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Recent Developments at the National Labor Relations Board and the Impact on Colleges and Universities

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**NATIONAL CENTER FOR THE STUDY OF
COLLECTIVE BARGAINING IN HIGHER EDUCATION
AND THE PROFESSIONS**

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Legal Update

*Recent Developments at the National Labor Relations Board
and the Impact on Colleges and Universities*

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1. The Controversy over NLRB Appointments: Noel Canning and the Constitutional Meaning of a “Recess”

In last year’s paper at this conference, we covered the considerable fresh ground carved out by the National Labor Relations Board over the preceding year in its decisions and administrative initiatives. That paper covered such major issues as:

1. A Call for Briefs by the Board in deciding whether or not to reverse *Brown University* and treat graduate teaching assistants as employees.
2. A Call for Briefs by the Board to examine what factors should be considered and emphasized under the *Yeshiva University* when assessing faculty managerial status.
3. Continuation of the “small bargaining unit” philosophy of the *Specialty Healthcare* case.
4. A decision rejecting the broad right of an employer to keep workplace investigations confidential.
5. Aggressive outreach to the non-union sector, including the defense of Section 7 rights for non-unionized employees in areas of employer policy and practice and in the new world of social media.
6. Decisions that narrow the degree to which employers may restrict union solicitation on its property.
7. Reversal of several long standing precedential decisions, including areas such as dues checkoff after a contract expires; duty to bargain over disciplinary actions prior to a first contract; union’s entitlement to witness statements from employer investigations, and other decisions
8. The Board’s continued defense of its earlier NLRB posting mandate and expedited election rules.

All of these actions were taken against the political backdrop of challenges to the Board’s legitimacy. While its previous membership had been a central issue during 2012 and much of 2013, at this point in time, for the first time in many years, there is a fully functioning and uncontested NLRB. On July 30, 2013, the U.S. Senate voted to confirm a slate of three Democratic and two Republican nominees to the NLRB, giving the agency a full complement of five members for the first time in a decade. The confirmed Board

members are: Chairman Mark Gaston Pearce (D), Kent Hirozawa (D), Nancy Schiffer (D), Philip Miscimarra (R) and Harry Johnson (R).¹

The confirmation came about as the result of an agreement reached earlier to avert a controversial rule change known as the “nuclear option,” which would have involved a simple majority of senators voting to change the rules to allow executive nominations to be subject to a simple majority vote threshold. As part of the agreement, President Obama withdrew the nominations of Sharon Block and Richard Griffin, who had been serving under controversial recess appointments, and replaced them with Hirozawa and Schiffer.

Behind much of the debate were two political points of view about the NLRB. On the one hand, many Republicans argued that the Board is, or should be, a neutral arbiter of federal labor law and Board members should not be cheerleading for organized labor. On the other hand, many Democrats would contend that the NLRA is designed to “encourage collective bargaining” and thus activist Board members who seek to expand NLRA rights are simply doing their job. Thus, for example, when Democratic Board members have sought to require NLRA postings by all employers or have tried to streamline election rules to get to representation elections completed more quickly, the two points of view clearly come into focus. The controversy led to deadlock on the normal process of Presidential Board appointments, and with the deadlock, ultimately came Obama’s move to appoint his NLRB members during what he thought was a Senate Recess, thus insulating the appointments from the full scrutiny of a divided U.S. Senate.

But while initially driven by politics, what emerged from the wrangling was a very real constitutional issue as to the extent of the President’s authority to recess appoint.

Using his recess powers, the President had appointed Members Sharon Block, Richard Griffin and Terrence Flynn to the Board on January 4, 2012 to fully staff the Board. The Board then issued a significant number of major, precedent-setting decisions during 2012, as reported at this conference last Spring. Challenges arose, however, on the theory that Block, Griffin and Flynn had not been legally appointed because, allegedly, the Senate was not in recess on January 4, 2012.

In January 2013, U.S Circuit Court for the District of Columbia decided that President Obama’s recess appointments to the NLRB in early 2012 were not valid. *Noel Canning Divisions of Noel Corp. v. NLRB*, D.C. Cir., No. 12-1115 (January 25, 2013). The particular case was before the Court because the company, found guilty of unfair labor practices by the Board, argued that Members Block and Griffin, who sat on the case, were not properly appointed. The employer in the case asserted *inter alia* that the

¹ Mark Pearce has been Chair of the Board since August 2011 and is a former union/plaintiff attorney from Buffalo. Kent Hirozawa has been chief counsel to Chairman Pearce until his recent appointment to the Board and represented unions and employees in New York City. Member Nancy Schiffer was associate general counsel and deputy general counsel to the UAW for many years and also associate general counsel to the AFL-CIO for over a decade. Philip Miscimarra is a career labor lawyer in Pennsylvania on the management side. Harry Johnson has also been a management side labor lawyer in California for his entire career.

Board did not have a quorum for the conduct of business on the operative date that it found the company guilty of unfair labor practices. Citing *New Process Steel v. NLRB*, 130 S.Ct.2635 (2010) which held that the Board cannot act without a quorum of three members, the company said, that even though there were five members on the Board on the date the Board ruled against the company, three of them were invalidly appointed, and thus there was no such quorum on that date. While Board Chairman Pearce and Member Hayes had been confirmed by the Senate, Members Flynn, Block and Griffin were all “recess appointments.” The employer claimed “the purported appointments of the last three members of the Board were invalid under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3.”

In its decision, the Court’s three judge panel (Chief Judge Sentelle and Justice Henderson, with a concurring opinion by Justice Griffith) had to deal with the term “the Recess” as use in the Recess Appointments Clause of the Constitution.

The employer had argued that the term only refers to “the intersession recess of the Senate, that is to say, the period between the sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President.” In contrast, the NLRB argued that the alternative appointment procedure created by the Clause “is available during *intrasession* “recesses,” or breaks in the Senate’s business when it is otherwise in continuing session.”

The Court agreed with the employer and found that the term “the Recess” only refers to the intersession breaks between formal sessions of Congress and not breaks or adjournments that may take place during a session of Congress.

While that decision was a setback for the Board, it was still only a single circuit court decision. However, things got worse for the Board when two other circuit courts weighed in on the same issues and reached similar conclusions.

First, the Third Circuit on May 16, 2013 agreed with the D.C. Circuit and also ruled that the Recess Appointments Clause is strictly limited to the intersession breaks between the annual Senate sessions. *NLRB v. New Vista Nursing & Rehabilitation*, 2013 WL 2099742, 195 LRRM 2781 (3rd Cir., 2013) In going even further than the D.C. Circuit, the Third Circuit held that the appointment of Board Member Becker, who was appointed during a March 2010 intrasession break, was also invalid, potentially opening up for challenge an even larger number of decided NLRB cases in which Member Becker participated.

