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## At Age 70, Should the Wagner Act Be Retired - A Response to Professor Dannin

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# At Age 70, Should the Wagner Act Be Retired?

## A Response to Professor Dannin

Jonathan P. Hiatt, Craig Becker†

I. TAPPING THE CORE VALUES OF FEDERAL LABOR LAW .....	293
II. A DOSE OF REALISM: THE BUSH NLRB .....	295
A. <i>The Last Four Years</i> .....	295
B. <i>What is to Come</i> .....	298
1. <i>Narrowing the Paths to Representation</i> .....	299
2. <i>Insuring the Union is a Stranger</i> .....	301
III. CONCLUSION.....	306

Reduced to its essence, the message of Professor Ellen Dannin’s paper “NLRA Values, Labor Values, American Values” is: don’t give up on the Wagner Act.<sup>1</sup> Professor Dannin advocates a litigation strategy that is directed at reminding the federal courts and the National Labor Relations Board of the core values embodied in the Act.

### I.

#### TAPPING THE CORE VALUES OF FEDERAL LABOR LAW

On the surface, it is hard to disagree with either of these suggestions, although on the heels of a rash of anti-worker, anti-union decisions issued by the Board in the past six months, there is a good deal of debate within the union-side bar at present concerning whether unions and employees should make any affirmative use of the Board’s processes at this time. Nevertheless, taking a broader view, the labor movement has been pursuing

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1. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

a litigation strategy intended to draw out and animate the Act's fundamental principles for the past 70 years.

In important cases, the AFL-CIO and its affiliated national unions attempt to ensure that factual records are developed at the administrative hearing stage which speak to the Act's core values. For example, in the more than decade-long debate over the supervisory status of nurses, the question has twice reached the Supreme Court<sup>2</sup> as a highly abstract one of construction of isolated phrases in the statutory definition of supervisor, making it all too easy for the Court to ignore the actual conditions under which nurses work in today's health care system—conditions Congress surely intended nurses to be able to ameliorate through collective bargaining. In the last round of this debate, when the Board solicited briefs from interested parties in two nurse cases, AFL-CIO affiliates that represent nurses filed a brief that attempted to paint a picture of the hard, dangerous, and emotionally draining work performed by nurses today.<sup>3</sup> The AFL-CIO and its affiliated unions also work hard to convince local unions and individual members to settle cases that threaten to establish harmful precedents because they arise out of bad facts. When the Board's members have had long experience with labor relations and draw on that experience rather than ideological predisposition to decide cases, we have vigorously urged judicial deference to the Board.

That said, however, we are also in full agreement with Professor Dannin's central thesis that the construction of the Act has been deformed by the Board's and the courts' lack of fidelity to the values that underlay its enactment and that are embodied in its terms. Moreover, over the 70 years since the passage of the Wagner Act there have been two significant sets of anti-union amendments.<sup>4</sup> Thus, our appeal to the original values is complicated by shifting congressional sentiments and scores of Supreme Court and Court of Appeals decisions interpreting the Act, as well as seven decades of NLRB jurisprudence. When union lawyers appear before the Board or a Court of Appeals today, they are a bit like anthropologists, if not

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2. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001); *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571 (1994).

3. Brief for Petitioners International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and United Steelworkers of America and of Amici American Federation of State, County and Municipal Employees; American Federation of Teachers; Communication Workers of America; International Brotherhood of Teamsters; International Union of Operating Engineers; Laborer International Union of North America; Office and Professional Employees International Union; Service Employees International Union; and United Food and Commercial Workers, *Beverly Enters.-Minn., Inc.*, Nos. 18-RC-16415 & 16416 (Aug. 20, 2002) & *Oakwood Healthcare, Inc.*, No. 7-RC-22141 (Feb. 4, 2002) (on file with authors).

4. The Labor Management Relations (Taft-Hartley) Act of 1947 and the Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 (codified at, and amending 29 U.S.C. §§ 141-144, 167, 172-87 (2000)) are codified together with the original Act at 29 U.S.C. §§ 141-187 (2000).

paleontologists, having to dig through the layers of sediment and other deposits to reach the original purposes of the Act.

## II.

### A DOSE OF REALISM: THE BUSH NLRB

Yet it is not only the passage of time that complicates Professor Dannin's project, its admirable vision must also be tempered with a dose of legal realism. This is true in two respects. First, judges and members of the Board absorb their values from the wider society and those societal values are reflected in their decisions. The revitalization of the Act's animating values must therefore be a broader project, not limited to judicial and administrative forums. The process of education about the importance of unions and collective bargaining must reach out to the public at large, as the AFL-CIO has undertaken to do through its national Voice at Work program.

