

6-1-2013

## Administering Labor Law in Political Turbulence

Lafe Solomon

Follow this and additional works at: <http://scholarship.law.berkeley.edu/bjell>

---

### Recommended Citation

Lafe Solomon, *Administering Labor Law in Political Turbulence*, 34 BERKELEY J. EMP. & LAB. L. (2013).  
Available at: <http://scholarship.law.berkeley.edu/bjell/vol34/iss2/4>

### Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z382W62>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# David E. Feller Memorial Labor Law Lecture

April 2, 2013

## Administering Labor Law in Political Turbulence

Lafe Solomon<sup>†</sup>

I am honored to have been asked to give a lecture in honor of one of the true pillars of labor law—Dave Feller. I unfortunately never met Dave, but it's not my fault. My application to Boalt Law School was rejected, and I went to Tulane instead. But I asked Mori Rubin, the Director of Region 31 in Los Angeles, who was one of Dave's students, to tell me about him, and I would like to read to you part of her response:

Professor Feller literally dug, trenched, laid foundations and built the skyscrapers of the developing labor law. He was not a bystander observing from academia. Dave's students will be the first to tell you that he was a brilliant thinker whose sharp wit and insights made studying labor law the highlight of many of their wonderful experiences at Boalt.

Imagine your law school professor launching into an examination of the seminal cases in his field by describing the oral arguments he made before the Supreme Court with reenactments of various justices' questions and his responses. All of this was conveyed with

---

<sup>†</sup> Lafe Solomon served as the Acting General Counsel of the NLRB between June 2010 and November 2013. He began his career with the Agency as a field examiner in 1972. After obtaining his J.D. from Tulane University in 1976, he returned to the NLRB as an attorney in the Office of Appeals. He has worked in various roles at the Agency ever since. This piece was prepared as an annual lecture in honor of David E. Feller and has been edited for publication.

chuckles and a sparkle in his eye. It is no wonder that Dave Feller inspired and exercised profound influence over generations of labor lawyers who have gone on to shape and mold labor law in the 21st century.<sup>1</sup>

I am proud that one such labor lawyer is our very own Regional Director Mori Rubin.

When my friend David Rosenfeld extended the invitation to me to give this lecture, he suggested that I talk about my tenure as acting General Counsel in light of the unprecedented scrutiny that my actions and the Agency have received from Congress and the media. I have taken David's suggestion to heart, and I am going to give you my side of the story. I apologize in advance that I may at times sound self-indulgent. But it's my story, and I'm sticking to it.

I was appointed acting General Counsel by President Obama on June 23, 2010. I guess I should have known I was in for rocky times as my first day was the day after the Supreme Court issued its decision in *New Process Steel*, invalidating the actions of the two-Member Board.<sup>2</sup> Those first few weeks were filled with meetings with my staff and with the Board, which had by then grown to its full complement of five Members, to chart a course through these uncharted waters. As the Board's lawyer, I had to consider many alternatives and answer such questions as: (1) should I recommend to the Board that they re-decide the 600 cases that the two-Member Board had decided?; and (2) what is the legal effect, if any, of intervening court opinions enforcing an otherwise invalid 2-Member Board decision? In the end, the Board took the approach of re-deciding only those cases which were still in some stage of litigation, which was about 100 cases.<sup>3</sup> It turned out that the parties in the remaining 500 cases did not seek to have their cases re-opened or re-litigated.<sup>4</sup> Their disputes had been resolved, and even if they had lost the dispute, they were satisfied that they had had their day in court, and the Board decision had given them the closure that they were looking for.

My political awakening arose in November 2010. The voters in four states—Arizona, South Carolina, South Dakota, and Utah—passed amendments to their state constitutions that mandated elections before

---

1. Email from Mori Rubin, NLRB Regional Director Region 31, to Lafe Solomon, NLRB Acting General Counsel (March 12, 2013) (on file with author).

2. *New Process Steel v. NLRB*, 560 U.S. 674 (2010).

3. Marcia Coyle, *NLRB Will Rehear Nearly 100 Cases*, BLOG OF LEGALTIMES (July 6, 2010, 3:17 PM), <http://legaltimes.typepad.com/blt/2010/07/nlrw-will-rehear-nearly-100-cases.html>.