Then, on July 17, 2013, the Fourth Circuit Court of Appeals similarly ruled that the appointments were invalid. *NLRB v. Enterprise Leasing Co.*, (No. 12-1514, 4th Cir., 2013). The Court thus ruled that the appointments of Members Block, Flynn and Griffin were all invalid intrasession actions and thus could not stand. In that case, as in others, the Board had argued that the intrasession appointments were supported by earlier decisions from two other circuits, *Evans v. Stephens*, 387 F. 3d 1220 (11th Cir., 2004) and *United States v. Woodley*, 751 F.2d 1008 (9th Cir., 1985). But the Court said that the

President's power to make recess appointments refers to "something different than a generic break in proceedings," supporting the view that such appointments can only be made during the interval between Senate sessions. The Court said that its holding "adheres to the plain language of the Appointments and Recess Appointments Clause and is consistent with the structure of the Constitution, the history behind the enactment of these clauses, and the recess appointment practice of at least the first 132 years of our Nation."

Not surprisingly, this central constitutional issue – which affects far more than just NLRB appointments – was taken up by the Supreme Court, which granted the Board's petition for cert in the *Noel Canning* case.² Oral argument was heard on January 13, 2014, and the case is now pending for decision, expected this coming June.

Now, with a fully constituted, fully confirmed Board, the new Board cases going forward will not likely be challenged, at least on quorum and constitutional grounds. However, many cases over the past two years remain in limbo, and the Supreme Court's ultimate ruling on this issue will determine whether those cases remain good law or whether they are all null and void. As reported by the Bureau of National Affairs, as of mid-February 2014, there were 108 cases pending in the 12 federal circuit courts of appeals that include challenges or defenses based on the recess appointments of Griffin and Block in January 2012. A small number also involve the recess appointment of Flynn, who resigned in mid-2012, only a few months after the start of his recess appointment. Most of those 108 cases are in the D.C. Circuit, where *Noel Canning* was decided, but there are additional cases in every other circuit.

In addition, there are 35 cases pending in the federal circuits that include challenges based on the 2010 recess appointment of Democrat Craig Becker. Twenty-eight of those cases are pending in the D.C. Circuit, while seven others are pending in the Third, Fourth, Fifth, Ninth and Tenth circuits. Member Becker was also given his recess appointment during an intrasession recess of the Senate. If the Supreme Court agrees with the D.C. Circuit in *Noel Canning*, decisions in which Member Becker provided a necessary vote will also be in question as well as those cases in which Members Block, Flynn and Griffin participated.

Beyond all that, the major Constitutional issue of the President's right to make recess appointments will affect the balance of power between the Executive and Legislative branches, not only with regard to NLRB appointments, but also for a myriad of other Presidential appointments for which Senate confirmation is necessary.

² The Court granted cert to consider: (1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; (2) Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess." Petition for Writ of Certiorari, *NLRB v. Noel Canning*, 2013 WL 1771081 (No. 12-1281). In addition, parties are to also address a third question: "Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma session. Order Granting Certiorari, *NLRB v. Noel Canning*, 133 S. Ct 2861 (June 24, 2013)

If the Supreme Court ultimately decides that the Board was lawfully appointed, then the cases we will discuss herein remain good law. But if the Supreme Court ultimately rules against the Board, many of the controversial decisions that have been in the spotlight over the past year or two will be essentially null and void. While this may provide a sigh of relief to employers, it may be a short lived joy. For indeed, now that there is a new fully confirmed Board with a Democratic majority, even if struck down, the controversial decisions issued by the Board may once again be issued in a new form with new titles and different parties *by the new Board*.

Supplemental information August 2014

The Supreme Court Decides Noel Canning

On June 26, 2014, this lengthy period of legal uncertainty came to end when the Supreme Court issued its decision in *NLRB v. Noel Canning*, 573 U.S. ___, 134 S. Ct. 2550 (Docket No. 12-1281, June 26, 2014) when the Court, by a unanimous decision held that the purported recess appointments in January of 2012 were invalid.

In the decision, the Court was primarily tasked with interpreting Article II, Section 2, Clause 3 of the Constitution, which reads:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

In addressing this matter, and applying it to the facts of the case, the Court held that:

1. The phrase “Recess of the Senate” is ambiguous but can be and will be interpreted broadly to include both inter-session and intra-session recesses.
2. The phrase in Article II, Section 2, Clause 3 regarding “vacancies that may happen” during the Recess includes both vacancies that arose *prior* to the Recess but continue to be in existence during the Recess as well as those that actually arise *during* the Recess itself.
3. As to what does constitute a valid Recess for purposes of the Presidential appointment power, the Court held that a recess that was not long enough to require the consent of the House of Representatives is not long enough to trigger the Recess Appointment Clause. The Court concluded that a break of more than three days but less than ten days is presumptively not a valid recess. As to how long a recess must be to allow Presidential recess appointments, the Court essentially deferred to the Senate and indicated that the Senate is in recess when it says it is. As long as the Senate under its own rules retains the capacity to transact Senate business, then it is in session. In the instant case, throughout much

of the time period in question, the Senate was deemed to be “in session” even though its sessions were *pro forma*. This was because the Senate said it was in session and had retained the power to conduct business. While there were short breaks between these *pro forma* sessions, they were too short to constitute a Recess under the Constitution. Thus, the President in this case, making the appointments within a three day period between the *pro forma* sessions, lacked the power to make such appointments because those three day periods were too short to constitute a Constitutional Recess.

While the decision was unanimous, a separate concurring decision by Justice Scalia, in which Chief Justice Roberts, Justice Thomas and Justice Alito joined, was sharply divergent from the majority decision. The dissent contended that the term “Recess” only referred to the period between the sessions of Congress, not breaks within such sessions. Similarly, the phrase “vacancies that may happen” during the Recess should be read as referring only to those vacancies that actually come into being during the Recess, not those that pre-existed the Recess.

In dealing with the first issue –whether the term “recess” is limited to breaks between sessions of Congress only or whether it has a broader meaning -- Justice Breyer, writing for the majority, addressed the linguistic issue of the word’s meaning and the context in which it appears in the Constitution. First, he explained that Founding-era dictionaries defined the word “recess” much as we do today as simply “a period of cessation from usual work.” Thus, any break in the Senate’s business could conceivably, without more, be considered a recess. Recognizing that the word “the” in the phrase “*the* recess” might suggest that the phrase refers to the singular only, and thus to the single break separating formal sessions of Congress, Justice Breyer still noted that “the word can also refer “to a term used generically or universally,” and “reading “the” generically in this way, there is no linguistic problem applying the Clause’s phrase to both kinds of recess.”

Since the clause is ambiguous, the Court chose to read the term broadly against the context of historical usage, noting, for example, that many presidents had made recess appointments during intra-session periods.

However, the Court was then left with the question of how long a recess must be in order to fall within the Clause. Noting that there can be multiple arguments in favor of variable times, the Court landed as follows:

We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word “presumptively” to leave open the possibility that some very unusual circumstance – a national catastrophe, for instance, renders the Senate unavailable but calls for an urgent response – could demand the exercise of the recess- appointment power during a shorter break.

On the second question, regarding the scope of the phrase “vacancies that may happen during the recess,” the Court again admitted that the word “happen” itself is susceptible to two constructions. But again, using historical precedents and broad readings, the Court held that the term refers to both vacancies that come into existence during the recess but also those that occurred prior to the recess but are still in existence during the break.

