

# Labor & Employment Law

## FULL BOARD DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD: FISCAL YEAR 2016

By John N. Raudabaugh

### Note from the Editor:

This article critically reflects on the most recent term of the National Labor Relations Board. The author describes and critiques the eleven full Board decisions made in Fiscal Year 2016.

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• Timothy Noah and Brian Mahoney, *Obama labor board flexes its muscles*, POLITICO (Sept. 1, 2015), <http://www.politico.com/story/2015/09/unions-barack-obama-labor-board-victories-213204>.

• Tim Devaney, *Enraging industry, labor board asserts its power under Obama*, THE HILL (Aug. 29, 2015), <http://thehill.com/regulation/labor/252232-enraging-industry-labor-board-asserts-its-power-under-obama>.

• Michael Hiltzik, *Labor regulators strike another blow against employers shortchanging workers*, L.A. TIMES (July 13, 2016), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-nlr-b-jpoint-employer-20160713-snap-story.html>.

• IBEW Media Center, *Yes, the Bureaucracy Matters to You. Here's Why*. (June 17, 2016), [http://www.ibew.org/media-center/Articles/16Daily/1606/160617\\_NLRB\\_appointments\\_matter](http://www.ibew.org/media-center/Articles/16Daily/1606/160617_NLRB_appointments_matter).

• Mark Joseph Stern, *In Landmark Decision, NLRB Allows Graduate Students at Private Universities to Unionize*, SLATE (Aug. 23, 2016), [http://www.slate.com/blogs/the\\_slates/2016/08/23/nlr-b-lets-graduate-students-at-private-universities-unionize.html](http://www.slate.com/blogs/the_slates/2016/08/23/nlr-b-lets-graduate-students-at-private-universities-unionize.html).

### About the Author:

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National Labor Relations Board (“NLRB” or “Board”) Chairman Pearce describes the Board as having “just recently stepped ‘out of the attic and into the kitchen’ to help the modern laborer.”<sup>1</sup> A review of Fiscal Year 2016 full Board decisions suggests that Pearce views the Board’s role as kitchen chef controlling, not only the menu, but the portions served to the parties.

The National Labor Relations Act (“Act” or “NLRA”),<sup>2</sup> as amended, authorizes a Board with five members appointed by the President by and with the advice and consent of the U.S. Senate.<sup>3</sup> The NLRB began Fiscal Year 2016 (October 1, 2015 through September 30, 2016) with four members following the August 27, 2015 expiration of Republican member Johnson’s term. The Board was reduced to three members on August 27, 2016 with the expiration of Democrat member Hirozawa’s term. The Board issued 298 published decisions in FY 2016, including 11 “full” Board decisions.<sup>4</sup> Full Board decisions are decisions in which all current members of a Board with three or more members participate, and which can overturn or change precedents.<sup>5</sup> There were 138 dissenting opinions; the lone Republican member dissented in 134 decisions, including all of the 11 full Board decisions reviewed below in chronological order.

On December 22, 2015, in *SolarCity Corp.*, a Board majority consisting of Chairman Pearce and Members Hirozawa and McFerran held that the employer unlawfully maintained a mandatory arbitration agreement requiring employees, as a condition of employment, to waive their rights to file class or collective actions in all forums, whether arbitral or judicial.<sup>6</sup> The majority reasoned that the fact that employees could file administrative charges with government agencies which could seek class or group remedies was insufficient to guarantee employees’ rights to engage in concerted legal activity. The

1 Mollie Cramer, *NLRB Chair: Board Gives Employee Voice in Workplace*, THE CORNELL DAILY SUN (October 25, 2016), <http://cornellsun.com/2016/10/25/nlr-b-chair-board-gives-employee-voice-in-workplace/>.

2 29 U.S.C. §§151 et seq.

3 29 U.S.C. §153(a).

4 *NLRB Watch: The Raudabaugh Report: Tracking NLRB Member Voting Patterns*, National Right to Work Legal Defense Foundation, <http://www.nrtw.org/en/nlr-b-watch/raudabaugh-report-tracking-nlr-b-member-decisions>. The Report is updated continuously noting issued decisions and dissents by member, panel, and initiating regional office.