4. *See id.* (quoting NLRB statement indicating that it was uncertain whether cases not challenged in federal courts could be contested).

workers in those states could have union representation.<sup>5</sup> By eliminating the possibility of voluntary recognition of unions by employers—which had long been recognized as lawful under the National Labor Relations Act<sup>6</sup>—these amendments were preempted by the Act, and all legal scholars and practitioners who voiced opinions agreed.<sup>7</sup> In fact, I thought it was a fairly straightforward legal question.

Nevertheless, when we contacted the four attorneys general, gave them our legal analysis, and asked them to issue opinions acknowledging that the amendments were unenforceable as preempted, what we received was a political response: that the voters of those states had spoken clearly and decisively and that any attempt by my office to interfere with the will of the voters was an unwarranted and unnecessary intrusion by a federal agency in states' rights.<sup>8</sup> And I personally was summoned to meetings with two of the senators from those states who predicted that my pursuing this litigation would have a negative effect on my confirmation process. Nevertheless, we filed suit in Arizona because I thought it was the right thing to do under the law.<sup>9</sup> And although the judge in Arizona agreed that the amendment could be preempted, he declined to enjoin it until the state or an employer attempted to apply the amendment in a manner inconsistent with the NLRA.<sup>10</sup>

The political fallout from the four-state litigation was but a prelude to what would follow shortly: on April 20, 2011, I authorized the issuance of a

---

5. *Election Center*, CNN (Nov. 15, 2010, 1:10 PM), <http://www.cnn.com/ELECTION/2010/results/ballot.measures/#>; Arizona Proposition 113 (2010), available at <http://www.azsos.gov/election/2010/info/pubpamphlet/english/prop113.htm>; South Carolina Amendment 2, H. 3305, 118th Sess. (2010), available at [http://www.scstatehouse.gov/sess118\\_2009-2010/bills/3305.htm](http://www.scstatehouse.gov/sess118_2009-2010/bills/3305.htm); Utah Amendment A, H.J.R. 8, 2009 Gen. Sess. (2009), available at <http://le.utah.gov/~2009/bills/hbillenr/hjr008.pdf>; South Dakota Amendment K, S.J.R. 3, 2010 Leg. Assemb., 85th Sess. (2010), available at <http://legis.state.sd.us/sessions/2010/Bills/SJR3ENR.pdf>.

6. See generally James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824-32 (2005) (describing history and process of employer neutrality agreements and card check provisions).

7. See, e.g., Ben James, *States to Play Hardball in NLRB Secret Ballot Fight*, LAW 360 (Feb. 2, 2011, 7:47 PM), <http://www.law360.com/articles/221147/states-to-play-hardball-in-nlr-secret-ballot-fight> (reporting practitioners' predictions about NLRA's preemptive effect).

8. Letter from Alan Wilson, Mark L. Shurtleff, Tom Home & Marty J. Jackley, Att'ys. Gen. of S.C., Utah, Ariz. & S.D., to Lafe E. Solomon, Acting Gen. Counsel, NLRB (Jan. 27, 2011), available at [web.archive.org/web/20130402040917/http://attorneygeneral.utah.gov/cmsdocuments/nlr012711.sol.pdf](http://web.archive.org/web/20130402040917/http://attorneygeneral.utah.gov/cmsdocuments/nlr012711.sol.pdf).

9. See Complaint, *NLRB v. Arizona*, No. CV 11-00913-PHX-FJM, 2012 WL 3848400 (D. Ariz. Sept. 5, 2012).

10. See *NLRB v. Arizona*, No. CV 11-00913-PHX-FJM, 2012 WL 3848400, at \*7 (D. Ariz. Sept. 5, 2012) ("It is possible that state litigation invoking Article 2 § 37 may impermissibly clash with the NLRB's jurisdiction to resolve disputes over employee recognition, conduct secret ballot elections, and address unfair labor practices.")

