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STATEMENT TO THE RECORD

Hearing on Emerging Trends at the National Labor Relations Board
House Education and the Workforce Committee's Subcommittee on Health, Employment, Labor and Pensions

February 11, 2011 – 10:00 a.m.

Good morning Committee Chairman Roe, Ranking Member Andrews and members of the House Education and the Workforce Committee's Subcommittee on Health, Employment, Labor and Pensions. It is an honor and pleasure to appear again before the Committee as a witness. My name is G. Roger King, and I am a partner in the Jones Day law firm. Jones Day is an international law firm with over 2,500 lawyers practicing in over 30 offices located on four continents. We are fortunate to count more than 250 of the Fortune 500 employers among our clients. I have been practicing labor and employment law for over 30 years and I work with employer clients located in various parts of the country with varying workforce numbers, with a particular concentration of my practice in the healthcare industry. I have been a member of various committees of The Society for Human Resource Management (SHRM) and The American Society of Healthcare Human Resources Association (ASHHRA) and I also participate in the work of other trade and professional associations that are active in labor and employment matters. A copy of my CV is attached to the written version of my testimony as Exhibit "A". Mr. Chairman, I request that my written testimony and the attachments thereto, be entered into the Record of the hearing. Finally, my testimony today is based on my personal and professional experience as a labor practitioner.[1]

It has been widely recognized by legislative leaders, legal practitioners and representatives of the academic community that in addition to the fact that the Board is not an Article III Court, it is also governed by political considerations dictated by the tradition that three (3) of the five (5) statutory positions on the Board are to come from the political party in control of the White House and the remaining two (2) statutory positions from the other party. The latter factor from the perspective of many commentators is the primary reason for the "politicization" of the Board and its oscillating position on various issues arising under the National Labor Relations Act ("NLRA" or "the Act"). Unfortunately, due primarily to the latter factor there have been frequent impasses between the Congress and the President as to the composition of the Board. Further, certain significant disagreements on major labor policy issues have developed between management and labor, including the future direction of the Board. Notwithstanding such disagreements, however, previous Boards have, for the most part, refrained from engaging in significant reversal of precedent or pursuit of policy objectives, such as rulemaking, without having a representative complement of Board members being seated. Although there are

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[1] My testimony today should not be construed as legal advice as to any specific facts or circumstances. The views expressed in my Statement to the Record are my own personal views and do not necessarily reflect those of Jones Day. I would also like to acknowledge my Associates, Scott Medsker and Kye Pawlenko, of the Jones Day Labor and Employment Practice Group for their assistance in the preparation of this testimony.

examples when the Board, in the past, has proceeded to overrule precedent without a full complement of members being seated, such an approach raises significant issues with respect to how our nation's labor laws should be administered and how national labor policy should be established. Further, at various times in the past, Board Members have taken the position that a full confirmed complement of Board members should be in place prior to precedent being reversed. For example, current Chairman Liebman, in a case in which she participated in prior to becoming Chairman, stated in her dissent in the Board case of *Teamsters Local 75 (Schreiber Foods)*, 349 N.L.R.B. 77, 97 (2007) as follows:

> First, as Chairman Battista states, the Board's representation to the Court that this case was pending hardly amounts to a promise that the Board, as constituted in 2002, would reconsider and possibly overrule *Meijer*. As it informed the Court, the Board at that time comprised only three Members (two were recess appointees). Given the Board's well-known reluctance to overrule precedent when at less than full strength (five Members), the Board could not have been signaling to the Court that a full-dress reconsideration of *Meijer* was in the offing. (emphasis added).

Unfortunately, the present Board majority, controlled by the party occupying the White House, appears to be significantly deviating from such past practice and self-imposed restraint. The "activist" nature of the present Board majority raises, from my perspective, substantive legal and policy issues that can be summarized as follows:

* The Obama Board, since being constituted in the latter part of 2010, has proceeded to undertake a very aggressive agenda. Two (2) confirmed Board Members—Chairman Liebman and Democrat Member Mark Pearce and unconfirmed Board Member Craig Becker—are not only dictating such agenda, but voting for and approving such agenda. In each instance, such courses of action have been undertaken over the strong dissent of a confirmed third Member of the Board, a Republican Member.[2] This approach of proceeding with only two confirmed Members of the Board raises a number of policy questions and, in many instances, is inconsistent with the past practices and self-imposed restraint of previous Boards. Further, such approach establishes a questionable precedent for an Agency that has been subject to considerable criticism over recent years. If a Republican "majority" of two confirmed Board members proceeded in such a fashion, certainly considerable "noise" would, no doubt, come from members of the other party and from representatives of organized labor. The Board, I submit, as a matter of sound public policy should not proceed to engage in rulemaking—either directly through the Administrative Procedure Act ("APA") or indirectly through case law adjudication—or overrule significant precedent without having five (5) confirmed members.

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[2] The composition of the NLRB over such period of time has included the Chairman Wilma Liebman, a Democrat, Mark Pearce, a Democrat, and until August 2010, Republican Member Peter Schaumber. Republican Member Brian Hayes was confirmed by the Senate on June 22, 2010 and also has been part of the Obama Board. Democrat Member Craig Becker has been serving on the Board pursuant to a recess appointment by President Obama since March 27, 2010. The United States Senate has chosen not to confirm Member Becker.