On the third question regarding the length of the recess, the Court did not agree with the administration that *pro forma* recesses ought not to count as recesses. In dealing with this issue, the Court stated that “for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.” In the instant case, the Senate “met that standard.” In the Court’s eyes, the critical component of its decision on this point was whether the Senate had the “capacity” to transact business even if it did not. For example, if the Senate left the Capitol, it would be unable to act no matter what it stated about its status. In the instant case, even during the *pro forma* sessions, the Senate had retained the capacity to act.

Thus, in *pro forma* sessions, the Senate maintained the capacity to act, even if it said it was not going to transact any business. Therefore, it was considered to be “in session” and not recess. When the President in this case made his appointments, it was between the January 3 and January 6 *pro forma* sessions. Because the Senate was in session during its *pro forma* sessions, the President made the recess appointments at issue during a three day recess. Three days is too short a time to bring a recess within the scope of the Clause, and thus the President lacked the authority to make those appointments.

In the wake of *Noel Canning*, the immediate questions focused on the status of the many cases that were decided without a proper NLRB quorum, and the many appeals of decisions still pending in the circuit courts. For example, there were 98 cases pending in the appellate courts regarding the Board’s authority, according to General Counsel Richard Griffin.³ The Board set aside 40 of them immediately and asked for remands on the rest to determine appropriate action.

But beyond those cases on appeal, hundreds of decisions over the contested period were essentially rendered invalid as a result of the Court’s decision. Included in those cases are many of the key decisions that marked departures from Board precedent discussed in previous annual reports.⁴ For example, there is *WKYC-TV*, 359 NLRB. No. 30, (Dec. 12, 2012) where the Board overturned 50 years of precedent and held that an employer’s obligation regarding the checkoff of dues continues as a part of the status quo after contract expiration..

³ Daily Labor Report, Bloomberg, BNA, July 9, 2014

⁴ For an excellent review of the decision’s implications, see “The Impact of the Supreme Court’s Noel Canning Decision- Years of Litigation Challenges on the Horizon for the NLRB,” G. Roger King and Bryan Leitch, Daily Labor Report, BNA, June 26, 2014.

In *Banner Estrella Medical Center*, 358 NLRB No. 93, (July 30, 2012), in a controversial decision, the Board restricted employers from requiring general confidentiality agreements from employees when investigating internal matters.

In *Alan Ritchey, Inc.*, 359 NLRB No. 40, (Dec. 14, 2012) the Board held for the first time that during the period after the union certification but before a first contract is concluded, the employer must give notice to a union and offer to bargain before initiating disciplinary action against an employee, particularly significant disciplinary decisions such as suspension and discharge.

Another decision of note is *Finley Hospital*, 359 NLRB No. 9 (Sept. 28, 2012) (holding that pursuant to the “dynamic status quo” doctrine an employer that negotiates a wage increase with its union must continue to offer such wage increase post-contract expiration and during renewal contract negotiations, notwithstanding the fact that the previous wage increase was only for the duration of the expired collective bargaining agreement).

While these and other cases no longer stand as binding Board precedent, employers can take small, and only limited, comfort from this result. The current make-up of the fully confirmed Board is still tilted towards labor’s favor. Thus, future litigation may still end up “re-establishing” the precedent that these controversial cases marked.

Finally, to remove any doubt about personnel appointments that the “improperly appointed” Board had made over the almost two year period, the current Board, on July 18, ratified a number of personnel appointments and administrative actions that were approved during the 19 month period in 2012 and 2013 when the Board lacked a quorum to operate according to the Supreme Court. These actions included the appointment of three regional directors and five administrative law judges. The action was taken “to remove any question” about the legality of these appointments and actions during the period in question.

2. Board invites briefs on jurisdiction over religious institutions and the managerial status of faculty members

As noted in last year’s conference, on May 22, 2012, the Board had requested briefs in the case of *Point Park University* on the issue of whether the faculty members of that institution are statutory employees or rather are excluded managerial employees consistent with the U.S. Supreme Court’s decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). The Board had given the public a series of questions to be addressed in any amici briefs and interested parties did indeed avail themselves of that opportunity. That case is still pending, perhaps because of the grand controversy over the Board appointments during that period.

However, the Board has picked up the issue again, and coupled it with another historically controversial matter, namely, the question of Board jurisdiction over religiously-affiliated institutions.

In *Pacific Lutheran University and Service Employees International Union, Local 925*, Case 19-RC-102521 (June 7, 2013), Region 19 of the Board found that it could assert jurisdiction over the Lutheran institution finding that the University is not a “church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).” It further found that a proposed unit of contingent faculty at Pacific Lutheran was appropriate for bargaining and that the institution had not proven that such faculty members were managerial employees within the meaning of *NLRB v. Yeshiva University*, 444 U.S.672 (1980)

On September 23, 2013, the Board granted the Employer’s Request for Review where the matter is now pending.

This case teed up two difficult issues for the Board: 1) how to determine whether or not the Board should assert jurisdiction over a religiously-affiliated educational institutions; and 2) how it should apply the Supreme Court’s ruling in *Yeshiva*.

On the first issue involving jurisdiction over religious institutions, the seminal case in this area is *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) where the Supreme Court stated that the Act must be construed to exclude church-operated schools, because to do otherwise “will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” 440 U. S. at 502. Two examples of how this could happen, noted the Court, would be where (1) the Board might infringe on religious freedom by inquiring into the good faith of assertions by clergy-administrators that action alleged to be unfair labor practices were mandated by the school’s religious creed; or (2) the Board’s exercise of jurisdiction might require the Board to determine the terms and conditions of employment in order to define the scope of mandatory subjects of bargaining for church-operated schools.

Following this decision, the Board began to apply a “substantial religious character” test on a case-by-case basis in deciding whether or not to assert jurisdiction over a particular school or institution. In using this test, the Board has considered such factors as:

- The purpose of the employer’s operation
- The role of unit employees in effectuating that purpose
- The potential effects of the Board exercising jurisdiction
- The organization’s mission statement
- Whether and to what degree curriculum requirements emphasize the associated faith
- Requirements that faculty teach or endorse the faith’s doctrine
- Significant funding by the religious organization

- Governance by the religious organization
- Requirements for (or preference for) administrators, faculty or students who are members of the faith associated with the institution

Trustees of St. Joseph's College, 282 NLRB 65, 68 (1986); *Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998)

In contrast, however, the D.C. Circuit Court of Appeals has disagreed with the Board and posited a different test in applying *Catholic Bishop*. The D.C. Court would exempt an institution from the Board's jurisdiction if the institution: (1) holds itself out to students, faculty and the community as providing a religious educational environment; 2) is organized as a nonprofit and 3) is affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined in least in part with reference to religion. *University of Great Falls v. NLRB*, 278 F. 3d 1335, 1343 (D.C. Cir., 2002) denying enforcement of *University of Great Falls*, 331 NLRB 1663; *Carroll College, Inc. v. NLRB*, 558 F.3d.568 (D.C. Cir., 2009) denying enforcement of *Carroll College*, 345 NLRB 254 (2005).

Clearly, these two approaches stand in stark contrast with each other.⁵

Note, also pending is the Board review of *St. Xavier University*, NLRB Case No. 13-RC-092296; and *Manhattan College*

On February 10, 2014, the Board invited the filing of briefs to afford the parties and interested amici the opportunity to address the issues raised in the case.

