this context, finding pro-union activities by supervisors – even in the context of overall anti-union campaigns by management – to be more coercive than anti-union activities by supervisors.

A. Supervisors Passing Out Union Cards: NLRB Found "Coercive"

Bush Board: When a Supervisor Campaigns Against a Union, It's Called "Free Speech;" When a Supervisor Campaigns For a Union, It Overturns the Entire Election

In *Harborside Healthcare*,[8] *Millard Refrigerated Services*,[9] *Chinese Daily News*,[10] and *SNE Enterprises*,[11] the Bush Board overturned union elections because individual supervisors, rather than urging employees to vote against the union, urged employees to support the union. Rather than urging employees not to sign union cards, a supervisor was urging them to sign up. The Board found this conduct objectionable enough to throw out entire elections, despite the fact that, in each case, the supervisor's conduct was done in the context of an employer anti-union campaign, whereby the employer had made its opposition to the union clear to the employees.

In their *Harborside Healthcare* dissent, Members Liebman and Walsh point out the double standard applied by the Bush Board when it comes to anti-union versus pro-union supervisor conduct. According to the dissent, the majority's new rule "could never be applied to a supervisor's involvement in an employer's antiunion campaign without a dramatic reversal of current Board law…"

Former NLRB General Counsel Leonard Paige told a gathering of lawyers that *Harborside Healthcare* "allows employers to choose not to disavow a supervisor's pro-union statement and 'lay in the weeds' and file an objection if the union wins the election."[12]

B. Supervisors Interrupting Employees Passing Out Union Cards: NLRB Found "Not Coercive"

How tolerant the Bush Board is of *anti*-union supervisor conduct was revealed in *Aladdin Gaming*,[13] where the employer was charged with unlawful surveillance of employees' organizing activity. There, a manager hovered around employees in the lunchroom, eavesdropped on conversations and interrupted with anti-union statements when off-duty employees solicited signatures for union cards. The Board found the conduct to be noncoercive and lawful because, according to the Bush Board, the Act is violated only when "out of the ordinary" methods of surveillance are used.

C. Management Posters Threatening Plant Shutdown: NLRB Found "Not Coercive"

In *Stanadyne Automotive Corp.*, the Bush Board allowed an employer to display a poster threatening closure a week before the election. The sign featured photos of closed plants and read: "These are just a few examples of plants where the UAW used to represent employees."[14] The poster continued: "Is this what the UAW calls job security? Vote NO!" The poster did not comply with *NLRB v. Gissel Packing Co.*, which requires an employer's prediction of plant closure to be based on objective facts and carefully phrased to convey an employer's belief regarding consequences beyond its control.[15] Nevertheless, the Bush Board found the sign to be lawful because it was merely attempting to inform employees about the potential negative consequences of a vote for unionization, or so they said.

D. Inferring That A Pro-Union Supervisor Will Spread His Pro-Union Message To Other Employees: Okay
Inferring That An Anti-Union Supervisor Will Spread His Anti-Union Message To Other Employees: Not Okay

In *Werthan Packaging*, the Bush Board refused to overturn an election despite evidence that a supervisor interrogated and threatened an employee about her support for the union and interrogated 25 other employees, speaking to them about the union and writing on a clipboard as he did.[16] During one interrogation of a worker, the supervisor told the

employee that it would be in the best interests of her family if she voted "no" to the union. The Bush Board refused to infer that the anti-union supervisor used the same unlawful threats with other employees as he did with one. In *Harborside Healthcare*, by contrast, the Bush Board inferred that an employer's pro-union statements to some employees were made to other employees as well. This evidentiary double standard was made even more apparent in *Crown Bolt, Inc.*, where the Bush Board overturned precedent establishing a rebuttable presumption that employer threats of a plant shutdown are widely disseminated in the workforce.[17] In short, under the Bush Board, the union always has the burden of proof – whether it is *proving* that anti-union supervisor statements were widely disseminated or whether it is *disproving* that pro-union supervisor statements were widely disseminated.

III. PERMITTING WORK RULES THAT CHILL ORGANIZING ACTIVITY

In *Guardsmark, LLC*, the Bush Board ruled that an employer could ban off-duty fraternizing by its employees.[18] According to the employer's rule, employees may not "fraternize on duty or off duty, date, or become overly friendly with the client's employees or co-employees." The law has allowed companies to prohibit on-duty fraternizing by employees, i.e., when a worker is on-duty, he may be required to spend 100% of that time working. At the same time, under long-standing law, workers have a right to engage in associational activity off-duty. The rule at Guardsmark made no distinction between on-duty and off-duty.