* The Obama Board majority has also evidenced a zeal to engage in an accelerated decision-making process which, except for one of its new initiatives (the Board majority's official NLRA notice rulemaking initiative) is being undertaken without the protections and procedures of the APA. Such approach not only disregards a sound public policy approach to important labor law matters, but gives every appearance that such Board initiatives are designed to ensure that Member Becker—who may have to leave the Board at the end of the current Congress if he is not confirmed by the Senate or again appointed during a recess—is involved in formulization and implementation of such agenda. Further, it is interesting to note that Chairman Liebman's term will also expire in August of this year, and such an accelerated agenda may also be designed around her tenure on the Board. This questionable accelerated agenda is in stark contrast to the only prior successful endeavor of the Board in rulemaking in 1989 with respect to acute care hospital providers. The Board's rulemaking initiative with respect to that issue was undertaken with considerable more deliberation and adherence not only to the APA, but also consistent with the Board's rulemaking statutory requirements.

* The Board's suggestion of rulemaking through case law adjudication and its request for *amici* participation in such cases as *Roundy's, Inc. and Milwaukee Building & Construction Trades Council, AFL-CIO*, Case No. 30-CA-17185, and *Specialty Healthcare & Rehabilitation Center of Mobile and United Steelworkers, District 9*, 356 N.L.R.B. No. 56, raise serious procedural questions. Certain important issues and questions posed by the Board majority in these cases do not arise from the facts or legal issues in such cases, and would appear to be a thinly veiled attempt to establish *sua sponte* a "case and controversy" where none previously existed. The Board majority's attempt to indirectly engage in rulemaking through such case law adjudication is not only inconsistent with the Board's traditional approach of only deciding issues presented by the facts of a pending case, but also brings into question the Board majority's objectives in proceeding in this manner. For example, as outlined below, the *Specialty Healthcare* case does not raise part of the issue in question number 7 in the Board's Notice to Interested Parties, and certainly does not raise the issue posed in question number 8 of such notice—the proper approach to follow in making voting or bargaining unit determinations in industries outside of non-acute health care facilities. In addition, the Board majority in the *Roundy's* case has posed questions that raise issues that are not presented in the case in question. For example, there is no question in the *Roundy's* case involving the rights of an employer to enforce its no solicitation policy with respect to employee activity—the facts and issues in the *Roundy's* case involve non-employee (union representatives) access to employer private property. Nevertheless, question number three posed by the Board majority in *Roundy's* specifically raises such question.

* The Board's recent expenditures in certain areas also bring into question its objectives, and present a clear need for close Congressional scrutiny of its budget. For example, on June 9, 2010, the Board, through a "request for information" ("RFI"), asked vendors to provide it information about "secure electronic voting" for Board-supervised elections. The RFI stated that the Board's division of administration was interested in acquiring equipment that would enable it to not only conduct on-site electronic balloting, but also to implement "remote electronic voting technology" which would permit telephonic and internet voting in union representation elections. Such RFI was not published in the

Federal Register or on the Board's website, and was only publicized on the Federal government's on-line procurement portal. This initiative appears to undermine the 75 years of labor law associated with the secret ballot box procedure in Board-conducted representation elections, and also raises questions regarding sections 9(c) and 9(e) of the NLRA directing that the Board shall utilize secret ballot elections in representation proceedings. Further, the Board's Rules and Regulations also require that "all elections are by secret ballot" (Rules and Regulations of the NLRB section 102.69). In addition to the electronic voting initiative, the Board has also recently engaged in a considerable expenditure of money for various public relations initiatives that would appear to support in part its aggressive agenda, including the recent establishment of an Office of Public Affairs and the hiring of its first New Media Specialist. The above-noted expenditures come at a time when the Board's case load, on average, over the last few years has significantly decreased.[3] The Subcommittee may wish to closely scrutinize the above Board expenditures and others that the Agency is planning to pursue.

* The Subcommittee may also wish to review precedent established by a prior Congress wherein the Legislative Branch prohibited funding for the implementation of a proposed Board rule with respect to the presumption of appropriateness of a single-site voting or bargaining unit. The Congress, in that instance, refused to fund through the appropriation process such initiatives by the Board for fiscal years 1996, 1997 and 1998, and the Board subsequently withdrew the proposed rule in 1998. A similar close scrutiny of any inappropriate Board proposed rule, either through direct rulemaking under the APA or through case law adjudication, may again be a prudent course of action for the Congress to consider. Attached as Exhibit "B" to this testimony is a chronology of the Board's unsuccessful rulemaking initiative in 1995 with respect to the Appropriateness of Requested Single Location Bargaining Units in Representation Cases.

* The Board's Office of The General Counsel also has been engaged in an "activist" agenda. For example, the Board's Office of The General Counsel recently issued guidelines with respect to the deferral of unfair labor practice charges to alternative dispute resolution procedures, including arbitration. These guidelines are cumbersome at best, and change long-standing Board practice regarding deferral of a Board charge to an alternative dispute resolution procedure. Such guidelines certainly have the potential to interfere with the deferral process and cause an unneeded burden on both employers and unions. Further, such initiative presents additional legal risks, particularly to employers and has the potential to result in a fewer number of matters being deferred to arbitration. The Federal Mediation and Conciliation Services ("FMCS"), the American Arbitration Association, and other neutral bodies that assist parties in resolving labor disputes may wish to comment on this initiative. Further, the Office of The General Counsel's greatly expanded use of Section 10(j) injunctions has resulted in unnecessary additional investigation time being expended by the Regional Offices of the Board, causing not only

[3] The trend of Board case intake has clearly decreased over recent years. I do note, however, there was a slight increase of 5% in total case intake by the Board during fiscal year 2010 as well as ten percent increase in representation cases. *See Solomon Reports NLRB FY 2010 Intake Rose; Representation Cases Up 10 Percent*, 07 DAILY LAB. REP. (BNA) A-1 (Jan. 11, 2011).

an inappropriate diminution of Agency resources, but also an unnecessary burden on employers in responding to such requests. One wonders if this approach is designed, in part, to "chill" employer responses to unfair labor practice charges and especially to force small businesses that may not understand the limits of the Board General Counsel's authority under Section 10(j), to prematurely enter into settlements.