complaint against the Boeing Company,<sup>11</sup> and my work life as I knew it has never been the same. As background, up until 2010, Boeing assembled all of its airplanes in the Seattle area, including all of its newly-designed 787s, the Dreamliner.<sup>12</sup> In 2009, Boeing decided to build a second production line of 787s in order to build an additional three planes a month because it was years behind schedule and wanted to ramp up production.<sup>13</sup> In a highly-publicized decision, it decided to build this second line in a new plant in North Charleston, South Carolina rather than to expand its existing facility in Washington State.<sup>14</sup> The motivation for this decision was the basis of the complaint. We maintained, based on the evidence that the Regional Office gathered during its extensive investigation, including Boeing managements public statements reported in the press, that the reason for the move was that Boeing was retaliating against its unionized employees for having engaged in costly strikes in the past and for being able to engage in strikes in the future.<sup>15</sup> The NLRA specifically protects employees' right to strike and specifically prohibits a company's interference with and retaliation for their exercising that right.<sup>16</sup> A point worth emphasizing, which was almost completely overlooked in the public dialogue that ensued, is that I, as General Counsel, have a responsibility to issue a complaint when there is reasonable cause to believe that a violation has occurred to put that issue before the Board and the courts.<sup>17</sup>

Although I knew from the outset that issuance of a complaint against Boeing, the United States' largest exporter,<sup>18</sup> was not to be undertaken lightly, I could not have predicted the distortions of my actions in the press or the personal attacks that ensued. I was told by a U. S. Senator on the eve of my issuance of the complaint that the political fallout to me and to the Agency would be huge and that he would come out with "guns a-blazin." I was denounced, along with the complaint, on the floors of the House and

---

11. *National Labor Relations Board Issues Complaint Against Boeing Company*, NAT'L LABOR RELATIONS BD. (Apr. 20, 2011), <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-issues-complaint-against-boeing-company>.

12. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, to Richard L. Ahearn, Reg'l Dir., Region 19, at 3, 10-12 (Apr. 11, 2011), <http://www.nlr.gov/cases-decisions/advice-memos> (select 2011; then follow "The Boeing Company" hyperlink).

13. *Id.* at 2, 29.

14. *See id.* at 10-12.

15. *Boeing Complaint Background*, NAT'L LABOR RELATIONS BD., <http://web.archive.org/web/20120916201459/http://www.nlr.gov/node/1809> (last visited Oct. 31, 2013).

16. 29 U.S.C. §§ 157-58.

17. *See* Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the NLRB, 20 Fed. Reg. 2175 (Apr. 1, 1955) (current version at 77 Fed. Reg. 45696 (Aug. 1, 2012)), available at [http://www.nlr.gov/sites/default/files/documents/254/delegationofauthotgce\\_0.pdf](http://www.nlr.gov/sites/default/files/documents/254/delegationofauthotgce_0.pdf).

18. Loren Thompson, *Boeing Accelerates Shift of Workers Away from Puget Sound Birthplace*, FORBES (June 6, 2013, 12:07 PM), <http://www.forbes.com/sites/lorenthompson/2013/06/06/boeing-accelerates-shift-of-workers-away-from-puget-sound-base/>.

Senate, and I have been publicly labeled as a thug, a rogue, a lackey of “Big Labor,” a job-killer, a pinhead and un-American, just to name a few.<sup>19</sup>

Also, I was forced to appear at a Congressional hearing in Charleston for two hours of grilling by Republican House Members.<sup>20</sup> I was the first General Counsel since 1940 to receive a subpoena from Congress, and I was threatened with being held in contempt of Congress,<sup>21</sup> a felony, and with the institution of disbarment proceedings for refusing to turn over our investigative file in the Boeing case pursuant to that subpoena.<sup>22</sup>

For the eight months that the Boeing litigation was ongoing, I cooperated with the House Committee’s request for information and attempted to negotiate a compromise that would allow the Committee to have access to the information they sought and allow me to protect the integrity of our enforcement proceeding against Boeing. I sought only to protect our trial strategy, the identity and affidavits of witnesses, and our ability to deliberate about the ongoing trial against Boeing. And for the year following the settlement of the Boeing case in December 2011, I continued the process to provide the Committee with the documents they were seeking.