Second, and perhaps the more bitter dose of legal realism to swallow, the distortion of the NLRA is not only due to a shift in values that are unconsciously brought into courtrooms and into the chambers of the Board, but also to a more self-conscious, unprincipled attack on unions. Raw politics is at issue here. We are afraid that even were we able to bring back Louis Brandeis to write another Brandeis brief to the current NLRB, documenting the exploitation of workers in various sectors of our economy, their expressed desire for union representation, their inability to secure representation through Board supervised elections, and the real economic, social and political benefits of providing representation to these workers, it would still not convince a majority of this Board to take action to alleviate the frustration of these workers with the current legal structure or prevent the majority from continuing a course of action that is effectively placing workplace representation beyond the reach of American workers.

#### *A. The Last Four Years*

During the eight years of the Clinton Administration, the Board was balanced with two management lawyers, two union lawyers, and a distinguished neutral as chair, first Professor William Gould of Stanford Law School, and then career NLRB official John Truesdale. President Bush has departed from this tradition and appointed a majority of management partisans with a long-time employer attorney as chair. As a result, increasingly over the past year, this partisan Board has drawn out isolated strands of the political history embodied in the amended National Labor Relations Act—the Labor-Management Relations Act—in an effort to further limit the extent of unionization in this country.

Consider, simply as one example, the current Board's drastic limitation of the coverage of the Act itself. In just over four months, the Board issued decisions reversing existing law and denying employee status, and thus all protections under the Act, to four distinct categories of employees: graduate assistants being paid to teach classes or perform research,<sup>5</sup> handicapped individuals working as janitors,<sup>6</sup> artists' models who provide their own robes or slippers,<sup>7</sup> and, effectively, temporary employees working jointly for a supplier employer and a user client absent consent from both employers.<sup>8</sup> Moreover, this contraction of the Act's coverage is unfortunately likely to be multiplied many fold when the Board decides three much-awaited cases applying the supervisory exclusion to a broad array of employees with minor authority over others, such as certain categories of nurses.<sup>9</sup>

Note also just a few of this Board's other anti-worker decisions issued over roughly the same time period, limiting employees' section 7 rights, weakening penalties for employers who commit unfair labor practices, and otherwise expanding employer rights. In *Holling Press, Inc.*,<sup>10</sup> this Board held that an employee's solicitation of a co-worker to testify before a state agency in support of her sexual harassment complaint was not "for mutual aid or protection" and was thus unprotected against retaliation. In *Alexandria Clinic*,<sup>11</sup> this Board held that 29 nurses were lawfully discharged for starting a strike less than four hours after the time specified in their union's required 10-day notice to the employer. In *First Legal Support Services*,<sup>12</sup> this Board held that special remedies were unwarranted despite egregious employer retaliation during an organizing campaign where workers who tried to form a union were fired, threatened with discharge, made to sign independent contractor agreements, and offered bribes if they would give up their support of the union. In *Hialeah Hospital*,<sup>13</sup> this Board rejected an Administrative Law Judge's recommendation of a *Gissel* bargaining order in a case where high level officers of the employer embarked on a course of discharge, threats to discharge, surveillance, and other illegal conduct within hours of learning of a union's organizing effort.

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5. Brown University, 342 N.L.R.B. No. 42 (July 13, 2004).

6. Brevard Achievement Ctr., 342 N.L.R.B. No. 101 (Sept. 10, 2004).

7. Pa. Acad. of Fine Arts, 343 N.L.R.B. No. 93 (Dec. 6, 2004).

8. Oakwood Care Ctr., 343 N.L.R.B. No. 76 (Nov. 19, 2004).

9. Oakwood Healthcare, Inc., No. 7-RC-22141 (Feb. 4, 2002); Beverly Enters.-Minn., No. 18-RC-16415 and No. 18-RC-16416 (Aug. 20, 2002); Croft Metals, Inc., No. 15-RC-8393 (Aug. 7, 2002), available at [http://www.nlr.gov/nlr/about/foia/Oakwood KY River/15-RC-8393\(SD\).pdf](http://www.nlr.gov/nlr/about/foia/Oakwood%20KY%20River/15-RC-8393(SD).pdf).

10. 343 N.L.R.B. No. 45 (Oct. 15, 2004).

11. 339 N.L.R.B. No. 162 (Aug. 21, 2003).

12. 342 N.L.R.B. No. 29 (June 30, 2004).