* The Board, to my knowledge to date, has failed to publicly embrace President Obama's January 18, 2011, Executive Order (Executive Order 13563), which stated as its primary goal, the objective of improving regulations and regulatory review. Specific provisions of such Executive Order not only require executive agencies to review existing regulations, but also require such agencies to conduct open, transparent rulemaking and to carefully balance the public health, welfare and other considerations against the need to protect economic growth, competitiveness and job creation. Finally, such Executive Order places a particular emphasis on agencies to engage in a cost-benefit analysis when proposing new initiatives in rules and regulations. While administrative agencies are not directly subject to such Executive Order, the Office of Management and Budget ("OMB") on February 2, 2011, requested that independent agencies, such as the NLRB, also comply with the President's Executive Order. The United States Chamber of Commerce has also made such a request to various federal agencies and, hopefully, the NLRB will favorably respond to such a request. It will be interesting to see if the Board makes a meaningful and substantive response to the requirements of President Obama's January 18, 2011, Executive Order.

Record of the Obama Board

The term of the Obama Board started with the confirmation of President Obama's nominees, Democrat Mark Pearce and Republican Brian Hayes on June 22, 2010, and the President's recess appointment of Democrat Craig Becker on March 27, 2010. Members Pearce and Becker joined Board Chairman Wilma Liebman, also a Democrat, to form what has become a three Member majority consisting of Chairman Liebman and Members Becker and Pearce for the major initiatives and rulemaking discussed in this testimony. During a portion of the time that the Obama Board has been in place former Chairman and Board Member Peter Schaumber, a Republican nominee of President Bush, served on the Board. When Member Schaumber's term expired in August 2010, he was not renominated by the President. The fifth statutorily authorized position on the Board – a Republican position – remains vacant with the President's nominee, Terry Flynn, awaiting Senate confirmation.[4] Finally, the important position of General Counsel to the Board remains vacant, with the President's nominee for the position, Lafe Solomon, serving as Acting General Counsel and awaiting Senate confirmation.

[4] The terms of the current NLRB Members expire as follows: Chairman Liebman, August 27, 2011; Member Pearce, August 27, 2013; and Member Hayes, December 16, 2012. Unless confirmed, Member Becker's recess appointment will expire when the present Congress adjourns later this year. Member Becker was recently renominated by the President for a term to expire in December 2014. According to Congressional Research Service, it appears that the President can make successive recess appointments to the same or different vacant Board positions. However, the Office of Legal Counsel has opined that in such a circumstance, the recess appointee would be prohibited from being paid from the Treasury pursuant to 5 U.S.C. § 5503(a).

The Democrat majority on the Obama Board has been particularly active in the relatively short period it has been in place. Over the dissent of former Member Schaumber and/or present Member Hayes, the Board has issued the following decisions that either overturn precedent, substantially change the direction of the law under the NLRA, or change the direction of the Board though either APA rulemaking or rulemaking through case law adjudication:

- In *Eliason & Knuth of Arizona, Inc.*, 355 N.L.R.B. No. 159 (Aug. 27, 2010), and numerous related cases, a three-Member majority held that the posting of stationary banners at a secondary employer's job site was not "coercive"—despite that the banners read "Shame On [Employer]" and "Labor Dispute"—and thus not prohibited under the Act. The majority held that merely holding banners that did not obstruct ingress or egress, and were not accompanied by chanting, yelling, or movement, was not unlawful picketing. In dissent, both Members Schaumber and Hayes accused the majority of "rely[ing] on a strained definition of statutory language, and selective and ambiguous excerpts from the legislative history" to find the conduct lawful. According to the dissent, "[t]his new standard substantially augments union power, upsets the balance Congress sought to achieve, and, at a time of enormous economic distress and uncertainty, invites a dramatic increase in secondary boycott activity."

- In *J. Picini Flooring, Inc.*, 356 N.L.R.B. No. 9 (Oct. 22, 2010), a Board majority of Chairman Liebman and Members Becker and Pearce held that questions concerning whether a respondent customarily uses a particular electronic method in communicating with employees and whether electronic notice would be unduly burdensome and/or appropriate in a particular case, would be resolved at the compliance stage. In doing so, the Board overturned *International Business Machines Corp.*, 338 N.L.R.B. 966 (2003) and *Nordstrom, Inc.*, 347 N.L.R.B. 294 (2006), to the extent that they are inconsistent with *J. Picini Flooring, Inc.*. In *International Business Machines*, the Board denied the Union's request to review the General Counsel's refusal to consider at the compliance stage whether the company would have to post electronic notices. The Board held that the appropriate time to request electronic posting was before the administrative law judge or the Board. *Nordstrom*, too, refused to require electronic posting where the issue was not raised during the underlying hearing. Thus, in *J. Picini Flooring, Inc.*, the Board expanded the "heretofore...extraordinary remedy" of electronic posting "into a routine remedy." 356 N.L.R.B. No. 9 at *8 (Hayes, dissenting).

- In *Austal USA, LLC*, 356 N.L.R.B. No. 65 (Dec. 30, 2010), a panel made up of Board Chairman Liebman and Members Becker and Pearce, without a Republican Member, held that unfair labor practice allegations can be considered for setting aside an election even if the unfair labor practices were not specifically stated in the election objections. The Board held that its decision was consistent with cases after *Super Operating Corp.*, 133 N.L.R.B. 241 (1961) and that *Super Operating Corp.* was an "anomaly" that had never

expressly been overturned. Thus, *Super Operating Corp.*, which held that challenges to an election must be specifically stated in the election objections, is "effectively overruled" by *Austal USA*.