5 Letter from Wilma B. Liebman, Chairman of the NLRB, to Hon. Phil Roe, Chairman of the subcommittee on Health, Education, Labor, and Pensions, Committee on Education and the Workforce, U.S. House of Representatives (Feb. 25, 2011), <https://www.nlr-b.gov/sites/default/files/attachments/basic-page/node-3302/chairmancommitteelatter.pdf> (detailing Board tradition with respect to acting with fewer than five members).

6 363 NLRB No. 83 (December 22, 2015), petition for writ of certiorari filed, No. 16-307 (September 9, 2016).

majority noted that there is a wide range of employment-related claims not within the purview of any administrative agency, that agencies may exercise discretion to not pursue employees' claims, and that access to a typical administrative agency is not access to a "judicial forum" as is required to satisfy the Board's decisions in *D.R. Horton*<sup>7</sup> and *Murphy Oil*.<sup>8</sup> Dissenting Member Miscimarra would have found such agreements lawful because the NLRA does not create a substantive right to insist on class treatment of non-Act claims, a class waiver for non-Act claims does not infringe on statutory rights or obligations, and enforcement of non-Act class waivers is warranted by the Federal Arbitration Act.<sup>9</sup>

In *Guardsmark, LLC*, the Board majority overruled 57 years of precedent by holding unlawful a "captive audience" meeting in which an employer attempted to persuade employees against supporting a union during the 24 hour period before ballots were scheduled to be mailed to eligible employee voters.<sup>10</sup> *Oregon Washington Telephone*—the 1959 precedent overruled in *Guardsmark*—prohibited mass campaign meetings only once the ballots were scheduled to be mailed.<sup>11</sup> The *Guardsmark* majority reasoned that the new rule would reduce confusion when compared with its *Peerless Plywood Co.*<sup>12</sup> decision prohibiting such gatherings within the 24 hour period prior to the start of an in-person election. In dissent, Member Miscimarra objected to the majority now prohibiting "captive audience" meetings for a longer period.

On June 9, 2016, the Board overruled a 32-year-old precedent to find that an employer that had voluntarily recognized a "mixed-guard" union of both guard and non-guard employees could not withdraw recognition upon contract expiration without showing a loss of majority support.<sup>13</sup> At issue in *Loomis Armored US, Inc.* was Section 9(b)(3) of the Act, which prohibits the Board from deciding that any unit is appropriate for the purposes of collective bargaining "if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons

on the employer's premises."<sup>14</sup> The Board majority reasoned that despite the statutory language, requiring an employer to demonstrate loss of majority support promotes the statutory goals of promoting stable labor relations.

In *Graymont PA, Inc.*,<sup>15</sup> the Board rejected the employer's defense of its unilateral changes to work rules, absentee policy, and progressive discipline schedule under the "contract coverage" standard applied by the D.C. Circuit and seven other circuit courts of appeal. The Board insisted that any contract waiver must be "clear and unmistakable." Notably, the Board's adamancy on contract waiver language was soundly rebuked three months later in *Heartland Plymouth Court MI, LLC v. NLRB*.<sup>16</sup> The D.C. Circuit majority found that the Board majority took "obduracy to a new level" when it again ignored the court's rebuke for insisting on "clear and unmistakable" contract language in a management-rights clause to waive a union's right to bargain over a specific matter during the term of a collective agreement.<sup>17</sup> The Board was ordered to pay the employer nearly \$18,000 in legal fees incurred due to the Board's asserted policy of "nonacquiescence."

In *Miller & Anderson, Inc.*,<sup>18</sup> the Board majority overturned *Oakwood Care Center*<sup>19</sup> and returned to the rule in *M.B. Sturgis, Inc.*,<sup>20</sup> which had previously overruled *Lee Hospital*.<sup>21</sup> The Board held employer consent unnecessary for bargaining units including both jointly employed and solely employed employees of a single "user" employer. In dissent, Member Miscimarra reasoned that the majority's decision in this case, which extended the joint-employer standard the majority had adopted in *Browning-Ferris*,<sup>22</sup> creates an unworkable situation with a unit in which parties have widely divergent interests and a majority of employees have no employment relationship with the "supplier" employer.