The parties and *amici* specifically were invited to address one or more of the following questions, with the first three centered on the religious issue and the last seven being the *same questions* posed in 2012 call for briefs in the *Point Park* case:

1. What is the test the Board should apply under *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), to determine whether self-identified "religiously affiliated educational institutions" are exempt from the Board's jurisdiction?
2. What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under *Catholic Bishop*?
3. Applying the appropriate test, should the Board assert jurisdiction over this Employer?
4. Which of the factors identified in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?

⁵ In the *Pacific Lutheran* case, the Regional Director found that the Board should assert jurisdiction under either standard, noting that the institution did not "hold itself out as providing a religious educational environment," but only providing an educational environment *inspired by* Lutheranism.

5. In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?
6. Are the factors identified in the Board case law to date sufficient to correctly determine which faculty are managerial?
7. If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?
8. Is the Board’s application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context, or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?
9. Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?
10. Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?
11. As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty--such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty-- depending on the faculty's structure and practices?
12. Did the Regional Director correctly find the faculty members involved in this case to be employees?

Such Briefs were to be filed no later than March 28, 2014. The parties may file also responsive briefs on or before April 11, 2014.

When these questions were posed last year in the *Point Park* case, various amici briefs were filed. For example, the AAUP filed an extensive brief urging the Board to read *Yeshiva* narrowly. It went on to offer additional factors the Board should consider. The thrust of the AAUP’s brief essentially is that since the 1980 decision, the growth of the corporate business model of running colleges and universities has increased dramatically and is now pervasive. Some of the key points, and consequences, presented by the AAUP to support this thesis included the following:

- There has been a major expansion of administration hierarchy which exercises greater unilateral control over academic affairs.
- Administrations today are making unilateral academic and other decisions based on market forces rather than relying on faculty recommendations.
- Faculty influence has eroded through administrations' application of corporate business model⁶
- Collective bargaining has been effective where it exists and has not created the conflict of loyalties and other problems that the Court envisioned in 1980.
- Faculty interests are not aligned with administrations in many of the initiatives set forth by modern colleges and universities.
- Between 1976 and 2009:
 - Full time executives and managers on campuses grew 129% compared to faculty growth of only 68%

⁶ Ironically, some of these points advanced by the AAUP in its brief on the evolution of collegial institutions to top down corporations were exactly the same points advanced by the dissent in the *Yeshiva* case. Thus, Justice Brennan writing for the dissent noted:

But the university of today bears little resemblance to the "community of scholars" of yesteryear. Education has become "big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization. The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and special interest group has only added to the erosion of the faculty's role in the institution's decision-making process.

These economic exigencies have also exacerbated the tensions in university labor relations, as the faculty and administration more and more frequently find themselves advocating conflicting positions not only on issues of compensation, job security, and working conditions, but even on subjects formerly thought to be the faculty's prerogative. 444 U.S. 672 at 703-704)

Justice Brennan's argument that universities are already "big business" operations suggests that the AAUP is probing deeper into the decision itself and arguing that the entire issue of managerial status should be stripped down and reviewed *de novo*.

- Places like Cornell and MIT and other major universities are layered with high level academic administrators, thus creating “buffer” zones between faculty and administration.,
 - More money is now allocated in budgets for administrative spending rather than instructional needs
 - There has been an increase in part time faculty by 256% and a diminution of tenure track faculty, thus diminishing further the input of full time faculty into decision making.
-
- Administrations are making decisions on program discontinuance and student admissions standards independent of faculty involvement and approval.
 - Administrations have increased involvement in nonacademic matters, such as hiring, reappointment, promotion and tenure decisions.
 - General Counsels have made statements that faculty handbooks are not contracts and not binding on the administration.
 - Strategic initiatives and market considerations are made by administrations rather than faculty.
 - There has been a growing influence of corporate donors on issues like curriculum and program content.

In conclusion, and specifically, the AAUP urged the Board to consider the following additional factors in assessing managerial status under *Yeshiva*.

1. The extent of administration hierarchy
2. The extent to which administrators makes academic decisions based on revenue generation or other market based considerations
3. The degree of consultation by administrations with faculty over academic and nonacademic matters
4. Whether administrations see faculty recommendations as advisory rather than effective
5. Whether administrations routinely approve nearly all faculty recommendations without independent review

6. Whether conflict between the administration and the faculty reflects lack of alignment of admin and faculty interests.

On the other side of the argument, an amicus brief filed on behalf of the American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, Association of Independent Colleges and Universities of Pennsylvania, College and University Professional Association for Human Resources emphasized that the Board's very call for amicus briefs constituted *de facto* rulemaking and expanded the mandate of the D.C. Circuit, namely, that the Board should "identify *which* of the relevant factors set forth in *Yeshiva*... are significant and *which* less so... and to explain *why* the factors are so weighted." The questions posed by the Board in its call for briefs go far beyond that directive.

The brief supports an argument that the Point Park University faculty members are indeed managers. In addition, the brief emphasizes the core findings of the Supreme Court. These include the central points that the "effective authority in matters of curriculum and course selection are of paramount importance under *Yeshiva* and such authority is the *sine qua non* of managerial status; that graduation policies, course scheduling, grading, student admission and retention policies, matriculation standards and teaching methods are also important and faculty should ordinarily have authority in a majority of these areas to be considered managerial; and that other considerations like faculty status matters are relevant but not central to managerial status under *Yeshiva*."

Such factors remain the *only* factors the Board should consider; the Supreme Court identified these factors as the core of its decision with great articulation and therefore there is no need for the Board to expand those factors in considering future cases.

Further, the brief underlined that the Supreme Court recognized that the Act cannot be applied to higher education in the same manner that it would be to private industry generally. The Board must analyze managerial factors in that spirit.

If such an inquiry proves different in the context of higher education than it does in the context of manufacturing, retail, health care or any of the other myriad areas subject to the Board's jurisdiction, it is simply a product of the fact that, as recognized by Yeshiva, higher education does not fit within the mold of pyramidal hierarchies found in private industry generally.

Finally, the brief noted, in answer to one of the Board's questions, that there have been no significant developments in models of decision-making in private universities since *Yeshiva*. Faculty today continue to exert the same amount of influence and control, if not more, over the aspects of institutional governance as they always have.

It is likely similar briefs on both sides will once again be filed, or re-filed, as the Board considers this pivotal issue in the arena of faculty collective bargaining.

The Board cannot reverse precedent in this case, as the Supreme Court's decision remains the law of the land for determining managerial status of private sector faculty. But the Board's slant in this case, its possible decision to choose some factors over others in importance or to add other considerations in deciding these types of cases make the Point Park University case extremely interesting to watch for future litigation.

3. Graduate teaching assistants and New York University

The long-awaited *New York University* case involving the employee status of graduate teaching assistants again garnered much attention this year, but this time it was primarily because the Board never had to decide the issue. NYU and the Graduate Student Organizing Committee/UAW settled the matter by agreeing that an election would be conducted under the auspices of the American Arbitration Association. In the agreement, the University agreed to remain neutral, refrain from influencing the election, and bargain in good faith for a contract following certification of a majority vote. The UAW agreed to withdraw pending National Labor Relations Board petitions for elections at NYU and NYU-Poly.