- In *Stabilus, Inc.*, 355 N.L.R.B. No. 61 (Aug. 27, 2010), the Board majority made up of Chairman Liebman and Member Becker, held that an employer violated the Act by prohibiting an employee from wearing T-shirts with union insignia during a certification election. Dissenting, Member Schaumber noted that the Board majority held "for the first time that the well-recognized right of employees to display union insignia extends to substituting a prounion T-shirt for a required company uniform." *Id.* at 7. Member Schaumber described *Stabilus* as "a radical rebalancing of the relevant interests and a sharp curtailment of legitimate management prerogatives."

Additionally, the Board majority of Chairman Liebman and Members Pearce and Becker, have engaged in a very aggressive rulemaking initiative with respect to requiring employers to post a new NLRA official notice. Such proposed rulemaking presents a number of issues. First, as noted by Member Hayes in his dissent, it is questionable whether the Board has the authority to engage in rulemaking to require notice posting, particularly where Congress has explicitly required notice posting in other statutes. "The absence of such express language in [the NLRA] is a strong indicator, if not dispositive, that the Board lacks the authority to impose such a requirement." 75 Fed. Reg. 80,410, 80,415 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104). Second, substantively, the notice only informs employees of some of their rights under federal labor law. For instance, there is no clear statement that employees have a right to refrain from joining a union or paying any dues in a right-to-work state. Nor is there any indication that employees have the right to file decertification petitions. Finally, there is no mention of an employee's right to remain nonmembers, paying only dues for representational activities under *Communications Workers v. Beck*, 373 U.S. 734 (1963). Indeed, in footnote five of the Notice of Proposed Rulemaking, the Board suggests that there is an affirmative duty under the NLRA for unions to notify employees of their *Beck* rights at various times during the employment relationship. However, I have found in my years of practice, it is exceptionally rare for a union to openly advertise the *Beck* rule, as apparently required by the Act.

Finally, the Board majority has in the context of case law adjudication avoided formal rulemaking under the APA and is engaging in indirect rulemaking by requesting *amicus* briefs from interested parties in the following areas:

- As I have already mentioned, the Board in *Roundy's, Inc.*, has engaged in overreaching to address issues that are not properly before the Board. By taking a case involving non-employee and third-party access issues and seemingly attempting to reverse the standard for discrimination as applied to employee access, the Board has gone far beyond the permissible limits of announcing new rules in adjudicatory matters.

- Likewise, in *Specialty Healthcare*, the Board even acknowledges that it is engaging in rulemaking via adjudication, writing that "we think it is evident that adjudication, which is subject to judicial review, provides for no less 'scrutiny and

broad-based review' than does rulemaking, *especially where interested parties are given clear notice of the issues and invited to file briefs.*" 356 N.L.R.B. No. 56 at 3 (emphasis added). While the Board engaged in rulemaking to address this issue with respect to the acute healthcare industry, it now finds a Notice and Invitation alone sufficient to address the same issue in not only the non-acute care industry, but in all industries. Such an approach, especially with less than a fully-confirmed complement of Board members, does not represent a sound public policy approach to these important issues.

- The same Board majority requested briefing in *Lamons Gasket Co.*, 355 N.L.R.B. No. 157 (Aug. 27, 2010) "to evaluate whether its decision in *Dana* [*Corp.*, 351 N.L.R.B. 434 (2007)] and the procedures developed to implement that decision have furthered the principles and policies underlying the Act." In *Dana Corp.*, the Board held that it would refuse to apply an election bar after a card-based recognition "unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition." 351 N.L.R.B. at 434. In the Notice and Invitation in *Lamons Gasket Co.*, the Board decried *Dana* as "a major departure from prior law and practice" and, as a result, sought comment on the parties experiences under *Dana.*

- Again, on the same day the same Board majority asked for briefing in *Lamons Gasket*, the Board also asked whether it should reverse *MV Transportation*, 337 N.L.R.B. 770 (2002), and return to the successor bar doctrine articulated in *St. Elizabeth Manor, Inc.*, 329 N.L.R.B. 341 (1999). *See* Notice and Invitation, *UGL-UNICCO Serv. Co.*, 355 N.L.R.B. No. 155 (Aug. 27, 2010). Under *MV Transportation*, "an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status." 337 N.L.R.B. at 770. Under *St. Elizabeth Manor, Inc.*, the presumption is irrebuttable, at least for a reasonable period of time. 329 N.L.R.B. at 344.

- Finally, in *Chicago Mathematics*, Case No. 13-RM-1768, the Board requested briefing on the issue of whether a charter school is a political subdivision within the meaning of section 2(2) of the Act and therefore exempt from the Board's jurisdiction. Although the primary issue in this case centers on scope of the Board's jurisdiction, it nevertheless is another example of the Board circumventing the formal APA rulemaking process and proceeding on indirect rulemaking through case law adjudication.

Under any objective definition the current Board majority with only one sitting Republican Member is engaged in an activist labor-oriented agenda. Irrespective of one's political party affiliation, academic perspective, or labor versus management viewpoint, this high degree of activism with only three Senate-confirmed Members, and in many of the above matters over the dissent of the lone Republican Member, establishes a dangerous precedent for an

Agency that already has been under substantial criticism from many quarters for being too "political" and not following a more judicial "*stare decisis*" approach to case law adjudication.[5] As noted above, only two confirmed Members of the Board are making important policy decisions for the Agency. If Republicans were in the majority at the Board with a third Republican member only sitting by a recess appointment, and the lone member of the other party consistently dissenting, clearly there would be expressions of concern and Democrat members of the Congress and representatives of organized labor would loudly state their objections to the manner in which the Board would be proceeding.