13. 343 N.L.R.B. No. 52 (Oct. 29, 2004).

In *Crown Bolt, Inc.*,<sup>14</sup> this Board held that an employer's threats to close a facility if employees voted for a union are not presumed disseminated throughout a bargaining unit. In *Bunting Bearings Corp.*<sup>15</sup> and *Midwest Generation*,<sup>16</sup> this Board found no violation of the Act when employers selectively locked-out only the portions of their workforces that the employers perceived to contain the strongest supporters of the union. Finally, in *Borgess Medical Center*,<sup>17</sup> the Board refused to require an employer that had unlawfully withheld grievance-related information from a union to turn over the information, reasoning that by the time of the Board's decision the grievance had been arbitrated so the traditional remedy was not merited. This onslaught on workers' rights occurred over just a 15 month period, with all but one of the decisions being issued in the four months ending in November 2004.

This extraordinary attack on employee rights cannot be ascribed to the customary swing of the pendulum after a change of administration—a modest jurisprudential “correction” that would be expected as new Board appointees express the policy choices of their administration in those areas where Congress has delegated such authority to the Board. Note, for example, that the *Borgess* decision reversed a 20 year-old decision in *Bloomsburg Craftsmen, Inc.*,<sup>18</sup> written by two Republican Members, Dotson and Johansen, and a Democratic Member, Dennis. Similarly, *Crown Bolt* overruled *General Stencils, Inc.*,<sup>19</sup> a 1972 decision authored by Republican Member Kennedy and Democratic Member Fanning, as well as *Coach and Equipment Sales Corp.*,<sup>20</sup> which was joined by Republican Members Murphy, Jenkins and Walther. Even some of the Clinton Board decisions reversed by the current Board in this recent wave of administrative activism were joined by Republican members. Republican Member Hurtgen, for example, joined *New York University*,<sup>21</sup> which was reversed in *Brown University*. In *Harborside Healthcare, Inc.*,<sup>22</sup> the current Board held that solicitation of authorization cards by supervisors, even where the employer is openly anti-union, is inherently coercive absent mitigating circumstances. The decision reversed a rule set forth in *Sutter Roseville Medical Center*<sup>23</sup> and followed in *Millsboro Nursing & Rehabilitation Center, Inc.*<sup>24</sup> that such

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14. 343 N.L.R.B. No. 86 (Nov. 29, 2004).

15. 343 N.L.R.B. No. 64 (Oct. 29, 2004).

16. 343 N.L.R.B. No. 12 (Sept. 30, 2004).

17. 342 N.L.R.B. No. 109 (Sept. 20, 2004).

18. 276 N.L.R.B. 400, 400 n.2, 405 (1985).

19. 195 N.L.R.B. 1109 (1972).

20. 228 N.L.R.B. 440 (1977).

21. 332 N.L.R.B. No. 111 (Oct. 31, 2000).

22. 343 N.L.R.B. No. 100 (Dec. 8, 2004).

23. 324 N.L.R.B. 218 (1997).

24. 327 N.L.R.B. 879 (1999).

solicitation is not objectionable unless it contains the seeds of “potential reprisal, punishment or intimidation.”<sup>25</sup> The later, 1999 opinion was joined by Republican Member Brame. Finally, in *Shaw’s Supermarkets*,<sup>26</sup> the Board granted review of a Regional Director’s dismissal of an employer’s petition for an election, and in so doing questioned the continued validity of *Kroger Co.*,<sup>27</sup> a case decided by two Republican Members, Jacobs and Murphy, and one Democratic Member, Fanning.<sup>28</sup>

### B. What is to Come

Looking ahead, however, one might reasonably fear that the most radical, partisan attack on workers and their unions is just about to begin. The Board has seemingly embraced a litigation strategy initiated by the National Right to Work Legal Defense Foundation, an organization that purports to represent employees but was founded by employers in the wake of the Taft-Hartley Act and is funded by the most anti-union fringe of the employer community,<sup>29</sup> an organization so ideologically driven that Chief Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit held that its lawyers are “not an adequate litigation representative” of class of a employees represented by a union.<sup>30</sup> In the two sets of pending cases discussed below, many of them instigated by Right to Work, we can anticipate an effort to place union representation effectively beyond the

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25. 324 N.L.R.B. at 219 (quoting *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980)).

26. 343 N.L.R.B. No. 105 (Dec. 8, 2004); see *infra* note 36 and accompanying text.

27. 219 N.L.R.B. 388 (1975); see *infra* notes 52-53 and accompanying text.