In an election conducted by the American Arbitration Association Dec. 10-11, 2013, 98 percent of the graduate employees at the two campuses who voted in the election chose to be represented by the UAW locals. Out of 1,247 graduate, research and teaching assistants eligible to vote in the election, 620 voted for the union and 10 voted against representation.

4. Appropriate bargaining units:

The arguments and consequences over the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 NLRB No. 56 (December 22, 2010) continue into 2014. It was in that case where the Board altered its approach to bargaining unit questions and indicated that it would look favorably on units with a small grouping of employees who share a community of interest, even if a larger unit makes more sense in light of all community of interest factors. In particular, the Board held that:

*...in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an **overwhelming** community of interest with the included employees*

Since the decision, considerable discussion has ensued in the labor community about the long range impact of this decision, and whether the Board's ruling will spawn a series of so-called "micro-units," where small clusters of employees who are identifiable as a

group and who share a community of interest would now have the right to unionize *even if* they have a considerable amount of connection to and community of interest with other employees. Standard bargaining units like production and maintenance units or service and maintenance units – common throughout the country – may now be subdivided by craft or department or job function. The Board’s use of the term “overwhelming” is a clear signal that it will not lightly accept employer arguments that only a larger unit of employees is appropriate.

The *Specialty Healthcare* case was finally affirmed by the 6th Circuit Court of Appeals in *Specialty Healthcare & Rehabilitation Center of Mobile* 357 NLRB No. 83, at *1(Aug. 26, 2011) *cross-appeals pending sub nom. Kindred Nursing Ctrs.E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th Cir.).

Specialty Healthcare has already been applied in a number of cases. See for example, *Guide Dogs for the Blind*, 359 NLRB No. 151 (July 3, 2013)(canine welfare technicians and instructors constitute an appropriate unit; no overwhelming community of interest with other dog handling classifications); *Fraser Engineering Company*, 359 NLRB No. 80 (2013); *DTG Operations*, 357 NLRB No. 175 (December 30, 2011); *Odwalla Inc.*, 357 NLRB No. 132 (December 9, 2011); *Northrup Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (December 30, 2011); *Nestle Dreyer’s Ice Cream Co.*, 358 NLRB. No. 45 (May 18, 2012); *The Neiman Marcus Group d/b/a Bergdorf Goodman*, Case No. 2-RC-076954 (May 4, 2012). See also *Macy’s Inc.*, 1-RC-091163 and *DPI Secuprint*, 3-RC-012019

Specialty Healthcare has now emerged as relevant in bargaining unit cases involving adjunct faculty. In *Loyola Marymount University*, 31-RC-118850 (January 15, 2014), the Regional Director found that a unit limited to all part time, non-tenured faculty employed at the University’s Westchester campus in Los Angeles was not appropriate in the face of the employer’s argument that the only appropriate unit would also include field work supervisors and all lecturers who teach an on line course that are part of a program at the Westchester campus. The RD stated that the University met its burden under *Specialty Healthcare* to show that the field work supervisors and the on line lecturers share an overwhelming community of interest with the petitioned-for unit such that there is no legitimate basis for their exclusion from the unit. Principle factors included:

- Common departmental structure
- Common terms and conditions of employment
- Common skills and training
- Common job functions and work and job overlap
- Interchange among employees
- Functional integration
- Common supervisor
- Same educational credentials

The RD noted that there were differences between the groups. These included:

- Field work supervisors are paid by number of students supervised rather than how many courses they teach
 - But noted that if the pay scale is changed for course work, it automatically affects how the field work supervisor is paid
- The physical work locations of the field work supervisors and on line lecturers differs from the other adjuncts
 - But even within the petitioned unit, the adjuncts are spread out over a 142 acre campus and in different buildings and schools
- Field work supervisors do not teach in a classroom
 - But both groups use the campus for meeting students
- On line lecturers do not meet in classroom all the time
 - But they use the same campus technology to instruct their courses and often meet students on campus
- Different methods of teaching, including different exam requirements and different frequency of meeting students
 - But these minor differences do not trump commonality factors

The RD also noted that many lecturers and field work supervisors co-teach during a semester and sometimes switch jobs.

In contrast, in *University of La Verne*, 21-RC-115880 (December 17, 2013;, Request for Review denied, February 19, 2014), the SEIU petitioned unit of adjunct faculty on the main campus of the University of La Verne was upheld as appropriate despite University arguments to broaden the unit to include all adjuncts on all ten regional campuses. The RD noted that “the Main and Regional campuses have different day to day management, the absence of evidence of true interchange and interaction among the part time faculty at the Main and Regional Campuses, and the fact that the campuses are geographically separated.” (Decision, p. 16).

There were numerous similarities among the adjuncts on all campuses. These included:

- Same application process
- Same hiring and appointment procedures
- Same wage scale
- Same eligibility for benefits
- Same employment policies
- Same contract form
- Same performance review system
- Same disciplinary procedures
- Same eligibility and notification period for contract renewal
- Same eligibility for promotion
- Same grievance procedure
- Centralized management
- Some adjuncts working at two or more campuses in same semester

But on the other hand, there were sharp geographic differences, local and significant daily supervision on each campus, and job locations specified in advertisements. For example, distance between the Main Campus and the Regional Campuses range from 12.5 miles to over 200 miles. The RD noted that either by applying the single facility standard found in cases like *Hilander Foods*, 348 NLRB 1200 (2006) or the *Specialty Healthcare* standard, the petitioned for unit limited to the Main Campus is appropriate.

It is highly likely that as adjunct organizing continues at a rapid pace, these issues will emerge in many cases, particularly in large universities with multiple schools and colleges and sometimes different geographic campuses.

Beyond adjuncts, one can imagine a myriad of potential bargaining units that now might ordinarily been seen as inappropriate fragments of larger units of employees. For example, a unit of lab technicians might be deemed appropriate as opposed to a broad unit of all technical employees, or all clerical and technical employees. A unit of academic counselors might be distinct enough in job function to constitute its own unit as opposed to being in a broad unit of all professionals. Similarly, a unit of admissions counselors who travel around the country on behalf of an institution might be an appropriate unit based on the unique nature of their work. Indeed, even certain departments of faculty, or divisions of faculty, or schools of faculty may have enough distinctive qualities to be certified as an appropriate bargaining unit. For example, a unit of library faculty might very well be separated as a separate unit from other faculty? Indeed, would a unit of the faculty of a School of Education have enough of a community of interest unto itself such that it could stand separate and apart from all other faculty at a major university?

In all of these cases, the issue from the employer perspective is not so much the *size* of the unit as the *sensibility* of the unit. As has been correctly pointed out, most bargaining units have a median size of around 23-25 employees. *Specialty Healthcare* is not going to alter that number significantly. But what the decision does spotlight is the question of whether larger units of employees with a commonality of interests is more sensible, practical, efficient and more conducive to labor peace than smaller groupings or subsets of employees.

We will wait to see how the Board applies its new standards to higher education in future cases.

5. End of the NLRB Posting Mandate

The long drawn out controversy over the NLRB's initiative to require employers to post a statement of NLRB rights came to an end this past year.