In addition to the above noted policy concerns there are a number of substantive legal questions posed by the direction in which the Board majority appears to be headed. These concerns are clearly evidenced not only in the Board's proposed rule with respect to the posting of NLRA notices in the workplace, but also in the two previously noted cases where the Board appears to engage indirectly in rulemaking through case law adjudication, the *Roundy's* case and the *Specialty Healthcare* case.

Employer Property Rights and Third-Party Access – *Roundy's Inc. and Milwaukee Building & Construction Trades Council, AFL-CIO*

In *Roundy's*, the Board issued in its Notice and Invitation to File Briefs a request for interested parties to address what standard should define discrimination with respect to non-employee access to employer private property and, further, what bearing a decision issued by the Bush Board in *Register Guard*, 351 N.L.R.B. 110 (2007), had on the matter. The *Register Guard* decision, a decision in which Chairman Liebman dissented, involved employee access and solicitation issues. The factual situation in the *Roundy's* case does not involve employee access or solicitation issues – the *Roundy's* case involves non-employee (union representative) access rights to employer private property. It appears that the current Board majority clearly would like to reverse *Register Guard's* definition of discrimination and is straining to find a way to place in front of it the issues addressed in the *Register Guard* decision. *Register Guard* held that *in the context of employees*, an employer is required to compare groups that seek access to its private property on the basis of whether they are of the same type and that an employer will not be found guilty of an unfair labor practice unless it engages in a practice of treating "equals" discriminatorily. It is inappropriate for the Board to try to get to the holding in *Register Guard*

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[5] *See The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights Joint Hearing Before the H. Subcomm. on Health, Employment, Labor & Pensions, H. Comm. on Educ. & Labor, Employment & Workplace Safety S. Subcomm., & S. Comm. on Health, Educ., Labor & Pensions*, 110th Cong. 27 (2007) (statement of Wilma Liebman, Member, National Labor Relations Board) (describing the Bush II Board's recent activities: "Some might say that the current board's decisions simply reflect the typical change of orientation that occurs with every new administration. But something different is going on now. More see [sic] change than seesaw, not just tilting the seesaw, but tearing up the playground. It was not surprising, perhaps, when the current board reflectively overruled a series of decisions by the prior Clinton board. But it has also reached back decades in some cases to reverse long-standing precedent going to the core values of this statute."); id. at 66 – Letter from Law Professors Regarding National Labor Relations Board ("Recent decisions by the National Labor Relations Board reflect an ominous new direction for American labor law. By overturning precedent and establishing new rules, *often going beyond what the parties have briefed or requested*, the Board has regularly denied or impaired the very statutory rights it is charged with protecting....") (emphasis added).

through the *Roundy's* case. Stated alternatively, there is no case or controversy before the Board in the *Roundy's* case involving employee access rights.

Roundy's addresses the proper standard for the Board to apply in cases involving alleged discrimination with respect to non-employee access to employer private property, and whether the Board should adhere to its prior holding in *Sandusky Mall Co.*, 329 N.L.R.B. 613 (1999)—an approach that has been rejected by numerous U.S. Courts of Appeals.[6] In *Sandusky Mall*, the Board held that an employer violated section 8(a)(1) of the Act by denying union access to its property while permitting other individuals, charitable groups, and organizations to use its premises for various activities. However, the U.S. Court of Appeals for the Sixth Circuit reversed the Board in *Sandusky Mall*, holding that "discrimination [] among comparable groups or activities and...the activities themselves under consideration must be comparable." Nonetheless, the Board's Notice and Invitation in *Roundy's* not only asks whether the Board should continue to apply *Sandusky Mall* and, if not, what standard should apply, but also calls for a discussion of the definition and application of "discrimination" in *Register Guard*, an employee access and solicitation case.

Although *Roundy's* is not a proper procedural vehicle for reversing *Register Guard*, that opinion plays an important role in this area. Because the Supreme Court has consistently held that the access rights of non-employees to employer property derive only from the organizational rights of that employer's employees, *Register Guard*—which addresses employee access—establishes the minimum threshold for a finding of discrimination in non-employee access cases. Indeed, the Board cannot logically or reasonably adopt a standard of discrimination regarding non-employees or third parties in *Roundy's* that is more exacting than, or that is in conflict with, the standard the Board recently established with respect to employee access rights in *Register Guard.*

Thus, while employers may hope that the Board will abandon *Sandusky Mall* and square its precedent with the U.S. Supreme Court's decisions in *Babcock*, *Lechmere*, and their progeny, the more likely result is foreshadowed in Chairman Liebman's *Register Guard* dissent. There, Chairman Liebman advocated a standard which in essence requires an employer to treat groups and organizations that are not the same on an equal basis. Under Chairman Liebman's approach, the Girl Scouts and the United Autoworkers Union presumably would be the same type of organizations. Accordingly, if an employer permitted the Girl Scouts entry to its private property it would also have to grant access to the UAW. In such hypothetical, if the employer said no to the UAW, it would be guilty of discrimination under the NLRA. By adopting Chairman Liebman's *Register Guard* dissent, the Board would not only interfere with fundamental private property rights of employers, but also be in conflict with the Supreme Court's decisions in *Babcock* and *Lechmere*.

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[6] *See, e.g., Salmon Run Shopping Center LLC v. NLRB*, 534 F.3d 108, 116-17 (2d Cir. 2008) (holding, in order to engage in discrimination, "the private property owner must treat a nonemployee who seeks to communicate on a subject protected by section 7 less favorably than another person communicating on the same subject") (emphasis added); *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 691 (6th Cir. 2001) (denying enforcement of Board order).