Bush Board Allows Employers to Punish Off-Duty "Fraternizing" Among Employees

The Bush Board found the prohibition on co-worker fraternizing to be lawful since workers would likely interpret it to mean that they could not date each other – and not that they could not discuss work. Yet the rule explicitly prohibits "dating" in addition to "fraternizing." The dissent in *Guardsmark* found the rule to be unlawfully vague. That is, without defining "fraternizing," the rule would have a chilling effect on the exercise of workers' Section 7 rights. It is often in the context of off-duty meetings with other workers – indeed, almost always in that context – when workers venture to learn one another's workplace concerns and begin the arduous process of organizing a union. With a "no off-duty fraternizing" rule in place, workers are unlikely to risk getting fired to have a meeting with co-workers at the local pizza parlor to discuss their families, their sports teams, or their workplace issues. Under such circumstances, organizing becomes impossible. The Bush Board ignored this reality.

In *Stanadyne Corp.*, the Bush Board found a CEO's statement warning pro-union employees against "harassing" co-workers to be lawful.[19] In this case, during an organizing campaign, the CEO told a meeting of employees: "[I]t has come to my attention that some union supporters, not all, but some, are harassing fellow employees. You can disagree with the Company position; you can be for the Union. You can be for anything you want to, but no one should be harassed. Harassment of any type is not tolerated by this Company and will be dealt with." The CEO never described what he

meant by "harassment." If an employee was anti-union, would it be harassment for a pro-union employee to attempt to change his mind? The dissent argued that the lack of clarity would tend to chill the exercise of employees' rights.

In *Palms Hotel and Casino*, the Bush Board found another vague rule to be lawful.[20] There, the employer promulgated a rule prohibiting "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." If an anti-union employee found pro-union statements to be offensive, would that be a violation of the rule? Again, the dissent argued that the lack of clarity would tend to chill the exercise of employees' rights. But the Bush Board dismissed the charge.

In *Tradesmen International*, the employer promulgated a number of ill-defined rules about employee conduct both on and off the job. Under these rules, employees were required to "represent the company in a positive . . . manner;" "avoid conflicts of interest;" not make "statements which are slanderous or detrimental to the company;" and not engage, "directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive, or damaging to the company."[21] Without further defining any of these prohibitions, would a reasonable employee conclude that complaining about low pay to co-workers or others constitute "damaging" or "disloyal" or "detrimental" conduct? Would it be representing the company "in a positive" manner? The Bush Board dismissed the charge that these rules tended to chill protected Section 7 activity.

In *Lutheran Heritage Village-Livonia*, the Bush Board found that employer rules prohibiting "abusive" language and harassment did not tend to chill Section 7 activity. [22] The terms "abusive" and "harassment" were defined no further by the employer. Without any delimiting language, however, as the dissent explained, "the rules at issue here could subject to discipline – and thus inhibit – an angry conversation with a supervisor expressing dissatisfaction over an evaluation, a heated discussion between employees over the benefits of unionization, or a loud protest by employees over safety conditions. But expressions of displeasure, and even anger, are protected means of Section 7 communication."

IV. SECTION 7 RIGHTS LIMITED

A. Non-Union Employees Lose Their Weingarten *Rights*

In *IBM Corporation*, the Bush Board denied nonunion workers the right to call co-workers as witnesses to investigatory interviews.[23] Under the U.S. Supreme Court decision in *NLRB v. J. Weingarten, Inc.*, employees have the right to have a co-worker present during a disciplinary meeting.[24]

Under the NLRA, the Section 7 right to engage in concerted activity is not limited to union workers. Indeed, if it were, there would be no union workers. Nonunion workers

must engage in concerted activity in order to organize a union. But protected concerted activity may fall far short of actually organizing a union. It includes any activity where workers join together for mutual aid and protection. A key example, via *Weingarten*, is where an employee asks another employee to attend a disciplinary meeting to serve as her representative or witness to what transpires. The Clinton Board affirmed the right of nonunion workers to ask for *Weingarten* assistance in the case *Epilepsy Foundation*.[25]

The Bush Board overturned *Epilepsy Foundation* with *IBM Corporation.* Now, nonunion workers have no right to ask that another employee be present during an investigatory interview that could lead to discipline.