First, as noted last year, in *National Association of Manufacturers. v. NLRB*, 846 F. Supp. 2d 34, 2012 WL 691535 (D.D.C., March 2, 2012), the District Court for the

District of Columbia ruled that the Board had the authority to require employers to post notice of NLRA rights. But the Court struck down the unfair labor practice penalty that the Board had promulgated for not posting, only to the extent that “the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice.” This case was appealed by the Plaintiffs and the Board filed a cross-appeal. Briefs were submitted and the case is pending.

In contrast, in *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778, 2012 WL 1245677 (D.S.C., April 13, 2012), the South Carolina federal district court ruled that the Board lacked statutory authority to promulgate the rule requiring all employers to post the notices informing employees of their rights under the NLRA. That decision was appealed to the Fourth Circuit by the Board where it was upheld in *Chamber of Commerce v. NLRB*, 721 F. 3d 152.

Similarly, in May 2013, the U.S. Court of Appeals for the District of Columbia held in *National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir., 2013) that requiring employers to post the statement of NLRA rights would be inconsistent with the free speech proviso of Section 8(c) of the Act, which precludes finding noncoercive employer speech to be an unfair labor practice or evidence of an unfair labor practice.

It was thought the Board may seek Supreme Court review of these decisions, but on January 2, 2014, the NLRB allowed Supreme Court deadlines to pass without filing petitions to review the two appellate cases that invalidated its rule. Thus, employers are not bound to post a statement of NLRA rights as the Board had originally proposed. However, the Board said it would continue to maintain a copy of the same workplace posted on its own website – something the D.C. Circuit had said would be allowable.

6. Expedited election rules struck down-- but arise again

As noted in previous conference papers, the Board originally published its final rule amending its representation procedures on December 22, 2011. 76 Fed. Reg. 80138. Those rules would have dramatically altered representation procedures and shortened time frames from the filing of a Petition for Representation to an actual election. The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a lawsuit in the U.S. District Court for the District of Columbia challenging the rule. In *Chamber of Commerce v. NLRB*, 2012 WL 1664028 (D.D.C. May 14, 2012). The D. C. District Court ruled that the Board lacked a quorum of three to promulgate the new expedited election rules. Three members required for Board action under *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010). The lower court had found then-Member Brian E. Hayes (R) did not participate in an electronic voting room procedure that was used to register final approval of the regulatory change, depriving the board of a three-member quorum required for action

The Board appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a statement of supplemental authorities Jan. 29, 2013 arguing that Becker was placed on the board by a recess appointment that the business groups said would be considered unconstitutional under the D.C. Circuit's recent ruling in *Noel Canning*, 194 LRRM 3089 (D.C. Cir. 2013). Therefore, the Chamber argued, the *Noel Canning* decision provides additional independent grounds to affirm the lower court's decision, since under its reasoning Member Becker's recess appointment on March 27, 2010 was unconstitutional. The NLRB did not respond to the filing. Even if Hayes participated in approval of the rule, the business groups argued, Becker's appointment was invalid and NLRB lacked a quorum when it changed its regulations.

On Feb. 19, 2013 that Circuit issued an order holding the appeal in abeyance an appeal concerning the December 2011 adoption of amendments to its regulations on representation case procedures (*Chamber of Commerce v. NLRB*, D.C. Cir., No. 12-5250, 2/19/13). In a brief order that cited "consideration of" the then- recently issued *Noel Canning*, the court removed the *Chamber of Commerce* case from an April 4, 2013 oral argument calendar and said the case would be "held in abeyance pending further order of the court."

But all of this prior litigation was rendered moot, as the Board chose not to pursue its appeal as to whether the past rules were properly implemented. On January 22, 2014, the Board formally rescinded its 2011 changes. Instead, in what essentially is a "do over," the Board decided that it would simply pose those same rules again and invite public comment. (February 2, 2014). As the Board stated in its proposed Rule, "the present proposal is, in essence, a reissuance of the proposed rule of June 22, 2011."

Those proposed rule changes include:

1. Pre-election hearings must be held within seven days after a hearing notice is served.
2. Requires employers to file a detailed statement of position on any and all issues involved in the petition before the hearing begin, with failure to present an issue constituting a waiver of the issue.
3. Defers voter eligibility issues until after the election.
4. Amended board regulations to state that the purpose of pre-election hearings is to determine whether a question concerning union representation exists that should be resolved in a secret ballot election
5. NLRB hearing officers were given authority to limit the presentation of evidence in such a hearing to genuine issues of fact material to whether a question of representation exists.
6. Post hearing briefs would no longer be a matter of right but only could be filed with the permission of the hearing officer

7. The right to seek Board review of the regional director's pre-election rulings was eliminated; such issues could only be review post-election
8. Eliminated language in the regulations that recommended that the regional director not schedule balloting within 25 days of directing an election.
9. Appeal of a pre-election ruling would only granted under "extraordinary" circumstances
10. Amended board rules to make NLRB review of post-election disputes discretionary
11. Employer must provide NLRB with list of names and addresses of voters within two days after the Regional Director's direction of election, instead of the current seven. Also, phone numbers, email addresses, and work locations must be provided.

In the end, the question of "what's broken?" still looms over these changes. For indeed, the General Counsel's own summary of 2011 cases at the Board issued in early March 2012 reveals two important findings:

- 91.7% of all initial elections in 2011 were conducted within 56 days of the filing of the petition.
- Initial elections in union representation elections were conducted in a median of 38 days from the filing of the petition.

These figures were under existing regulations and show a reasonable processing period on issues of such consequence. The Board, in pushing for the expedited election rules, never sets forth a compelling case as to why these reasonable time lines have to be shortened even further. And, since despite their democratic nature, unions do not have to "stand" for re-election, the Board's regulations will force employees in many situations to make the most consequential and largely irreversible decision of their workplace life in but a handful of days.

As the dissenting members of the Board stated with regard to the newly proposed regulations, "how short is too short to assure employees the 'fullest freedom' of choice as required by the Act?" The dissent continued:

The great majority of employees in the United States lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining. In 2011, the Board found that '*nonunion* employees are especially unlikely to be aware of their NLRA rights, and the Board acknowledged that 'to the extent that lack of contact with unions contributed to lack of knowledge of NLRA rights 20 years ago, it probably is even more of a factor today.'

The Board has found that many *employers*... lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.

We do not know the precise point in time when shortening the timetable applicable to all Board-conducted elections impermissibly denies employees, unions, and employees the right to engage in speech protected by the Act and the First Amendment. However, by further reducing the time between petition-filing and the election, the NPRM (Notice of Proposed Rule Making) curtails the ability of parties to exercise their right to engage in protected speech. Particularly because the consequences of an election can be long-lasting – regardless of whether employees vote for or against union representation – the NPRM limits the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important. (*Dissent to NPRM of Members Miscimarra and Johnson*).

While the Board majority views these proposed changes as necessary fixes to the system, it is fair to say, however, that it is very likely that many employees will also now be voting in elections with a lack of clarity as to who is in and who is out. Indeed, on one of the most sensitive statutory issues – who is a supervisor? – it is likely many elections will proceed without any final determination, since such judgments are now to be made *after* the election. This will affect voter sentiment, as well as making it very confusing as to whether the conduct of such individuals can be attributed to the employer. One only has to think of the example of the status of a department chair on a college or university campus and the traditional fights over whether or not the chair is a supervisor to underscore the importance of such issues to faculty.