While there are numerous reasons why such a holding would be troubling to employers, allow me to highlight two from my private practice experience. *First*, with respect to health care providers, hospitals have long been recognized by both the Board and the courts to have a special patient-care mission that can be harmed by unchecked third party access, solicitation and distribution. Most notably, the Supreme Court has affirmed the importance of a tranquil environment in a hospital and the need to avoid unnecessary disruptions caused by organizational activities. To that end, the Court has upheld restrictions on solicitations and distribution – *even among hospital employees* – and has further stated that rules restricting appeals to patients and visitors would be justified by patient care concerns. *See, e.g., NLRB v. Baptist Hosp.*, 442 U.S. 773, 778 (1979) (noting greater leniency for solicitation rules in hospitals because of "the need to avoid disruption of patient care and disturbance of patients"); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring) ("Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed."). To the extent that *Sandusky Mall* or the *Register Guard* dissent would require hospitals to "open the door" to trespassory union activities without regard to its impact on patient care, they would conflict with U.S. Court of Appeals and Supreme Court precedent and should not be allowed to stand. *Second*, retail employers also regularly face challenges in this area in that if they permit community groups such as the Girl Scouts or the Salvation Army to have access to the premises under the *Sandusky Mall* rationale, they would be subject to unfair labor practice charges if they thereafter prohibited unions and other non-charitable groups similar access.

If the Board continues to apply the *Sandusky Mall* analysis to access issues, an employer assumes the risk of being required to open its doors to any third-party solicitation or distribution even if the groups are not comparable. This approach would appear to give little to no attention to the *criteria* an employer (such as a hospital or retail store) applies in permitting third-party groups to solicit and distribute on its premises, and whether such criteria – rather than a blanket assumption of arbitrariness or anti-union animus – might explain why an employer would choose to open its doors to certain charitable groups but close its doors to for-profit groups and labor organizations. For example, if permitting charitable solicitations for health causes or allowing support groups to meet on a hospital campus is viewed as "opening the door" to all third party groups including union canvassing, then hospitals are faced with a dilemma: either to close their doors to all important activities that benefit their communities, or permit unfettered third party and union access to their campuses. Attached as Exhibits "C" and "D" are the *amicus* briefs filed with the Board in the *Roundy's* case by Human Resource Policy Association, Society for Human Resources Management, and the American Hospital Association that provide in greater detail the troubling approach that the Board majority appears to be taking in this area.

Defining The Proper Standard For Unit Determination Issues – *Specialty Healthcare & Rehabilitation Center of Mobile and United Steelworkers, District 9*

An equally aggressive example of disregarding a standard of only addressing case and controversies that are actually before the Board can be found in the Board's recent Notice and

Invitation in *Specialty Healthcare, Inc.*, 356 N.L.R.B. No. 56 (Dec. 22, 2010). Here the Board majority rejects proceeding under the APA and injects unraised issues into the case. Question 7 in its Notice to Interested Parties asks whether units of all employees performing the same job at a single facility for **all** employers covered by the NLRA should, as a general matter, be presumptively appropriate.

Like *Roundy's*, *Specialty Healthcare* also could lead to the reversal of decades of labor law precedent by replacing the widely accepted "community of interest" test in determining which groups of employees can vote or petition to form a bargaining unit. This long-established standard may be replaced with a "job description" unit approach with a presumption that such a unit is appropriate if the unit includes all employees performing the same job at a single facility. And again like *Roundy's*, it appears that the Board's result may have been foreshadowed in another prior Board dissent, this time authored by Member Becker. In *Wheeling Island Gaming*, Member Becker dissented and wrote that "one clearly rational and appropriate unit is all employees doing the same job and working in the same facility. Absent compelling evidence that such a unit is inappropriate, the Board should hold that it is an appropriate unit." 355 N.L.R.B. No. 127 (Aug. 27, 2010), Slip Op. at 2. The similarities between his views in *Wheeling Island Gaming* and the questions posed in the Notice and Invitation cannot be ignored.

Based on my experience in various industries, it would be highly disruptive for the Board to adopt a rule that would lead to the proliferation of extremely narrow units. While I would be happy to discuss the consequences of such a rule with respect to the non-acute health care industry,[7] I would like to focus my *Specialty Healthcare* comments on the Board's attempts to change the community of interest standard for important unit determination tests for all employers subject to the Board's jurisdiction.[8] I believe that the Board's consideration of changing the standard across industries is inappropriate for at least three reasons.

First, it is unclear whether the Board even has the authority to make this decision through adjudication, rather than rulemaking under the APA. While the Supreme Court has recognized that the NLRB may announce new principles in adjudicative proceedings and that the decision to rely on adjudication or rulemaking belongs to the Board, the Court has also noted that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

Relying on *Bell Aerospace Co.*, the U.S. Court of Appeals for the Ninth Circuit in *Pfaff v. U.S. Department of Housing*, 88 F.3d 739 (9th Cir. 1996), struck down a rule announced in an

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[7] It should be noted that Chairman Liebman did not agree with Member Becker's dissent in the *Wheeling Island Gaming* case and joined with Member Schaumber to find the requested single job description unit – a unit of poker dealers – to be inappropriate.