B. Range Of Activity Protected By Act Is Narrowed

The Bush Board, however, did not stop with removing protections for nonunion employees. In *Holling Press*, involving a unionized workforce, an employee was fired for "attempting to coerce workers into corroborating an unsubstantiated charge of sexual harassment" when she requested a fellow employee testify on her behalf before a state agency.[26]

According to the Bush Board, the employee's Section 7 rights were not violated when she was fired for asking her co-worker to be a witness on her behalf in the state proceeding because the employee was acting in self-interest, not for "mutual aid or protection."

The Bush Board ignored the fact that alleviating harassment is in the best interest of all employees – perhaps even more obviously so than in the run-of-the-mill *Weingarten* case in which an employee is seeking a defense against discipline for a work rule violation. The *Holling Press* decision also creates an extremely narrow understanding of concerted activity. Until the Bush appointees reversed course, the Board had long recognized that many requests for "mutual aid or protection" are for the sake of one individual – and often with the understanding that the beneficiary will one day take the same stand for those who have come to his or her aid. *Holling Press* is devoid of such notions of solidarity.

In *Waters of Orchard Park*, the Bush Board further limited the range of protected concerted activity.[27] There, nurses called a patient hotline to report excessive heat. The employer then discharged one of the nurses and suspended another. The Bush Board admitted that the activity was concerted. But the Board decided it was not protected because it did not relate to a term or condition of employment. The nurses were deemed to have acted in the interest of patients and not fellow workers, ignoring the fact that excessive heat not only affected patients but interfered with working conditions and the nurses' ability to do their job.

V. LOWERING THE BAR FOR FAIR ELECTIONS

Under federal labor law, shortly before a union election, the union is entitled to an "Excelsior List" – which is a list of all employees in the bargaining unit and their addresses – seven days after the NLRB schedules an election.[28] Because a union has no right of access to the employees – i.e., the voters – on company property in order to campaign, unions are relegated to standing on public sidewalks outside of plants or visiting employees at their homes in order to convince them to vote yes to unionization. An Excelsior List is vital to what little access to voters unions are afforded.

Union Has Access to only 90% of the Voters? Fair Enough, Says Bush Board

In *Washington Fruit and Produce*, the Bush Board engaged in what can only be described as fuzzy math.[29] There, the employer gave the union an inaccurate Excelsior List – 87 of the employee addresses were incorrect. The union was unable to locate correct addresses for 28 employees before election day. The union lost 161-121.

While a 28 vote swing would have resulted in a 149-133 union victory, the Bush Board ruled that, since the union had access to at least 90% of the voters, the election was fair enough. Meanwhile, the employer had access to 100% of the voters – at work, where they congregated everyday – and hired expensive anti-union consultants to wage a campaign against the union, including threats of job loss. After *Washington Fruit and Produce*, what little access unions have to employees can be frustrated even further.

VI. UNDERMINING ALREADY WEAK REMEDIES

Under federal labor law, an employee who is unlawfully discharged or discriminated against is entitled to his backpay, minus any interim earnings, and nothing more. There are no punitive damages, fines, or civil penalties for violating a worker's rights under the NLRA. In short, current remedies are famously weak and fail to serve as a deterrent to unlawful behavior. A recent study found that, when faced with organizing drives, 30% of employers fired pro-union workers and 49% threatened to shut down or move their businesses.[30] Every year, more than 20,000 American workers are fired or otherwise discriminated against by employers for exercising their Section 7 rights.[31]

The Bush Board has made the meager remedies under the NLRA even weaker. In *A.J. Mechanical, Inc.*, the employer unlawfully fired, refused to give pay increases to, and laid off several employees because of their union activity.[32] During the organizing drive and commission of the unfair labor practices, the joint owners of the company began a series of "shareholder distributions" and drained the company dry. The business shut down entirely. The Bush Board then refused to pierce the corporate veil and order the owners, now in possession of the "shareholder distributions," to pay the workers their backpay. Instead, the dissent explains, "the majority rewards a business owner who committed a series of unfair labor practices in a failed attempt to defeat a union organizing drive and

who then sought a final victory by making sure there was no money left in the corporate treasury to pay his victims."

VII. ROLLBACKS IN COLLECTIVE BARGAINING

Under long-standing precedent, if a company claims an "inability to pay" wage or benefit demands during bargaining, the union has a right to request financial information from the employer to substantiate the claim.[33]

In *American Polystyrene Corp.*, the employer and union were engaged in contract negotiations. The union demanded wage increases and improvements to the company's 401(k).[34] The company told the union "things are tough." When the union negotiator asked the company negotiator, "Are you saying that you can't afford the union's proposals?" the company negotiator replied: "No, I can't. I'd go broke." When the union requested financial substantiation of the claim, the company refused and wrote a letter to the union saying that "at no time have I ever told you we cannot afford the union's proposals."