That process consisted of teams of NLRB employees, who spent over 1,000 hours engaged in discussion, collection and review of over 150,000 documents from the field and headquarters, as well as production of over 50,000 pages of documents. Many of these documents were email communications spanning a two-year period of time collected from close to forty Agency employees considered custodians of the requested records, including myself and my immediate staff in the Office of General Counsel.

During my tenure, we have also been inundated with expansive Freedom of Information Act requests related not only to the Boeing case, but to other legal decisions I have made, such as the four-State litigation I have discussed; and we followed a similarly tedious and time-consuming process in answering all of these requests. Suffice it to say, just about every communication between me, as acting General Counsel, and anyone else in

---

19. See, e.g., Kyung M. Song, *NLRB’s Top Lawyer Still Feels Fallout from Boeing, Union Case*, SEATTLE TIMES, Feb. 19, 2012, [http://seattletimes.com/html/business/technology/2017551565\\_solomon20.html](http://seattletimes.com/html/business/technology/2017551565_solomon20.html) (describing situation in which Mr. Solomon was called a “job killer”).

20. *Acting General Counsel Lafe Solomon Testifies at Oversight Committee Field Hearing in South Carolina*, NAT’L LABOR RELATIONS BD. (June 17, 2011), <http://www.nlr.gov/news-outreach/news-story/acting-general-counsel-lafe-solomon-testifies-oversight-committee-field>.

21. *Acting General Counsel Responds to Congressional Subpoena*, NAT’L LABOR RELATIONS BD. (Aug. 8, 2011), <http://www.nlr.gov/news-outreach/news-story/acting-general-counsel-responds-congressional-subpoena>.

22. See Joan Biskupic & Kim Dixon, *Lying to Congress Tough to Prove in Any Scandal*, HUFFINGTON POST (May 23, 2013, 12:59 AM), [http://www.huffingtonpost.com/2013/05/23/lying-to-congress\\_n\\_3323691.html](http://www.huffingtonpost.com/2013/05/23/lying-to-congress_n_3323691.html) (describing criminal charges for perjury, obstruction, or making false statements to Congress).

the Agency and outside the Agency, including my family members, has been searched and scrutinized at the request of Congress and various political groups.

Our case against Boeing was settled by the parties in December 2011, but the political attacks have continued. Dozens of bills have been introduced in Congress to defund or abolish the Agency and to amend the Act to undo any actions that have been taken by me or by the Board.<sup>23</sup> In fact, just weeks ago, an amendment to the FY2013 budget bill was introduced in the Senate to defund the Agency.<sup>24</sup> Meanwhile, in the House, a bill passed out of Committee to shut the Board down pending resolution of the *Noel Canning* recess issue,<sup>25</sup> which I will discuss later.

As I previously stated, I am the first General Counsel since 1940 to receive a Congressional subpoena,<sup>26</sup> and the parallels between 1940 and today are remarkably similar. In 1940, unemployment was high (more than 8 million people were out of work), the national debt was high (almost \$43 billion) and wages for the average worker were low (the minimum wage was 30 cents and the average income was less than \$1,300).<sup>27</sup> The National Labor Relations Act, passed by Congress in 1935 as part of the New Deal, with the stated purpose of leveling the playing field between workers and management through the encouragement of unionization and collective bargaining,<sup>28</sup> had, from its enactment, been a target.<sup>29</sup>

23. See, e.g., Melanie Trottman, *NLRB Defunding Fails, But Agency Remains GOP Target*, WALL ST. J., (Feb. 17, 2011), <http://blogs.wsj.com/washwire/2011/02/17/nlr-defunding-fails-but-agency-remains-gop-target/> (reporting that Republicans failed to pass a measure to defund the NLRB); Assoc. Press, *Gingrich: Defund NLRB for Boeing Challenge*, KOMO NEWS (May 13, 2011, 3:54 PM), <http://www.komonews.com/news/local/121810809.html> (noting Newt Gingrich's calls to defund NLRB); Michael McAuliff, *Recess Appointments Ruling Prompts Bill to Defund Actions of CFPB, NLRB Leaders*, HUFFINGTON POST (Feb. 1, 2013, 5:14 AM), [http://www.huffingtonpost.com/2013/01/31/recess-appointment-ruling\\_n\\_2593330.html](http://www.huffingtonpost.com/2013/01/31/recess-appointment-ruling_n_2593330.html) (detailing Republican bill to defund any action taken by recess appointments at NLRB).