28. This pattern of partisan decision making extends even to routine procedural rulings. In *Dana Corp.*, 341 N.L.R.B. No. 150 (June 7, 2004), discussed *infra* note 35, the Board granted review in two cases raising the question of whether an employer’s voluntary recognition of a union (after a showing of majority support for the union among employees) must be honored for a reasonable period of time before it can be challenged by a decertification petition. The grant of review placed in question an unbroken line of precedent dating as far back as the 1966 decision in *Keller Plastics E., Inc.*, 157 N.L.R.B. 583 (1966). On June 14, 2004, the Board issued a notice inviting interested parties to file briefs in the case on or before July 15, 2004. The Board’s own General Counsel, also appointed by President Bush, requested an extension of the briefing schedule, stating, “the current deadline allows substantially inadequate time to fully analyze and brief the complex issues involved in these matters.” Motion of the General Counsel for an Extension of Time at 7, *Dana Corp.*, 341 N.L.R.B. No. 150 (June 7, 2004) (No. 8-RD-1976). The union party in the case, the United Automobile Workers of America, also requested an extension due to the fact that the entire union, including its legal department, was shut-down for two weeks during the auto industry’s annual summer shut-down, ending on the day briefs were due. The AFL-CIO as amicus curiae also requested a brief, 14 day extension of time. By a 3-2 vote, along strict party lines, the Board denied all the requests. Nevertheless, today, after the reelection of President Bush, almost a year after the inflexible deadline for filing briefs, clearly enforced because of the uncertainty created by the then upcoming election, the cases have not been decided.

29. FINE, CHAIN, & GOLD, SETTING THE RECORD STRAIGHT: A REPORT ON THE NATIONAL RIGHT TO WORK COMMITTEE AND THE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC. (1991) (describing formation and funding of Committee and Foundation).

30. *Gilpin v. Am. Fed. Of State, County & Mun. Employees*, 875 F.2d 1310, 1313 (7th Cir. 1989).

reach of most American workers by distorting or ignoring the fundamental values Congress embraced when it adopted the Act.

### *1. Narrowing the Paths to Representation*

Professor Dannin describes the democratic values embodied in the NLRA. Senator Wagner drew on those values by inserting the mechanism of the election into the Act, but only as a means of forcing recalcitrant employers to recognize their employees' choice of representative. The election was never meant to be and has never been the exclusive means of obtaining workplace representation. Indeed, the Act both recognizes and grants primacy to voluntary recognition when it provides that employees may petition for an election only when their "employer declines to recognize their representative . . . ."<sup>31</sup> For the entire 70 years that the Act has been in effect, there have been two accepted paths to workplace representation—NLRB elections and voluntary recognition grounded on a showing of majority support for a union. Turning the law's entire structure on its head, the current Board is threatening to use the rhetoric of employee free choice and symbolism of elections to effectively prevent workplace representation.

Employer agreements to recognize unions and engage in collective bargaining based on evidence of majority support other than the results of an election have been enforced since before the Wagner Act. From its inception, the Board has held that "[e]mployers and unions do not require Board certifications as a prerequisite to collective bargaining if recognition of a majority representative suffices for their purposes."<sup>32</sup> Indeed, in a 1949 dissent, two Board members noted, "There are thousands of employers who have voluntarily recognized and bargained with representatives of their employees."<sup>33</sup> In 1970, another Republican administration's Board recognized that "[t]o hold otherwise would be to make a mockery of the Board's orderly election processes—whose essential function is to resolve *legitimate* disputes concerning the desires of a majority of the employer's employees to be represented by a union . . . . [T]he Board should not permit its election processes to be used as a loophole in the law through which an employer may lawfully delay his bargaining obligation . . . ."<sup>34</sup>

Yet this is exactly what the current Board is threatening to do. In two cases now pending before the Board, it has suggested that it may lower the

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31. 29 U.S.C. § 159(c)(1)(A)(i) (2000).

32. *General Box Co.*, 82 N.L.R.B. 678, 683 (1949).

33. *Monroe Co-operative Oil Co.*, 86 N.L.R.B. 95, 99 (1949) (Murdock and Gray, Members, dissenting), quoting *Advance Pattern Co.*, 80 N.L.R.B. 29, 40 (1948) (Murdock and Gray, Members, dissenting).