In later bargaining sessions, the union again asked if the company truly was having financial problems. The company negotiator responded: "Have you seen sales lately?" The union again asked for financial information. Again, the company refused. Soon thereafter, the company temporarily laid off most of the union employees and pointed to financial problems as the reason.

The Bush Board ruled that the company did not violate the Act by refusing to turn over financial information. According to the Bush Board, saying that one would "go broke" did not amount to saying one had an "inability to pay."

On appeal, the Ninth Circuit overturned the Bush Board's decision.[35] The court explained that "the Company could not have used simpler words to declare that its financial situation was the cause of its refusal" of union wage and benefit demands.

VIII. UNION-BUSTING LOCKOUTS PERMITTED

The right to strike is the classic concerted activity and most powerful method by which unions exert their bargaining power with employers. Conversely, an employer has the right to lock out employees to bring economic pressure to bear on bargaining. There are rules restricting both activities. For instance, an employer cannot engage in partial lockouts where it discriminatorily chooses which employees to lock out in order to discourage support for the union. Lockouts must be economic in nature – that is, designed to press the employer's bargaining position – and not an attempt to bust a union. Accordingly, in a partial lockout, an employer must show a legitimate and substantial business justification, such as a need to maintain operations during the lockout, for why it did not simply lock out all of the employees.[36]

A. Bush Board Allows Employer To Lock Out All Union Members And Let Inexperienced – But Non-Union – Probationary Employees Continue Working

In *Bunting Bearings*, during contract negotiations with a union, an employer locked out of the plant all non-probationary employees and allowed probationary employees to continue to work.[37] The locked-out, non-probationary employees were union members. The probationary employees who continued to work were not yet union members. In other words, if you were a union member, you could not work. The employer could not claim legitimately that it was attempting merely to maintain operations during the lockout. The employees it chose to retain were its least knowledgeable and least experienced. The Bush Board approved.

Bush Board Gives Green Light to Punish Strikers and Union Members; Appellate Courts Reverse

But, upon appeal, the D.C. Circuit reversed the Bush Board's ruling.[38] While the court pointed out that it usually defers to administrative decisions, it could not in this case, where the Board's decision was "inconsistent with controlling precedent" from the U.S. Supreme Court.

B. Bush Board Allows Employer To Lock Out All Workers Loyal To A Strike And Let Picket-Line Crossers Continue Working

The same chain of events unrolled in another Bush Board decision, *Midwest Generation*.[39] There, the union went on strike. During the strike, 47 strikers crossed the picket line and made unconditional offers to return to work. After two months, the union voted to end the strike and return to work – with no contract yet reached. The employer then instituted a partial lockout. The partial lockout was imposed only on those strikers who did not cross the picket line earlier and instead waited for the union vote to return to work. The Bush Board found the partial lockout to be lawful.

The Seventh Circuit overturned the Board, finding the lockout to be unlawfully discriminatory.[40] According to the court, employers cannot have "carte blanche to lock out employees of their own choosing . . ." The court explained: "Such an approach would allow employers acting under the guise of maintaining business operations to engage in exactly the type of action Midwest undertook: punishing those who stood with the Union and rewarding those who crossed picket lines." The court pointed out that "the only distinction" between the employees whom Midwest allowed to work and the employees whom Midwest selectively locked out "was whether an individual worker had made his or her offer to return as part of the Union's action or individually." Such discrimination, which would tend to discourage participation in strikes or other concerted activity, reflects an employer's anti-union animus and is unlawful.

IX. THE GOTCHA GAME

While the Bush Board has often seen fit to give employers a great deal of leeway – such as locking out union members while holding onto inexperienced non-union workers and claiming it is an "economic" tactic – the Bush Board has rarely, if ever, seen fit to give unions or workers any breaks. When it comes to striking or using company property, the Bush Board has displayed a penchant for details. A smattering of cases illustrates the point.