Similarly, the expedited procedures and the drive to a quick election will invariably lessen the time for reflection and debate about the central employee question of what type of work environment they want to work in and what the consequences may be of unionization. Such decisions are of immense importance and the pre-election period provides a time period for the airing of all points of view. The Board's proposed rules may come close to eradicating the time for reflection that employees deserve.

From the employer's perspective, the processing of an R petition is already on a fast track. An employer must currently scramble to be ready for a hearing no more than 14 days after receiving a faxed copy of the Petition. Particularly in the world of higher education, being able to research the propriety of a proposed bargaining unit, develop evidence, find witnesses and otherwise prepare for one of the institution's most consequential hearings is already done over a breathtakingly short period. The Board does an injustice to the legitimate rights of employers by these new rules and forcing an even tighter time frame, while never establishing why such changes are critically important for employees.

The Board is planning public hearings on the proposed rule for April 10 and 11, 2014.

7. D.R. Horton and Class Action Waivers

The NLRB had held in *D.R. Horton*, 357 NLRB No. 184 (2012) that requiring employees to enter into an arbitration agreement, that among other things, prohibits an employee from pursuing claims in a collective or class action, violated the National Labor Relations Act because the class action waiver inhibited employees from engaging in protected concerted activity. On December 3, 2013, in *D.R. Horton v. NLRB*, 737 F. 3d 344, 2013 BL 335349 (5th Cir., 2013), the Fifth Circuit Court of Appeals reversed the Board and held that there was no violation of the Act. However, the Court further held that such agreements can violate the NLRA if their language could reasonably be interpreted as prohibiting employees from filing unfair labor practice charges with the Board.

The Court held that the Board failed to give proper weight to the Federal Arbitration Act (“FAA”) which generally requires arbitration agreements to be enforced according to their terms. The Court further rejected the Board’s arguments regarding two exceptions to this rule.

First, the Board relied upon the FAA’s “savings clause” arguing that because all contracts violating employees’ NLRA-protected rights are unenforceable, the Board’s invalidation of the mutual arbitration agreement (“MAA”) was no different than that of any other contract. The Court rejected this contention, noting that “[w]hile the Board’s interpretation is facially neutral ... the effect of this interpretation is to disfavor arbitration.” Relying in part on the U.S. Supreme Court’s ruling in *AT&T Mobility LLC v. Conception*, 131 S.Ct. 1740 (2011), the Court held that the savings clause was not a basis for invalidating class action waivers in arbitration agreements because “[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA.”

Next, the Board argued that NLRA contained a congressional command precluding application of the FAA. Once again, the Court rejected the Board’s argument. After reviewing the NLRA’s statutory text, legislative history and purpose, the Court held that “[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA.” The Court further noted that it was “loath to create a circuit split” observing that “[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale, and held arbitration agreements containing class waivers enforceable.”

The Court, in examining legislative history, found that there was no congressional mandate in the NLRA to override the FAA. The FAA establishes “a liberal federal policy in favor of arbitration agreements” and its purpose to “ensure the enforcement of arbitration agreements according to their terms.” *AT & T Mobility v. Conception*, 131 S.Ct. 1740, 1748,1749

While the Court found that employers do not automatically violate the NLRA through the use of arbitration agreements containing class and collective action waivers, it agreed with the Board that this particular employer’s MAA violated the NLRA because its

language could reasonably be interpreted as prohibiting employees from filing unfair labor practice charges with the Board. The MAA's arbitration provision spoke only to the requirement for employees to bring claims through arbitration without any reference to any exceptions for unfair labor practice charges. The Court specifically focused on the MAA's language that the employee "knowingly and voluntarily waiv[es] the right to file a lawsuit *or other civil proceeding* relating to Employee's employment with [Horton] *as well as* the right to resolve employment-related disputes in a proceeding before a judge or jury." According to the Court, "[t]he reasonable impression could be created that an employee is waiving not just his trial rights, but his administrative rights as well."

8. Fair share Case: *Harris v. Quinn*

On October 1, 2013 the Supreme Court granted *certiorari* in *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), a case that raises various issues involving the constitutionality of forcing public employees to pay fees to their collective bargaining representative. Oral argument was heard on January 21, 2014 and a decision is pending.

The plaintiffs are home care personal assistants that provide in-home care to disabled individuals through Medicaid-waiver programs in Illinois. The employees are challenging mandatory fair share fees they are required to pay to the SEIU and that the Union uses those funds for petitioning the state on issues involving Medicaid. The plaintiffs are argued that this "petitioning" is itself "speech," and therefore they are being forced to finance the Union's positions that the plaintiffs may or may not agree with.

The plaintiffs have first argued that they are not State employees, but alternatively, if they are deemed to be State employees, the fair share fees employees were required to pay under the contract violated their First Amendment rights by compelling association with, and speech through, a Union.

Even more broadly, the plaintiffs seek the overturn of the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, (1977) which allowed agency shops in the public sector.

9. Employer confidentiality and workplace rules

Previous annual conference papers have discussed in detail the Board's scrutiny of employer workplace rules to determine if such rules chill employees' Section 7 rights. General Counsel advice memos have similarly been cited in which the GC's office has given guidance on such matters. These decisions spring out of a line of cases that take their root in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (holding that maintaining rules that are likely to chill Section 7 rights is an unfair labor practice, even absent evidence of enforcement.") and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), where the Board said that an employer rule or policy will be deemed unlawfully

overbroad if: 1) employees would reasonably construe the language to prohibit Section 7 activity; 2) the rule was promulgated in response to union activity; or 3) the rule has been applied to restrict the exercise of Section 7 rights.

In *MCPs, Inc.*, 360 NLRB No. 39 (February 6, 2014), the Board found that the employer maintained an overly broad confidentiality rule in its employee handbook stating that “dissemination of confidential information within the company, such as personal or financial information, etc, will subject the responsible employee to disciplinary action or possible termination.” The Board found that employees would reasonably construe this rule to prohibit the discussion of wages and other terms and conditions of employment with their coworkers – activity protected by Section 7. See *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) and *Cintas Corp.*, 344 NLRB 943 (2005). The Board has previously held that employees may not be prohibited from discussing their own wages or attempting to determine what other employees are paid. *Mediaone*, 340 NLRB 277, 279 (2003); *NLS Group*, 352 NLRB 744 (2008).

On the other hand, in *Copper River of Boiling Springs*, 360 NLRB No. 60 (Feb. 28, 2014), a Board panel of Members Miscimarra and Johnson and Chairman Pearce found that an employer did *not* violate Section 8 (a)(1) of the Act by maintaining a rule prohibiting employees from “displaying a negative attitude” in dealing with fellow employees or restaurant patrons Chairman Pearce dissented from dismissal of the Section 8(a)(1) allegation, arguing that “an employee would reasonably interpret a ‘negative attitude’ as one that is critical of the employer.” The rule would inhibit employees from discussing their own terms and conditions of employment, the chairman found.