34. *Redmond Plastics, Inc.*, 187 N.L.R.B. 487, 488-89 (1970) (emphasis added).

status and value of voluntary recognition.<sup>35</sup> The Board has signaled that it may eliminate the insulated period running for “a reasonable period of time” after voluntary recognition during which the parties are given an opportunity to bargain pursuant to the express wishes of a majority of employees free of the pressure of the threat of withdrawal of recognition or a decertification petition. The Board has even questioned the very legality of voluntary recognition agreements in its recent decision in *Shaw’s Supermarkets*,<sup>36</sup> stating, “we have some policy concerns as to whether an employer can waive the employees’ fundamental right to vote in a Board election.”<sup>37</sup> This off-hand comment in an interim decision simply granting review of the dismissal of an employer’s RM petition and remanding for a hearing, prior to full briefing by the parties, and without the traditional notice and opportunity for comment the Board has provided the broader labor-management community when it is considering a major shift in policy, signals that the Board is prepared to issue what would be the most radical and legally unfounded decision in its history—a signal that has already sent shock waves through the labor-management community.

The promise of representation is already largely a dead letter for the vast majority of workers covered by the Act. They enter unorganized workplaces and never experience any organizing effort. They never vote in any election. They are never confronted by a choice and never get to make a choice. This is because under current law all workplaces are created without representation and remain so until workers or unions change the status quo.

That this lack of actual choice results in 90% of employees being unrepresented is problematic as a matter of public policy because there is a high level of satisfaction within the shrinking sector represented by unions. Richard Freeman and Joel Rogers have found that among those currently represented by unions, nearly 90% say they would vote for the union if an election were held tomorrow while only 8% say they would vote against the union.<sup>38</sup> Despite the well-documented flaws in the election system and the tremendous advantages enjoyed by employers opposing unionization, unions consistently win around 50% of those elections that do occur — 57.8% in 2003.<sup>39</sup> Survey data also suggests that many more employees want representation than are able to obtain it. A February 2005 survey by Hart Research Associates found that 57% of workers stated that they would

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35. Dana Corp., 341 N.L.R.B. No. 150 (June 7, 2004).

36. 343 N.L.R.B. No. 105, 2004 (Dec. 8, 2004), WL 2899843.

37. *Id.* at \*2.

38. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 69 (1999).

39. *Trends: Number of Elections Decreased in 2003; Union Win Rate Increases for Seventh Year*, Daily Lab. Rep. (BNA), at C-1 (June 8, 2004).

definitely or probably vote for a union if an election were held tomorrow in their workplace, compared to only 35% who said they would vote no.<sup>40</sup>

The current Board appears to be intent on narrowing even further the means through which workers can enter the increasingly distant land of representation. To do so based on an expressed concern for employee free choice would be a dishonest distortion of that statutory policy.

## 2. *Insuring the Union is a Stranger*

Professor Dannin also describes the statutory value of peaceful dispute resolution, what she calls “the procedure of friendly adjustment of disputes.”<sup>41</sup> Again spurred by the National Right to Work Foundation, the Board’s General Counsel has placed a number of critical questions before the Board concerning exactly when those procedures can begin. The answers to these questions will also be critical to the nature of the free choice guaranteed employees by the Act.

In these cases, the General Counsel is urging the Board to revive and expand the moribund doctrine of the 1964 decision in *Majestic Weaving*.<sup>42</sup> In that case the Board overruled its prior decision in *Julius Resnick, Inc.*<sup>43</sup> As read by the General Counsel, *Majestic Weaving* held that it violates section 8(a)(2) of the Act for an employer and union to agree to terms and conditions of employment that will apply after a majority of employees support the union, even if the agreement is conditional on a showing of such support.

The decision rested solely on the Supreme Court’s decision in *ILGWU v. NLRB (Bernhard-Altman Texas Corp.)*.<sup>44</sup> Yet the decision in *Bernhard-Altman* was clearly not controlling as the Board acknowledged before the Second Circuit.<sup>45</sup> In *Bernhard-Altman*, the employer granted the union the status of exclusive representative before it obtained majority support. The illegality of the action rested on the fact that it presented the employees with “a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative.”<sup>46</sup> This action had the

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40. PETER D. HART RESEARCH ASSOCIATES, *THE PUBLIC VIEW OF UNIONS* (2005).

41. Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 *BERKELEY J. EMP. & LAB. L.* 223 (2005).

42. 147 N.L.R.B. 859 (1964). The General Counsel’s argument is made in Counsel for the General Counsel’s Brief in Support of Exceptions to the Decision of the Administrative Law Judge, *Dana Corp.*, Cases Nos. 7-CA-46965, 7-CA-47078, 7-CA-47079, 7-CB-14083, 7-CB-14119, 7-CB-14120 (June 5, 2005) (on file with author).