A. Late Start-Time For Strike Means Strikers Can Be Fired

Unlike in the lockout cases *Bunting Bearings* and *Midwest Generation*, where the Bush Board gave great leeway to employers who discriminate against union members or strike supporters, the Bush Board has taken a much stricter approach when it comes to unions exercising their ultimate economic weapon: the strike. Under Section 10(g) of the NLRA, when a health care facility is involved, the union must provide the employer with 10 days' written notice of a planned strike. In *Alexandria Clinic P.A.*, the nurses' union told the clinic that there would be a strike on September 10 at 8 a.m.[41] The union later moved the strike time to noon without notifying the employer. Thus, on the day of the strike, the union began the walkout four hours late. In the meantime, the employer had replacement workers waiting in the lounge. The clinic fired the strikers.

Even though the late start time did not affect patient care, the Bush Board overturned prior precedent and found that the firings of the strikers were legal. The dissenters found the Bush Board's focus on the 8 a.m. start time to be "absurd" and "simply punitive."

B. Property Rights Trump Human Rights

In another case highlighting the Bush Board's time sensitivity, *Quietflex Mfg. Corp.* involved 83 Hispanic workers who held a protest in the employer's parking lot, refusing to work and demanding that the employer stop discriminating against them.[42] After 12 hours, the employer ordered them to leave at 7 p.m. Because the employees did not leave the premises until 7:15 p.m., 15 minutes late, the Bush Board ruled that it was perfectly lawful for the employer to assert its property rights – and fire every worker for protesting in the parking lot.

Topping *Quietflex*, however, is the Bush Board's decision in *Johnson Technology, Inc.* There, an employee posted a union meeting notice on a breakroom bulletin board. A supervisor typically ripped down such notices. When the employee found that his notice had been removed, he took a piece of used paper from the copying room, wrote on it, and reposted it. The employee was threatened with discipline. The Bush Board found the threat perfectly legal – particularly since the paper was used on only one side and could be reused by the company. The dissent pointed out that the warning to the employee, "in context, clearly sent the message that any misconduct, no matter how trivial, would be dealt with harshly if it involved union activity."

C. Error On Ballot Voids Entire Union Election Victory

In another case of the Bush Board's attention to detail, *Woods Quality Cabinetry Co.*, the Board overturned the results of an election, where the union won by 5 votes, because the ballot indicated that the Carpenters and Joiners of America was affiliated with the AFL-CIO.[43] In fact, it was not affiliated. The Board threw out the entire election based on this error. It was, however, careful to point out that it was not creating a "per se" rule that an affiliation mistake must invalidate an election.

X. SUCCESSFUL ORGANIZING METHODS UNDER THREAT

Card Check, a Successful Form of Organizing, Has the Bush Board Very Concerned

Because the NLRB election process is inherently unfair, open to delay and manipulation by employers, unions have increasingly turned to voluntary recognition agreements to organize workers. NLRB elections do not measure up to basic democratic standards for free and fair elections.[44] One side, the employer, is given unfettered access to voters every day and may even require those voters, under threat of discipline, to attend anti-union captive audience meetings. The other side, the union, is not allowed to access voters in the one place where they congregate: the workplace. One side, the employer, holds a daunting amount of power over voters' lives, capable of taking away their livelihoods. The other side, the union, holds no such cards.

In an attempt to minimize these and other problems in the traditional NLRB election, unions and employers use voluntary recognition agreements. Often, under these agreements, an employer agrees to voluntarily recognize a union once it obtains a majority of union cards from the employees – a process known as "card check." These non-NLRB processes are vital to union organizing. They tend to eliminate unlawful employer interference in organizing, ensuring that the choice to unionize remains where it belongs – with the employees, not the employer. A recent study found, for example, that workers in NLRB elections were twice as likely to report that their employer coerced them to oppose the union than workers in card checks.[45] Workers and unions increasingly turn to these alternative organizing methods. In 2003, for instance, only an estimated 20% of the 400,000 newly organized workers gained union recognition via NLRB elections.[46] The other 80% achieved representation by other means, such as card check.

It is no wonder that the success of card check places it squarely in the sights of the Bush Board. A number of cases pending before the Board threaten to undermine the efficacy and effectiveness of card check.

In *Dana Corp.* and *Metaldyne Corp.*, cases spurred by the anti-union Right to Work Foundation, the Bush Board is considering whether to eviscerate the "recognition bar" long afforded to voluntary employer recognition of a union. Under long-standing

precedent, a decertification petition may not be filed after an employer voluntarily recognizes a union until a reasonable time for bargaining a first contract has elapsed.[47] Decertification drives are highly divisive and disruptive to the workplace, and the Board has recognized that such petitions should be barred long enough to give bargaining a chance after an initial recognition of the union as the employees' bargaining representative. The Bush Board is threatening to reverse this precedent with a decision that could allow card check recognition to be collaterally attacked. After a union wins card check recognition, it could be thrown into a new NLRB election immediately – rather than representing and bargaining on behalf of the employees.