24. S. Amend. 349 to S. Con. Res. 8, 113th Cong., 159 Cong. Rec. S2199 (daily ed. Mar. 21, 2013).

25. Preventing Greater Uncertainty in Labor-Management Relations Act, H.R. 1120, 113th Cong. (2013) (as passed by House, Apr. 12, 2013).

26. Nat'l Labor Relations Bd., *Acting Gen. Counsel Responds*, *supra* at note 21.

27. See Stanley Lebergott, *Annual Estimates of Unemployment in the United States*, in THE MEASUREMENT AND BEHAVIOR OF UNEMPLOYMENT 211, 216 (Univ.-Nat'l Bureau of Econ. Research ed., 1957), available at <http://www.nber.org/chapters/c2644.pdf> (unemployment); Diane Petro, *Brother, Can You Spare a Dime? The 1940 Census: Employment and Income*, 44 PROLOGUE MAG., no. 1, Spring 2012, available at <http://www.archives.gov/publications/prologue/2012/spring/1940.html> (average income was \$1,368);

*Federal Debt 1940-2017*, TAX POLICY CTR. (Apr. 13, 2012), [www.taxpolicycenter.org/taxfacts/Content/PDF/federal\\_debt\\_historical.pdf](http://www.taxpolicycenter.org/taxfacts/Content/PDF/federal_debt_historical.pdf) (federal debt was 44.2% of GDP); *Table 652: Federal and State Minimum Wage Rates: 1940 to 2011*, U.S. CENSUS BUREAU (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0652.pdf> (federal minimum hourly wage).

28. National Labor Relations Act (NLRA), codified at 29 U.S.C. § 151 *et seq.* (2012).

In a 1938 decision, the Board found Ford Motor Company—like Boeing, a significant player in the US economy—guilty of systematic discharges of union advocates and the employment of thugs to terrorize and beat up union members and sympathizers.<sup>30</sup> The House Appropriations Committee responded to the Board’s decision by cutting the Board’s budget by \$400,000 and disparaging the Board as a “partisan, prejudiced, perfidious, persecuting, penalizing, putrid institution to browbeat, bulldoze, and bully the people of this country in order to force them to comply with the arbitrary and ambiguous rules and regulations that it arrogantly and ruthlessly lays down.”<sup>31</sup>

Virginia Representative Howard W. Smith created a special House committee to investigate the Agency, and the Committee subpoenaed and took over 3,800 files from the Board, including correspondence files, all memos and reports by and sent to the Board, and attorney notes on cases they worked on, and drafts of all decisions and memos.<sup>32</sup> The Committee then issued a report in March 1940, criticizing the NLRB’s “overzealousness” and suggesting that the Board was controlled by “leftists,” and “tinged with a philosophical view of an employer-employee relationship as a class struggle, something foreign to the proper American concept of industrial relations.”<sup>33</sup> This report bears striking similarities to the report issued by the House Committee on Oversight and Government Reform in December 2012. That report, titled “President Obama’s Pro Union Board: the NLRB’s Metamorphosis from Independent Regulator to Dysfunctional Union Advocate,” concludes that the Agency “appears to have shifted from an equitable treatment of job creators and labor unions under previous Administrations to a politicized pro-union bias under the Obama Administration.”<sup>34</sup>

John Logan, professor and director of Labor and Employment Studies at San Francisco State University, wrote in a recent article in *The Hill* newspaper that the real reason opponents of the Board want to destroy the NLRB is that they no longer believe in the fundamental workers’ right that

---

29. *1937 Act Held Constitutional*, NAT’L LABOR RELATIONS BD., <http://www.nlr.gov/75th/1937act.html> (last visited Oct. 27, 2013).

30. Ford Motor Company, N.L.R.B Case C-1999 (1937), available at <http://www.nlr.gov/cases-decisions/board-decisions>.

31. JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* 51 (1981).

32. *Id.* at 2, 70, 103.