43. 86 N.L.R.B. 38 (1949).

44. 366 U.S. 731 (1961).

45. *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 859 (2d Cir. 1966).

46. *Bernhard-Altman*, 366 U.S. at 736 (quoting *ILGWU v. NLRB (Bernhard-Altman Tex. Corp.)*, 280 F.2d 616, 621 (D.C. Cir. 1960)).

effect of “impressing that agent upon the nonconsenting majority.”<sup>47</sup> In a *Majestic Weaving* situation, in contrast, there is no such *fait accompli* because the negotiated contract is conditional on a showing of majority support. The Board’s statement in *Majestic Weaving* that “the fact that [the employer] conditioned the actual signing of a contract with Local 815 on the latter achieving a majority at the ‘conclusion’ of negotiations is immaterial”<sup>48</sup> makes no sense.

Moreover, the employer in *Bernhard Altman* did not simply negotiate a contract with the union but recognized it as the exclusive representative. The Court found that “the violation which the Board found was the grant by the employer of exclusive representation status to a minority union.”<sup>49</sup> Indeed, the Court itself held “the exclusive representation provision is the vice in the agreement.”<sup>50</sup> Again, in a *Majestic Weaving* situation, there is no grant of exclusive status. If another union requests that the employer agree to the same terms also conditional on a showing of majority support, the employer is free to enter into such a parallel agreement. The Board’s statement in *Majestic Weaving* that it could “see no difference between the two [cases] in the effect upon employee rights”<sup>51</sup> is simply baseless. In one case, employees have no choice. In the other, they make a clear and informed choice knowing precisely what representation will bring them. It is for these reasons that the General Counsel’s reading of *Majestic Weaving* is misguided.

While virtually no cases have followed *Majestic Weaving* during the past 40 years, an extensive line of cases has arisen based on the 1975 decision in *Kroger Co.*<sup>52</sup> that is in direct tension with the General Counsel’s reading of *Majestic Weaving*. Under the *Kroger* line, the Board has enforced agreements arising out of an existing bargaining unit providing that the employer will recognize the union and apply the terms of the existing agreement in additional units upon a showing of majority support in those units. While the Board has never expressly explained why the two lines of cases result in different outcomes or precisely what the critical factual distinctions are between the two types of cases, it appears that the distinction rests on prior recognition of the union in at least one unit in the *Kroger* line of cases. But this distinction does not justify the different holdings—it has no bearing on the freedom of the choice made by employees in the additional units. In *Kroger*, the Board not only enforced the “additional store clause[,]” it held that “national labor policy favors

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47. *Id.* at 737.

48. 147 N.L.R.B. 859, 860 (1964).

49. 366 U.S. at 736.

50. *Id.* at 736-37.

51. 147 N.L.R.B. at 860.

52. 219 N.L.R.B. 388 (1975).

enforcing their validity.”<sup>53</sup> The same is true whether or not the union is already recognized in one unit.

It is in all parties’ interest to allow bargaining and binding agreements prior to recognition so long as any agreement is conditional on majority support. Such prerecognition bargaining allows an informed choice by *both* employers and employees and allows for non-conflictual dispute resolution not to be deferred until after a typically bitter campaign over representation has already made it impossible.

For employees, knowledge about what representation would mean is increasingly important as unionized workplaces are increasingly isolated and as fewer and fewer workers have personal knowledge about unions either through their own or family members’ experiences in a unionized workplace. In other words, today, workers not only face the well-known difficulties of accessing the Act’s system of representation through the electoral mechanism, but find it increasingly difficult to even envision what representation would be like. The law allows employers to make dire predictions of what will happen if employees choose unionization,<sup>54</sup> but prevents the parties from reaching an agreement so that employees will actually know what it would be like.<sup>55</sup> As Professor Samuel Estreicher has observed:

Nor does the present regime invariably promote employee free-choice. Workers . . . must decide on union representation against a backdrop of uncertainty. All too often they are voting without an understanding of the union’s bargaining objectives and acumen, its effectiveness in contract administration, and its fit with the particular culture of the firm.<sup>56</sup>

Because “the law conditions bargaining authority on a prior showing of majority support,” Estreicher points out, it leads to “workers casting lots with limited information.”<sup>57</sup>

Indeed, it is precisely the foreignness of representation, the incumbent and dominant status of a lack of representation, that the General Counsel

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53. *Id.* at 388-89.