In *Shaw's Supermarkets*, the NLRB is considering whether to void an agreement between a union and an employer – known as an "after-acquired store clause" – whereby the employer must recognize the union at a newly opened store based on a showing of majority support by the employees. These clauses have been enforced by the Board for decades. Having had such an agreement with the United Food and Commercial Workers (UFCW) since 1989, and having had 14 stores organize under the agreement, the employer now seeks to void it. A case that would have been open and shut under any previous Board now has an audience with the Bush Board.

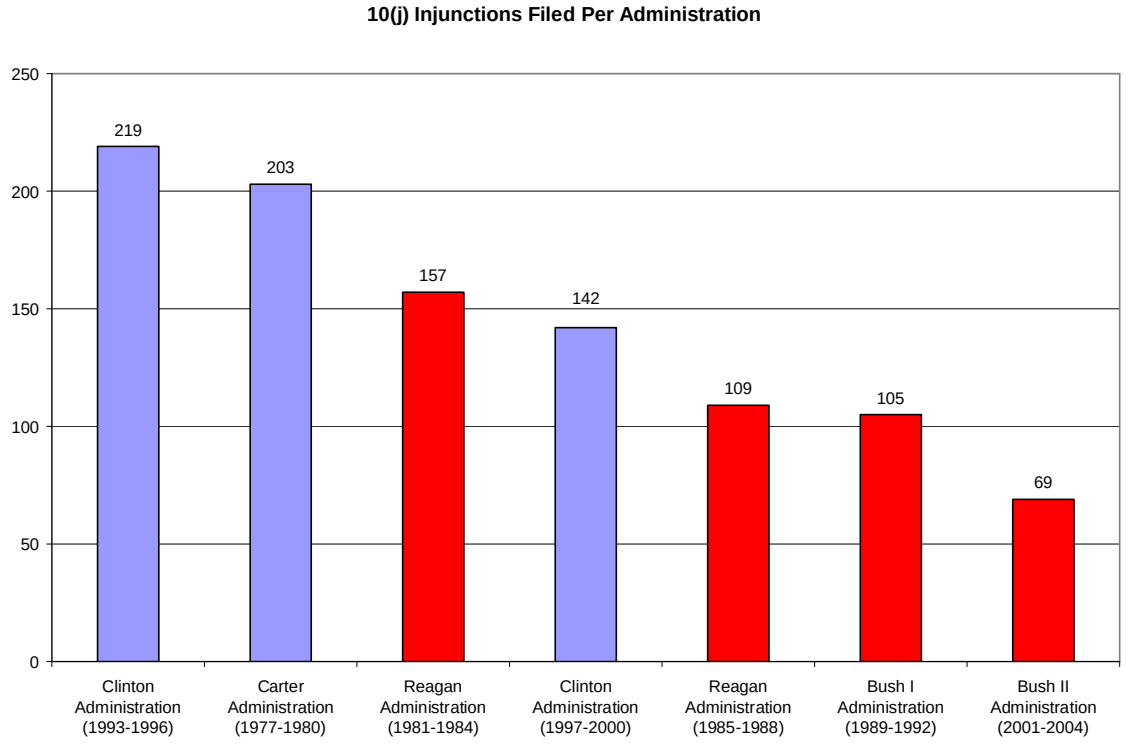
XI. THE NLRB TIES ITS OWN HANDS – THE DECLINE OF 10(J)

Section 10(j) of the Act grants the NLRB the option to petition a federal district court for an emergency temporary injunction against unlawful conduct, pending a final decision. The NLRB uses Section 10(j) to stop particularly egregious conduct, such as unlawful employer interference in organizing drives and employer refusals to bargain or withdrawals of recognition. Section 10(j), for example, may be used to reinstate wrongfully discharged employees pending a final Board decision on the violation.

An examination of the last thirty years of NLRB activity reveals that, under the Bush Board, the use of the Section 10(j) injunction against unlawful employer conduct has plummeted. The year 2005 saw the fewest number of Section 10(j) injunctions (nine) filed by the NLRB. The years 2004, 2002, and 2003, saw the second (11), third (14), and fourth (15) fewest number filed, respectively. During the first term of the Clinton administration, 219 Section 10(j) injunctions were filed, followed by 142 in the second term. The first term of the Bush administration, by comparison, saw a mere 69 Section 10(j) injunctions. Of all administrations examined in the last thirty years, from Carter to the current administration, the administration of George W. Bush ranks dead last in Section 10(j) filings.