A charter school was found subject to Board jurisdiction for the first time in *Pennsylvania Virtual Charter School*.<sup>23</sup> Relying on Section 2(2) of the Act and the Supreme Court's decision in *NLRB v. National Gas Utility District of Hawkins*

7 357 NLRB No. 184, enf. denied in relevant part 737 F.3d 344 (5th Cir. 2014).

8 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1023 (5th Cir. 2015). Many scholars adamantly support the Board majority's view. See Christine Neylon O'Brien, *Will the Supreme Court Agree with the NLRB That Pre-Dispute Employment Arbitration Provisions Containing Class and Collective Action Waivers in Both Judicial and Arbitral Forums Violate the National Labor Relations Act - Whether There is an Opt-Out or Not?*, 19 U. Pa. J. Bus. L. \_\_\_\_ (2017).

9 9 U.S.C. §§1 et. seq.

10 363 NLRB No. 103 (2016). See Shaun Richman, *Could a New NLRB Case Limit Bosses' Best Anti-Union Tool, the Captive Audience Meeting?*, IN THESE TIMES (Feb. 3, 2016).

11 123 NLRB 339 (1959).

12 107 NLRB 427 (1953).

13 *Loomis Armored US, Inc.*, 364 NLRB No. 23 (June 9, 2016), overruling *Wells Fargo Corp.*, 270 NLRB 787 (1984), rev. denied sub nom. *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5 (2d Cir. 1985).

14 29 U.S.C. §§159(b)(3).

15 364 NLRB No. 37 (June 29, 2016). The long running debate regarding contract construction was reviewed in Matthew D. Lahey, *I Thought We Had a Deal?: The NLRB, the Courts, and the Continuing Debate over Contract Coverage vs. Clear and Unmistakable Waiver*, 25 ABA J. LAB. & EMP. L. 37 (2009).

16 No. 15-1034, 2016 WL 5485145 (D.C. Cir., Sept. 30, 2016).

17 *Id.*

18 364 NLRB No. 39 (July 11, 2016).

19 343 NLRB 659 (2004).

20 331 NLRB 1298 (2000).

21 300 NLRB 947 (1990).

22 362 NLRB No. 186 (2015) (3-2 decision).

23 364 NLRB No. 87 (Aug. 24, 2016). See Martin H. Malin and Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885 (2007).

County,<sup>24</sup> the Board majority found that the school was neither created directly by the state nor a political subdivision with school administrators responsible to public officials or the general electorate. In dissent, Member Miscimarra would have declined jurisdiction because of the school's insubstantial effect on interstate commerce and in order to foster certainty and predictability.

In the much anticipated *Columbia University* decision, the Board held that student teaching and research assistants are statutory employees under Section 2(3) of the Act<sup>25</sup> if their relationship with the university satisfies the common law "right to control" test for employment.<sup>26</sup> This decision overruled *Brown University*,<sup>27</sup> which had previously overruled *New York University*.<sup>28</sup> Dissenting Member Miscimarra viewed collective bargaining and the resort to economic weapons as likely to upset the educational process quite apart from any economic interests of participating student assistants.

The Board overhauled its make-whole remedy in *King Soopers, Inc.*<sup>29</sup> The majority reasoned that search-for-work and interim employment expenses had been wrongly treated as offsets to interim earnings rather than as an additional element of backpay:

Fully compensating discriminatees for search-for-work and interim employment expenses even when a discriminatee's interim earnings equal or exceed his or her lost earnings and expenses appropriately relates to the policies of the Act because this approach will deter unfair labor practices and encourage robust job search efforts.<sup>30</sup>

In dissent, Member Miscimarra argued that this new remedial formula will result in greater than make-whole relief in some cases and protracted litigation.

In *Total Security Management Illinois 1, LLC*,<sup>31</sup> the Board reaffirmed the reasoning of *Alan Ritchey, Inc.*<sup>32</sup> The majority held that an employer must provide the union notice and an opportunity to bargain before imposing discretionary discipline on employees represented by a union that has not yet entered into a collective bargaining agreement with the employer. Dissenting Member Miscimarra argued that the majority's decision upends

"decision and effects bargaining" principles, requires bargaining over actions that are consistent with the manner in which the employer applied discipline in the past, imposes disfavored single-issue bargaining, and ignores longstanding precedent regarding waiver of collective-bargaining rights.