54. We could cite many examples, but one recent example is *Savers*, 337 N.L.R.B. 1039 (2002), in which the Board held that a supervisor’s statement that “if the union ever did come in, the store wasn’t making enough money to . . . pay off higher wages, and it would be a possibility that everybody would lose their job” was held to be a permissible prediction of future events. *Id.* at 1039.

55. In its decision refusing to enforce *Majestic Weaving* on procedural grounds, the Second Circuit suggested that the Board’s decision could be read to permit pre-recognition bargaining so long as employees are informed of any resulting agreement and that the application of the agreement is wholly conditional on majority support of union representation. “We cannot tell, for example, how far the new rule depends on knowledge of the negotiation by the employees, or whether a full disclosure of the condition to them would save the situation.” *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 862 n.4 (2d Cir. 1966).

56. Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 835-36 (1996).

57. *Id.* at 838.

and current Board are attempting to preserve and extend. In explaining why he authorized issuance of a complaint in one case placing *Majestic Weaving* issues before the Board, the General Counsel made clear what interest will be served by the extension of this misguided rule. Because of the conditional agreements concerning terms and conditions of employment, the General Counsel explained, “the union is no longer ‘merely an outsider seeking entrance.’”<sup>58</sup> According to the General Counsel, the law may require that unionization be a stranger to employees at the very time they make their “free” choice.

Employers, too, may be forced to make decisions about what position to take on the union question from behind a legally imposed veil of ignorance. Two respected management lawyers asked in 1987:

But where does this leave an employer who learns that a union is trying to organize its employees? Typically, the employer’s response will be to launch an aggressive anti-union campaign. Most often, the employer will respond in this manner without any knowledge of the union’s goals and without any attempt to ascertain the union’s position. Such a response is understandable, particularly in view of the legal quagmire that an employer may find itself in if it is not aware of the somewhat hazy boundaries of the law.<sup>59</sup>

But this is bad business. As these management lawyers explain:

[A] relationship with the union is one of the most significant business transactions in which an employer can engage. If that relationship is not successful, the results can [be] disastrous. As in any other potential business relationship, the employer should be able to talk to the other side and perhaps even reach some preliminary understandings before it determines whether it wants to avoid such a relationship or not . . . .

. . . [B]efore embarking on a course of action—whether pro-union, anti-union or neutrality, employers should have enough information to allow for an intelligent decision . . . .

. . . [T]he value of engaging in preliminary discussions with unions should not be overlooked. Meeting with a union early on to ascertain its goals and representation philosophy enables the employer to more realistically assess (1) the potential impact of the union on the employer’s

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58. Press Release, NLRB General Counsel Arthur Rosenfeld Issues Report on Recent Case Developments 11 (Nov. 17, 2004) (quoting *NLRB v. Golden Age Beverage*, 415 F.2d 26, 30 (5th Cir. 1969)), available at <http://www.nlr.gov/nlr/press/releases/r2544.pdf>.

59. Stanley J. Brown & Henry Morris, Jr., *Pre-recognition Discussions with Unions*, in U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION: SECOND INTERIM REPORT—A WORKING DOCUMENT 98, 99 (Bureau of Labor-Mgmt. and Cooperative Programs, U.S. Dep’t of Labor, 1988).

operations; and (2) the wisdom of expending company resources to campaign against the union.<sup>60</sup>

Thus, these representatives of employers recommend the following sensible steps whose legality the current Board has cast into question:

First, employers should establish at the outset that they only intend to engage in exploratory discussions, not in collective bargaining. Second, they should make clear that they will not extend recognition to the union unless and until it demonstrates majority support. Third, any understandings reached with the union during preliminary discussions should expressly be contingent on the union's demonstration of majority support. Fourth, all such agreements should unequivocally reaffirm the employees' right freely to select the representative of their choice.<sup>61</sup>

The mutual benefit of the type of preliminary and conditional "friendly adjustment of disputes," which the Board is threatening to foreclose, can be illustrated in a number of industries, but here we use just one that is of growing significance in our aging society—nursing homes. In the last several decades the industry has been in chaos. Reports of resident neglect and abuse are common. Wages are low and benefits almost nonexistent leading to chronic turnover and understaffing. Nursing home workers have injury rates two and one-half times the national average and their rate of injury has risen by over 50% since 1983.<sup>62</sup> And owners are also suffering as illustrated by a string of bankruptcies filings. Labor relations in the industry are as sick as each of its constituent parts, as illustrated by the fact that Beverly Enterprises, the nation's largest chain of proprietary homes, was the first employer since the notorious J.P. Stevens to be subject to a nationwide, broad cease and desist order issued by the Board.<sup>63</sup> Despite virulent and often unlawful employer opposition, nursing home employees repeatedly vote in favor of union representation. But with insufficient union density, inadequate government reimbursement rates, and the financial woes of the industry, it has been difficult for individual unions to produce significant gains in collective bargaining with single homes. This is an industry badly in need of the "friendly adjustment of disputes" promised by the Act.