A recent study by American Rights at Work found that average annual Board authorizations of 10(j) injunctions during the current Bush Administration declined 74 percent compared to the Clinton Administration and 61 percent compared to the George H.W. Bush Administration.[48] The Bush Board is authorizing fewer 10(j) injunctions, and its General Counsel is requesting fewer 10(j) injunctions, than their predecessors. In the 1998 and 2001 General Counsel reports of the Clinton Administration, the General

Counsel had requested 10(j) authorization in 44% and 53% of all regional recommendations for the injunction, respectively.[49] And the Clinton Board authorized injunctions for 93% and 86% of those requests, respectively. In the 2006 General Counsel report, on the other hand, the Bush Board General Counsel requested 10(j) authorization in only 29% of all regional recommendations for the injunction. And the Bush Board authorized injunctions for only 68% of those requests.[50]



Source: 42nd through 69th NLRB Annual Reports (fiscal years 1977-2004)

XII. THE NLRB GETS "FRIENDLY" WITH BIG BUSINESS

The NLRA is interpreted to preempt other regulations of activity which arguably is already regulated or protected by the NLRA.[51] Thus, a state law which forbids private-sector strikes would be preempted by the NLRA. On the other hand, where a state is acting as a market participant, it may pursue its proprietary interests and impose requirements on actors without incurring NLRA preemption. Thus, in *Building and Construction Trades Council v. Associated Builders and Contractors of Mass./R.I. (Boston Harbor)*, the U.S. Supreme Court found that a state agency's requirement that contractors on a state project sign a pre-hire collective bargaining agreement with a union was not preempted by the NLRA.[52]

One month after taking office, President Bush issued an executive order barring federal agencies from requiring union agreements known as project labor agreements for federal contracts. When the Executive Order was challenged, the Bush administration argued

that the order was not preempted because it was "proprietary, not regulatory, in nature." The administration asserted that the general prohibition of the Executive Order, as opposed to prohibitions which might be on a case-by-case basis, did not make the order regulatory.[53]

That was the Bush administration's position when it came to a prohibition on union agreements. When the state of California passed a statute that barred state taxpayers' money from being used by state contractors to either discourage or promote union organizing drives, and when the New York state and the Milwaukee County Board of Supervisors passed similar laws, the Bush Board joined business groups, as an amicus curiae, to challenge the new laws as preempted by the NLRA. In effect, the Board argued that a state does not have the right to direct how its tax funds shall be used – at least not when it comes to their use by state contractors in fending off organizing drives.

The Bush Board's position directly contradicted the position of the Bush administration with its Executive Order barring project labor agreements. In the New York case, for example, rather than arguing that the law's general nature did not destroy its proprietary nature, as the administration claimed in the project labor agreement case, the Bush Board argued that the New York law "is not limited to a single project or service. Rather it is a general statute applying without time limit to every state-funded organization . . . [and] cannot 'plausibly be defended as a legitimate response to state procurement restraints or local economic needs.'"[54] In the Milwaukee case, the Bush Board also made the point: "Chapter 31 is not a contract that applies to a single project or service."[55] Upon the Bush Board's decision to file an amicus brief in the California case, union-side labor attorney Stephen Berzon pointed out: "The only consistency is taking the anti-union position."[56]

CONCLUSION

An examination of significant decisions by the Bush Board over the past five years has revealed an alarming and systematic rollback in workers' rights. The Bush Board has limited both the workers who are covered by the Act and the activities protected by the Act. At the same time, the Bush Board has displayed a great deal of tolerance for employer behavior designed to discourage unionization. Often, the rationales from one case to another are not consistent. The outcome of each case, however, is almost invariably a setback for labor unions and the rights of workers.

Even as the Bush administration has weakened already weak federal labor law, Congressional Democrats are fighting to strengthen workers' protections. The most significant reform proposal in years is the Employee Free Choice Act, H.R. 1696, introduced by Representative George Miller (D-CA) in the U.S. House of Representatives. Senator Edward Kennedy (D-MA) is the chief sponsor of the Employee Free Choice Act in the U.S. Senate, S. 842. The Employee Free Choice Act addresses three major failures in the NLRA. First, it toughens the penalties for workers' rights violations, creating a meaningful deterrent to employers who otherwise run roughshod over the law. Second, it ensures that, when a majority of workers indicate that they want a union by signing cards, the workers' union is recognized. Third, it provides for binding arbitration of first contracts, encouraging the formation of genuine, good-faith bargaining relationships between employers and newly-organized unions. The Employee Free Choice Act has garnered the support of 215 bipartisan cosponsors in the House of Representatives and 43 bipartisan cosponsors in the Senate. Thus far, however, the bills have languished in committees, and the Republican leadership has refused to give them a hearing, let alone a vote.