33. Report on the Investigation of the National Labor Relations Board, Intermediate Report of the House Special Committee, H. Rep. 1902, at 36 (76th Congress., 3d Sess.) (March 30, 1940).

34. STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 112TH CONG., *PRESIDENT OBAMA’S PRO-UNION BOARD: THE NLRB’S METAMORPHOSIS FROM INDEPENDENT REGULATOR TO DYSFUNCTIONAL UNION ADVOCATE* (2012), available at <http://oversight.house.gov/wp-content/uploads/2012/12/NLRB-Report-FINAL-12.13.12.pdf>.

the Agency is charged with enforcing.<sup>35</sup> If that is true, we are facing a true crisis situation, not unlike the situation in the 1940s. There is no doubt that the middle class in this country is disappearing and that the income disparity between rich and poor is the largest since the Great Depression in the '30s.<sup>36</sup> Congress in 1935 envisioned collective bargaining to be a principal means to address these inequities.<sup>37</sup> Indeed, the preamble to the NLRA states that "it is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . ." <sup>38</sup> And Congress' vision proved to work: the middle class grew by increasing the wage scale for all workers, both unionized and non-unionized, the wage disparity between rich and poor lessened, and safer working conditions became the norm, such as the 40-hour work week.<sup>39</sup>

Collective bargaining is as important today to address these issues as it was in the '30s and '40s. Collective bargaining between the Machinists Union and Boeing worked in the Boeing case to bring about a settlement heralded by both parties,<sup>40</sup> as it can and does work in many jobsites every day. The National Labor Relations Act and its enforcement cannot solve all of the economic issues facing this country, but it certainly can play an important part in improving labor-management relations and resolving workplace disputes. I believe today, as those enacting the NLRA did in 1935, that bilateral cooperation and resolution over economic issues, in particular, can only help to improve the chasm between the "haves" and the "have nots," thereby improving the economic landscape for all of us nationwide.

Next, I would like to focus on the Act's application to non-union workplaces. I have been accused of aggressively and in a novel fashion applying the NLRA to non-union employers because I have authorized the issuance of a number of highly-publicized complaints involving discharges resulting from Facebook conversations among workers and involving company social media policies that are written so overbroadly as to

---

35. John Logan, *Right Seeks to Further Weaken NLRB*, THE HILL (Jan. 21, 2013, 5:30 PM), <http://thehill.com/blogs/congress-blog/labor/278361-why-the-right>.

36. David J. Lynch, *Growing Income Gap May Leave U.S. Vulnerable*, BLOOMBERG (Oct. 13, 2011, 9:37 AM), <http://www.bloomberg.com/news/2011-10-13/growing-income-divide-may-increase-u-s-vulnerability-to-financial-crises.html>.

37. National Labor Relations Act (NLRA) § 1, codified at 29 U.S.C. § 151 (2012).

38. *Id.*

39. David Madland, Karla Walter & Nick Bunker, *Unions Make the Middle Class: Without Unions, the Middle Class Withers*, AM. PROGRESS ACTION (Apr. 2011), <http://www.americanprogressaction.org/wp-content/uploads/issues/2011/04/pdf/unionsmakethemiddleclass.pdf>.

40. Fred Feinstein, *Boeing Settlement Showcases the Value of Collective Bargaining*, THE HILL (Dec. 16, 2011, 4:50 PM), <http://thehill.com/blogs/congress-blog/labor/199945-boeing-settlement-showcases-the-value-of-collective-bargaining>.

interfere with employees' rights under Section 7.<sup>41</sup> Indeed, a reporter asked me recently when in my tenure I decided that the Act applied to nonunion employers. The fact is that Congress in 1935 wrote into the Act the protection of union and "other concerted activities," and the Board since its inception has found violations by nonunion companies that have discharged or disciplined workers for engaging in protected concerted activities.<sup>42</sup> Over 50 years ago, the United States Supreme Court in *NLRB v. Washington Aluminum* enforced a Board order reinstating with back pay seven employees who were not represented by a union and who were discharged for acting in concert by walking off their jobs without permission when they claimed it was too cold to work in the shop.<sup>43</sup> In authorizing the issuance of complaints based on workers' concerted, protected activity in Facebook discussions, I have done nothing novel or different from my predecessors but simply have applied these long-standing principles to this new technology.