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60. *Id.* In another context, the Board has recognized that preliminary discussions between employers and unions further the policies of the Act and that it would be inconsistent with those policies if employers were "compelled to simply deny the union the opportunity to express its objectives, or further still, to avoid altogether any contact with the union." *Terracon, Inc.*, 339 N.L.R.B. No. 35, (June 6, 2003), 2003 WL 21353736, at \*6.

61. *Id.* at 103.

62. Occupational Safety & Health Admin., U.S. Dep't of Labor, Nursing Home and Personal Care Facilities: Possible Hazards and Solutions, <http://www.osha.gov/SLTC/nursinghome/solutions.html> (last visited Apr. 7, 2005); United Food & Commercial Workers, Nursing Homes: Danger in the Workplace, [http://www.ufcw.org/workplace\\_connections/health\\_care/safety\\_health\\_news\\_and\\_facts/nursing\\_homes.cfm](http://www.ufcw.org/workplace_connections/health_care/safety_health_news_and_facts/nursing_homes.cfm) (last visited Apr. 7, 2005).

63. See *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817 (7th Cir. 2000).

We can envision a meeting of employers and unions in the industry in which they agree that they should act cooperatively to increase government funding; to an equitable sharing of the increased revenue among owners and workers; to innovative solutions to increase retention, reduce understaffing, and prevent injuries to residents and workers; and to avoid the waste of scarce resources on bitter election campaigns by permitting employees to decide whether to be represented by a union through a card check, knowing exactly what it will mean if they do, and without employer opposition. We can envision a no-strike guarantee that goes into effect immediately upon the majority choosing to be represented when the terms of the prenegotiated, but conditional contract becomes effective, thereby insuring the continuity of care so critical to elderly consumers, as recognized by Congress when it adopted the healthcare amendments to the Act in 1974.<sup>64</sup> We can envision this rational approach to labor-management relations that truly advances the friendly adjustment of disputes, but only if the current Board does not misread and extend *Majestic Weaving*.<sup>65</sup>

Congress had no intention of placing employees and employers behind a veil of ignorance when they make critical decisions about representation. The current Board has the opportunity to eliminate the impediment created by *Majestic Weaving* to relationships that are beneficial to employees, employers, and unions. However, spurred by the ideologically driven Right to Work Foundation, the Board appears poised to expand *Majestic Weaving* and even to overrule *Kroger* despite the fact that there is no coherent explanation of how an expansive construction of *Majestic Weaving* serves the policies underlying the Act.

### III. CONCLUSION

Under the guise of preserving the purity of employees' choice, the Board is threatening drastically to restrict the manner in which employees

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64. See Pub. L. 93-360, 88 Stat. 395 (1974), and, in particular, the section codified at 29 U.S.C. § 158(g) requiring ten-days written notice of a strike at a healthcare facility.

65. Apart from the fact that *Majestic Weaving*, properly understood, involved actual recognition of the union prior to its obtaining majority support, *see supra* text accompanying notes 44-51, the case involved four other critical facts: (1) agreement on a complete contract, (2) at a time when the union did not represent any employees of the employer and (3) a rival union had substantial support in the unit and, finally, (4) the commission of other, independent violations of section 8(a)(2). Not only do some of the cases in which complaints have issued raise the question of whether the *Majestic Weaving* doctrine should apply when there is no recognition and the application of a contract and grant of recognition is expressly conditioned on majority support, others could result in an expansion of the doctrine to apply despite the absence of each of the facts present in the original case. Such cases question, for example, whether a union and employer may ever lawfully agree (still on a conditional basis, of course) that a no-strike commitment will apply during the post-recognition negotiation process, or that interest arbitration procedures will be used in the event the parties are not able to amicably reach a first collective bargaining agreement.

can choose to be represented. And under the guise of preventing employers from influencing employees' choice, the Board is threatening to prevent both employees and employers from knowing what the choice will actually mean. "At Age 70, Should the Wagner Act be Retired?" is the normative question posed by our Symposium. A simple descriptive answer is that, even as we write, the current Board is, in effect, imposing that very retirement on the Act.