In *E.I. Du Pont de Nemours*, the Board held unlawful any discretionary unilateral changes to union-represented employees' benefit plans made pursuant to past practice under a management-rights clause in an expired collective bargaining agreement while the parties were negotiating a successor agreement and had not reached impasse.<sup>33</sup> The case was decided on remand from the D.C. Circuit.<sup>34</sup> In reaching its decision, the Board majority overruled *Beverly Health & Rehabilitation Services* (2006),<sup>35</sup> *Courier-Journal*,<sup>36</sup> and *Capitol Ford*,<sup>37</sup> which had found past practice controlling. The majority instead followed the holdings of *Beverly Health & Rehabilitation Services* (2001)<sup>38</sup> and *Register-Guard*<sup>39</sup> concluding that unilateral, post-contract expiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or past practice pursuant to that clause. The Board majority specifically rejected any rationale that "past practice" involving union acquiescence waives a union's right to bargain over employer post-contract expiration changes which the union opposes. In a lengthy dissent, Member Miscimarra argued that the majority contorted the definition of "change" in the Supreme Court's decision in *NLRB v. Katz*,<sup>40</sup> by considering *anything* done following impasse to be a change requiring notice and an opportunity to bargain, effectively eliminating any consideration of past practices.

The Board adopted a new standard for an administrative law judge's approval of settlement terms a Respondent proposes over the objection of the NLRB General Counsel or the charging party in *Postal Service*.<sup>41</sup> Overturning 29 years of precedent set in *Independent Stave Co.*,<sup>42</sup> Chairman Pearce and Members Hirozawa and McFerran agreed that a consent order accepting and incorporating a Respondent's settlement offer, without agreement of both the General Counsel and the charging party, must provide a "full remedy" for all violations alleged in the complaint, not just a "reasonable" resolution of the dispute. Dissenting Member Miscimarra noted that *Independent Stave* was a rare full, five member unanimous decision approving the practice of administrative law judges' early voluntary

24 402 U.S. 600 (1971).

25 29 U.S.C. §152(3).

26 364 NLRB No. 90 (Aug. 23, 2016).

27 342 NLRB 483 (2004).

28 332 NLRB 1205 (2000). The American Association of University Professors filed an amicus brief in support of graduate student organizing. See Catherine Fisk, *Why The NLRB Should Allow Graduate Student Bargaining*, ONLABOR (March 2, 2016).

29 364 NLRB No. 93 (Aug. 24, 2016), petition for review filed, No. 16-1316 (D.C. Cir. Sept. 9, 2016).

30 364 NLRB No. 93 at 7.

31 364 NLRB No. 106 (Aug. 26, 2016).

32 359 NLRB 369 (2012). *Alan Ritchey, Inc.* was voided as a result of the Supreme Court's *Noel Canning* decision, which held that President Obama had made invalid recess appointments to the Board.

33 364 NLRB No. 113 (Aug. 26, 2016).

34 *E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).

35 346 NLRB 1319 (2006).

36 342 NLRB 1093 (2004).

37 343 NLRB 1058 (2004).

38 335 NLRB 635 (2001), *enfd.* in relevant part 317 F.3d 316 (D.C. Cir. 2003).

39 339 NLRB 353 (2003).

40 369 U.S. 736 (1961).

41 364 NLRB No. 116 (2016).

42 287 NLRB 740 (1987).

“reasonable” resolutions of labor disputes. Miscimarra argued that the majority’s requirement of a “full remedy” ignores that there is no certainty that the General Counsel and charging parties will prevail in Board litigation.

A Board majority advocating for “outreach and education” is one thing, but dramatically changing case precedent confuses employees and employers, making compliance ever more difficult. The Act’s purpose is clear—employees have the right to choose whether to engage in self-organization and bargain collectively or not. While our 1935 federal labor law needs updating, that task is for Congress. Outcome determination predicated on statutory construction should be consistent over time, not radically altered any time the kitchen crew changes shifts.<sup>43</sup>

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<sup>43</sup> H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 at 109 (1970). See Benjamin I. Sachs, *Employment Law As Labor Law*, 29 CARDOZO L. REV. 2686 (2008) (discussing using employment law as an alternative to NLRA failures).