[8] There appears to be no substantive or empirical evidence to support the need to engage in rulemaking in the first instance with respect to non-acute care healthcare facilities. A preliminary review of the representative cases involving unit determinations for this industry suggests that very few cases go to a hearing and that a great number of such representation cases are not litigated in any fashion. Further, it would appear that many of the voting unit eligibility issues are resolved by stipulation of the parties. Second, my experience in practicing in this area would support such a conclusion.

adjudication conducted by the U.S. Department of Housing. The Court wrote that an agency could abuse its discretion where:

> the new standard, adopted by adjudication, *departs radically from the agency's previous interpretation of the law*, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and *where the new standard is very broad and general in scope and prospective in application.*

Id. at 748 (emphasis added). The Ninth Circuit further stated that:

> We do not mean to suggest that an agency can never adapt its interpretation of a statute in the light of experience, or that administrative adjudication is a presumptively invalid means to make such changes. Adjudication has distinct advantages over rulemaking *when the agency lacks sufficient experience with a particular problem to warrant ossifying a tentative judgment into a black letter rule*; still other solutions may be so specialized and variable as to defy accommodation in a rule. . . . The disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency's authority. While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable per se, *this problem grows more acute the further the new rule deviates from the one before it. Adjudication is best suited to incremental developments to the law, rather than great leaps forward.* The APA contains numerous mechanisms, such as the notice and comment rulemaking procedure, by which the public is given notice of proposed changes before they occur. For this reason, the Supreme Court has concluded that rulemaking is generally a better, fairer, and more effective method of announcing a new rule than ad hoc adjudication.

Id. at fn. 4 (emphasis added) (quotation and citation omitted).

Though I recognize that the Board has the statutory discretion to decide whether to proceed in rulemaking or adjudication, I suggest as a matter of sound public policy that if the Board majority decides to consider reviewing such a long standing and well-established principle of labor law (which I submit there is no reason to do), it should first wait until a full five-member Board has been confirmed and then proceed through formal rulemaking with the safeguards provided for in the APA. For instance, had the Board proceeded in this fashion, it could have properly raised, in the first instance, whether any change at all is necessary with respect to voting or bargaining unit determinations outside the non-acute health care industry instead of proceeding in a "back door" approach by injecting such an important question into an otherwise rather routine bargaining unit determination case such as *Specialty Healthcare*.

The Board is certainly familiar with the proper way to proceed with respect to rulemaking. When the Board addressed unit determination issues in acute health care facilities, it engaged in a formal rulemaking process that included three hearings in Washington D.C., San Francisco and Chicago, and even then a fourth hearing was held at the request of interested parties. I was involved in that process and there the Board gave great attention to detail and assembled data and experiences from many and varied interests. At these hearings, 47 witnesses appeared and offered over 1,000 pages of testimony. *See* 53 Fed. Reg. 33,900, 33,900 (Sept. 1, 1988) (to be codified at 29 C.F.R. pt. 103). One would hope that at a minimum the Board would take those same precautions before addressing this important issue not only for the acute care industry, but before considering changing the law of how unit determinations are made for the remainder of the nation's industries.

Second, Member Becker's position in *Wheeling Island Gaming* raises serious concerns in relation to section 9(c)(5) of the Act, which states that "[i]n determining whether a unit is appropriate...the extent to which the employees have organized shall not be controlling." *See* 29 U.S.C. § 159(c)(5). While section 9(c)(5) does not prevent the Board from considering extent of organizing as one factor in determining whether a unit is appropriate, the Board has also noted that section 9(c)(5) "was intended to prevent fragmentation of appropriate units into smaller appropriate units." *Overnite Transportation Co.*, 322 N.L.R.B. 723 (1996); 93 Cong. Rec. 6444 (1947) (statement of Senator Taft) ("Subsection 9(c)(5) adopts the House amendment written to discourage the Board from finding a bargaining unit to be appropriate even though such unit was only a fragment of what would ordinarily be appropriate, simply on the extent of organizing.").

If *Specialty Healthcare* results in the Board adopting Member Becker's *Wheeling Island Gaming* position, it will almost certainly result in highly fragmented bargaining units with a corresponding adverse impact not only on employee rights but also a great damage to the day-to-day operations of many and varied business interests. Member Becker's view focuses on "the perspective of employees seeking to exercise their rights" and requires the Board to honor those wishes "absent compelling evidence that [the petitioned-for] unit is inappropriate." 355 N.L.R.B. No. 157 Slip Op. at 2. However, in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), the Fourth Circuit held that the Board violated section 9(c)(5) by refusing to include technicians in a petitioned-for unit because they did not share "such a community of interest...as to mandate their inclusion in the unit." The Court noted that by presuming the proposed unit was appropriate unless there was evidence to the contrary, "the Board effectively accorded controlling weight to the extent of union organization. This is because the union will propose the unit it has organized." *Id.* at 1581 (internal quotation and citation omitted). Member Becker's proposal in *Wheeling Island Gaming* fails for the same reason.

Finally, from a practical perspective, adopting Member Becker's "job description" bargaining or voting unit approach could result in a number of presumably unintended consequences for the workplace. For employers, having their workforce divided into multiple narrow job description units would lead to a state of constant bargaining, including the frequent drama and potential work disruption attendant to collective bargaining. Further, once a contract is achieved, supervisors and managers will have the added burden of attempting to properly administer numerous contracts, with different provisions, applicable to a narrow subset of the workforce. Inevitably, errors in contract administration will be made, resulting in increased costs

in time and money handling grievances, arbitrations, and, ultimately, unfair labor practice charges.

But the employer is not the only party burdened by Member Becker's position on unit determination issues. A rule allowing for narrower units also creates barriers for employees. For instance, presumptively approving a petitioned-for unit solely along job description lines may deny employees excluded from the petition the ability to organize because, though they share a community of interest with the petitioned-for unit, they may not form a viable unit on their own. Allowing overly narrow units also creates the risk of balkanizing the workforce by forming communities of interest based on such unit determination, rather than the underlying functional reality of the positions. But perhaps most troublesome is the freezing effect that fragmented units would have on employee advancement. When the varied collective bargaining agreements inevitably have differing provisions for transfers, promotions, seniority, position posting and preference, etc., it would be extremely difficult for an employee whose unit is limited to his or her unique job description to develop his or her career.