APPENDIX 1: FEDERAL LABOR LAW IN A NUTSHELL

The National Labor Relations Board (NLRB or "Board") was created in 1935 with the passage of the National Labor Relations Act (NLRA or "Act"), which governs the right of private sector workers to organize unions and collectively bargain. Congress charged the NLRB with administering and effectuating the NLRA. The NLRB uses its adjudicatory power – its authority to decide disputes among specific parties with specific fact patterns – to create precedents that serve as the rules and regulations of the NLRA.
The National Labor Relations Act protects the fundamental human rights of American workers to organize and collectively bargain.

Who is covered?
The NLRA covers private sector **employees** in industries other than airlines, railways, and agriculture. Managers, supervisors, and domestic workers are not covered by the protections of the Act.

What activities are protected?
The core protections of the Act are known as **"Section 7 rights."** These are all the rights which flow from the right of employees to engage in **"concerted activity"** for their **"mutual aid or protection."** Concerted activity happens whenever an employee joins with another employee (or attempts to join with another employee) to make life better at work. This activity could include everything from holding meetings and petitioning a boss, to organizing a union or striking. The Act also protects the ultimate concerted activity: collective bargaining.

When are employers required to recognize a union?
To ensure the right to collectively bargain, the Act requires that when a majority of workers form a union, the employer must recognize that union and bargain with it in good faith over the terms and conditions of employment. An employer may voluntarily recognize a union when confronted with a showing of majority support for a union. Or the employer may insist on, and the employees themselves may petition for, an NLRB-supervised election. If the union wins the election, the Board will certify the union and order the employer to bargain. The NLRB resolves disputes related to elections, such as who constitutes employees and the scope of the bargaining unit, in **representation** cases.

How does the NLRB protect these rights?
The Act outlaws any activity which interferes with these rights. The NLRB hears **"unfair labor practice"** charges, or claims of violations of the Act, and issues written decisions which have come to define what activity is legal or illegal. For example, disciplining a worker for trying to organize a union while off-duty is illegal, while disciplining a worker for passing out leaflets on the plant floor while he was supposed to be working is legal. The Act provides specific prohibitions for both employer and union behavior. Changing these rules with a shift in an NLRB decision can have a dramatic impact on labor relations and workers' rights throughout the country.

The decisions of the NLRB in unfair labor practice cases may be appealed to a U.S. Circuit Court of Appeals. The U.S. Supreme Court is the final venue for an appeal.

The NLRA is rife with weaknesses, such as an election process that is open to delay and manipulations by employers and extremely weak penalties for violations, resulting in often repeated and flagrant violations of workers' rights by employers determined to bust a union.

APPENDIX 2: THE BUSH BOARD

The Board consists of five Members, including three of the President's party and two of the opposition. All five are appointed by the President. Over the past five years, the Bush Board has consisted of the following individuals:

Member	Term	Prior Background Highlights
Peter N. Kirsanow (R)	2006 - Present	Bush II appointee to U.S. Commission on Civil Rights
Ronald E. Meisburg (R)	2004	Management-side labor lawyer
Peter C. Schaumber (R)	2002 - Present	President of the Republican National Lawyers Association; labor arbitrator
R. Alex Acosta (R)	2002 - 2003	Founder of Project on the Judiciary at the Ethics and Public Policy Center, a rightwing think tank
Robert J. Battista (R)	2002 - Present	Management-side labor lawyer
William B. Cowen (R)	2002	Founder of management-side firm Institutional Labor Advisors, LLC
Michael J. Bartlett (R)	2002	Director of labor law policy at the U.S. Chamber of Commerce
Dennis P. Walsh (D)	2000 - 2001; 2002 - 2004; 2006 - Present	NLRB Attorney
Wilma B. Liebman (D)	1997 - Present	Union-side labor lawyer; deputy director at the Federal Mediation and Conciliation Service
Peter J. Hurtgen (R)	1997 - 2002	Management-side labor lawyer

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