And finally I will close with my present legal conundrum: the D.C. Circuit's decision on January 25 of this year in *Noel Canning*, which found that the President's recess appointments to the Board in January 2012, were unconstitutional.<sup>44</sup> In light of the Senate's failure to confirm any Board Member nominations since June 2010, the Board would have been reduced to two Board Members when former Member Becker's term expired on January 3 of this year; and the President made these recess appointments to avoid the two-Member *New Process* issue and keep the Board functioning and capable of issuing decisions.<sup>45</sup>

The D.C. Circuit's *Noel Canning* decision presents many important legal issues which will some day be resolved by the Supreme Court, but in the meantime we face the possibility that unless the Senate confirms Board Members, we will literally be faced, for the first time in the Board's seventy-eight-year existence, without a functioning Board when Chairman Pearce's term expires this August and without the possibility of recess appointments to solve the problem.<sup>46</sup> And even more troubling is the

---

41. Jonathan C. Fritts et al., *NLRB Extends Reach to Nonunion Workplaces*, MORGAN LEWIS (Aug. 16, 2012), <https://www.morganlewis.com/index.cfm/publicationID/88d06cc1-7b60-45f3-87d2-9c18550a3f45/fuseaction/publication.detail>.

42. See *Protected Concerted Activity*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/rights-protect/protected-concerted-activity> (last visited Oct. 26, 2013).

43. *NLRB v. Wash Aluminum Co.*, 370 U.S. 9 (1962).

44. *Noel Canning v. NLRB*, 705 F.3d 490, 512-14 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (2013).

45. See Todd Ruger, *Senate Moves Forward on NLRB Nominations*, THE BLT: THE BLOG OF LEGALTIMES (last updated July 30, 2013, 8:15 PM), <http://legaltimes.typepad.com/blt/2013/07/senate-moves-forward-on-nlr-b-nominations-.html>.

46. See *id.*; Stefan J. Marculewicz, *NLRB Revises Representation Case Handling Procedures for Two-Member Board*, LITTLER (Dec. 29, 2011), <http://www.laborrelationscounsel.com/agency-rulemaking/nlr-b-revises-representation-case-handling-procedures-for-two-member-board/>.

prospect that, in light of the D.C. Circuit's decision to put all NLRB cases in abeyance, those workers who are the victims of unfair labor practices will receive no remedy until a Supreme Court decision if the violators of the Act choose to raise the *Noel Canning* issue and pursue the litigation through the D.C. Circuit. Such a result is detrimental to labor-management relations and devastating to the workers.

The NLRB matters in the lives of real people and companies struggling in this economy. In Financial Year 2012 alone, 1,241 workers received offers of reinstatement as a result of the Board's processes.<sup>47</sup> Workers also received almost \$44 million in back pay as a result of the work we did.<sup>48</sup> I remain hopeful that, despite the *Noel Canning* decision, most employers and unions will continue to abide by the decisions of the Board and choose, as they did after *New Process*, to prefer to have their disputes resolved rather than have them fester for years. Since January 2012, there have been over 25,000 charges filed in the NLRB Regional Offices and there have been over 3,000 petitions filed. Yet the recess appointment issue has been raised in only about 125 of those cases.

Through all of the political attacks that have come, and those that have yet to come, I and all NLRB employees remain committed to resolving workplace disputes and giving employers and employees the due process that they desire. It is my fervent hope that, in the words of Mr. Spock in *Star Trek*, the NLRB "lives long and prospers" for the sake of the working men and women in this country and for the economic and social well-being of each of us and our country.

Again, I am honored to appear here tonight, I thank you for listening, and I will now try to answer any questions you may have.

---

47. *National Labor Relations Board: Performance and Accountability Report*, NAT'L LAB. REL. BOARD 40 (2012), [http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/nlr\\_2012\\_par.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/nlr_2012_par.pdf).

48. *Id.*