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Thus, both *Roundy's* and *Specialty Healthcare* exemplify concerns of the Board's decision to inject issues into cases when they are not presented by the facts, and to decide those issues through adjudication, without the protections of the APA and to so proceed with less than a full complement of confirmed members.

Finally, allow me to briefly discuss the Board's Office of The General Counsel and its increasingly aggressive and burdensome litigation policies.

The Office of The General Counsel's Initiatives

In recent months, the Office of The General Counsel has taken two positions with the potential to cause serious policy, procedural, and operational problems. First, on January 20, 2011, the Acting General Counsel issued Memorandum GC 11-05, entitled "Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases." Under the Board's long-standing prior deferral procedures, the Board would consider deferring to an arbitrator's award where the grievance submitted to arbitration involved alleged violations of both the NLRA and the applicable collective bargaining agreement. In such cases, the Board would defer to the award if the contract and statutory issues were "factually parallel" and the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice." *See Olin Corp.*, 268 N.L.R.B. 573, 573-74 (1984). Going forward, the Acting General Counsel has instructed the Regional Offices to engage in an investigation of the statutory allegation before agreeing to defer and, if the Region finds arguable merit in the allegation, defer to arbitration. *See* Memorandum GC 11-05 at 10.

Under the new procedures, even if the employer agrees to settle the grievance, the NLRB will not defer to a pre-arbitral-award grievance settlement unless the parties intend the settlement to cover the unfair labor practices. As part of that review, the Board will examine all circumstances, including "(1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risk

of litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements"). *See* Memorandum GC 11-05 at fn. 24 (citing *Independent Stave Co.*, 287 N.L.R.B. 740, 743 (1987)).

Assuming the Region, after the above analysis, agrees to defer and the arbitration produces an award, deferral is still not guaranteed. And, now far different from the standard under *Olin*, the party seeking deferral—rather than the party seeking to avoid deferral—must prove not only that all of the NLRA issues were presented to the arbitrator, but that the arbitrator "correctly enunciated the applicable statutory principles and applied them in deciding the issue" and that "the arbitral award is not clearly repugnant to the Act." In effect, the Acting General Counsel has provided virtually an automatic appeal to the Board for a merits review of any arbitrator's decision that involves NLRA issues.

Understandably, employers are concerned that grievances will now contain statutory allegations as a matter of course. If the Board decides to defer, any settlement or arbitral award made thereafter will be subject to the Board's review. This is particularly troublesome if a matter has been successfully litigated before an arbitrator—under a procedure mutually agreed upon by the parties through collective bargaining—and is then forced to litigate a second time to defend the arbitrator's award before the Board. Indeed, this burden may be substantial, given that, in cases that are deferred, it appears the Board's General Counsel will have already found arguable merit in the complaining parties' position.

This initiative may not only undermine the desirability of arbitration—an approach embraced by unions and employers alike—but cause all parties to expend additional resources and perhaps discourage the use of the arbitration process as a means to resolve workplace disputes. It would not be surprising to see the Federal Mediation and Conciliation Service, the American Arbitration Association, and other neutral resolution groups requesting that the Acting General Counsel reexamine this initiative.

Second, the Office of The General Counsel has exponentially increased the number of Section 10(j) petitions that it is filing, particularly in cases related to union organizing. The increase in 10(j) cases is directly related to Acting General Counsel Lafe Solomon's GC Memorandum 10-07, titled "Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns." In that memo, the Acting General Counsel indicated his intention to increasingly use Section 10(j) petitions as a way to "nip in the bud" any possible retaliation or coercion by employers being organized. The Board also recently created an entire section of its webpage summarizing the 10(j) injunction activity taken since September 23, 2010. That information reveals that for the period between September 23, 2010 and February 4, 2011, the General Counsel's Office has authorized 26 petitions, compared to the 23 petitions filed in all of Fiscal Year 2009.[9]

[9] The Board's website, www.nlrb.gov, was substantially revised on February 9, 2011. It appears that the webpage dedicated to 10(j) petitions no longer exists.

While there may be merit in the Board's General Counsel requesting injunctive relief in certain cases, the Acting General Counsel's initiatives with respect to Section 10(j) certainly appears to be overbroad and as a practical matter has placed considerable additional pressure on the Board's Regional Offices to unnecessarily expand the scope of investigations in a number of unfair labor practice charge cases that, under past practice of both Republican and Democrat General Counsels, would not have merited even a cursory 10(j) analysis. Indeed, the Office of The General Counsel is on a pace to more than double the number of injunctions that this Office has historically sought. I submit that there are no doubt more productive ways to use the Agency's resources. Further, this initiative also has placed a strain on employer resources by requiring them to respond to Section 10(j) "threats" where the underlying facts of such cases merit no 10(j) consideration. I submit that there are no doubt more productive ways to use the Agency's resources.

In conclusion, I have not meant to overstate the concerns of employers regarding the above matters. Perhaps when the *Roundy's*, *Specialty Healthcare*, and other pending important decisions before the Board are decided, concerns of dramatic reversals of precedent and inappropriate rulemaking will be proven to be unfounded. I hope that this is the outcome regarding such matters. The Board, however, has put these issues in play particularly by proceeding with only two confirmed Board Members and over the strong dissent of the lone Republican Board Member. Further, the exceptionally accelerated manner in which the Board is proceeding, and in certain instances bypassing the procedural safeguards of the APA, raise serious questions. Hopefully, the Board will properly utilize its resources, including being totally transparent regarding its intentions with respect to off-site electronic voting. Finally, hopefully the Board also will embrace the objectives and desired outcomes of President Obama's January 18, 2011 Executive Order and not only curtail certain of its initiatives but also reexamine all of its rules and regulations.

Mr. Chairman, I would be pleased to answer any questions you or your colleagues may have regarding my testimony.