The rule in question, found in the company handbook, prohibited “insubordination to a manager or lack of respect and cooperation with fellow employees or guests,” and specified “[t]his includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests,” citing *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011). In the latter case, the Board had found that “negative attitude” language was lawful because linking an employee’s attitude to work assignments made the rule “significantly less likely to be construed by employees as prohibiting concerted, protected activity.” Similarly, the rule in *Cooper River* was found to be valid because it was limited to unprotected conduct that would interfere with the Respondent’s legitimate business concerns.”

Chairman Pearce, who dissented from the board ruling in *Hyundai America*, said he “adheres to the view ... that an employee would reasonably interpret a ‘negative attitude’ as one that is critical of the employer, and that the rule would thereby reasonably inhibit employees from discussing controversial topics, including terms and conditions of employment.”

10. Neutrality clauses: *UNITE HERE Local 355 v. Mulhill*

In *UNITE HERE Local 355 v. Mulhill*, 667 F.3d 1211 (11th Cir., 2012), the Eleventh Circuit ruled that Hollywood Greyhound Tack, Inc., entered a memo of understanding with the union in which the employer promised to give union representatives access to nonpublic areas of the work premises in order to organize its employees during nonwork hours. The agreement also committed the employer to providing the union with a list of employees, including jobs, departments and home addresses. The employer also promised to remain neutral during the campaign. In return, the union promised to lend financial support to a Florida state ballot initiative on casino gambling. The union also promised not to picket, boycotts or strike against the employer.

A track worker brought a suit claiming that the agreement constituted a “thing of value” that might be violated of Section 302 of the LMRA- which prohibits employers from acting to “pay, lend or deliver, any money or other thing of value” to a labor organization, except as authorized by the Act (e.g remitting union dues or health and welfare contributions). The lower court dismissed the case. But the Eleventh Circuit revived the lawsuit, noting that “organizing assistance can be a thing of value” under Section 302. The Supreme Court granted cert. and a decision is pending.

11. General Counsel Advice Memo GC 13-04: What the GC Wants to Review

On February 25, 2014, the General Counsel issued a Memorandum in which he stated:

In light of Board and circuit court decisions issued since GC 11-11, and the emergence of new policy issues in the past several years, this updated list of matters that should be submitted to the Division of Advice has been prepared.

The list is divided into three groups. The first group includes matters that involve General Counsel initiatives or areas of the law and labor policy that are of particular concern to me. The second group includes difficult legal issues that are relatively rare in any individual Region and issues where there is no governing precedent or the law is in flux. The third group includes updates regarding case handling matters that have traditionally been submitted to Advice.

Group 1: Cases that involve the General Counsel’s initiatives or policy concerns:

- Cases involving the issue of whether a perfectly clear successor should have an obligation to bargain with the union before setting initial terms of employment, as opposed to only narrow exceptions as enunciated in *Spruce Up*, 209 NLRB 194

- (1974), enforced, 529 F.2d 516 (4th Cir. 1975). (see dissenting Members Fanning and Panello in *Spruce Up*, 209 NLRB at 199-210, as further explicated in the concurrence by former Chairman Gould in *Canteen Co.*, 317 NLRB 1052, 1054 (1995)).
- Cases involving an allegation that the employer’s permanent replacement of economic strikers had an unlawful motive under *Hot Shoppes*, 146 NLRB 802 (1964).
 - Cases that involve the issue of whether employees have a Section 7 right to use an employer’s e-mail system or that require application of the discrimination standard enunciated in *Register Guard*, 351 NLRB 1110 (2007), enf. denied in part, 571 F.3d 53 (D.C. Cir. 2009).
 - Cases involving the duty to furnish financial information in bargaining where the employer has arguably asserted an “inability to pay” or where the employer has made more specific financial assertions and refused to provide information in support of those assertions (see GC 11-13 and SAM ADV 13-18).
 - Cases involving the applicability of *Weingarten* principles in non-unionized settings as enunciated in *IBM Corp.*, 341 NLRB 1288 (2004).
 - Cases involving make-whole remedies for construction industry applicants or employees who sought or obtained employment as part of an organizing effort as enunciated in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).
 - Cases involving pre-recognition bargaining by a prospective successor with an incumbent union.
 - Cases involving a refusal to furnish information related to a relocation or other decision subject to a *Dubuque Packing* analysis (see Liebman dissent in *Embarq Corp.*, 356 NLRB No. 125 (2011) and OM 11-58).
 - Cases where *Collyer* deferral may not be appropriate because an arbitration has not/will not be conducted within a year (see GC 12-01 and *Collyer*_deferral chart on Advice/Operations webpages).
 - Pre-arbitral settled and post-arbitral deferred cases involving 8(a)(1) and (3) violations (see GC 11-05 and pre-arbitral settlement chart and post-arbitral deferral chart on Advice/Operations webpages).
 - Cases covered by GC Memorandum 11-01 (Effective Remedies in Organization Campaigns) where the following remedies might be appropriate: (1) access to employer electronic communications systems, (2) access to nonwork areas, and (3) equal time to respond to captive audience speeches.

- Cases covered by GC Memorandum 11-06 (First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies and Submissions to Division of Advice) where reimbursement of bargaining expenses or of litigation expenses might be appropriate.

Group 2: Cases that involve difficult legal issues or the absence of clear precedent:

- Cases involving novel issues arising from the application of the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012), specifically: (1) whether the employer has demonstrated "exigent circumstances" that permitted unilateral discipline, (2) what is the appropriate remedy for a failure to engage in pre-discipline bargaining, and (3) what suffices for purposes of good faith bargaining in these circumstances.
- Cases that involve an assertion of 9(a) status in the construction industry based on contractual language (per *Central Illinois/Staunton Fuel*, 335 NLRB 717 (2001)) that implicate the D.C. Circuit's decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003) (see OM 14-23).
- Cases involving whether a novel form of conduct (e.g. coordinated "shopping", excessive use of loudspeakers, corporate campaigns) constitutes Section 8(b)(4)(i) or (ii) or 8(b)(7) conduct.
- Cases involving the validity of partial lockouts.
- Cases in organizing situations raising the issue of union access to lists of employee names and addresses where those employees are widely dispersed or have no fixed duty location, under *Technology Service Solutions*, 324 NLRB 298 (1997).
- Cases in which the Region is considering issuing or has issued complaint against an entity that has purchased a bankrupt entity through a "free and clear" sale.
- Cases involving "at-will" provisions in employer handbooks that are not resolved by extant Advice memoranda.

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- Cases in which the Board invites parties to file position statements following a remand from the Court of Appeals or on the Board's own motion and cases where the Region wants to seek to file a brief notwithstanding lack of a Board invitation.
- Cases involving the need to harmonize the NLRA with local, state, or other federal statutes.
- Cases of potential or actual overlapping jurisdiction with other Federal agencies, except where there is an inter-agency memorandum of understanding.
- Cases presenting unresolved issues concerning undocumented workers, including remedial questions left open in *Mezonos Maven Bakery*, 357 NLRB No. 47 (2011).
- Cases involving the legality of a pending or completed lawsuit or grievance where the Region recommends issuing a complaint.
- Cases involving the legality of any aspect of a "neutrality" or card check agreement or other pre-recognition agreement that is not answered by the Board's decision in *Dana Corp.*, 356 NLRB No. 49 (2010).
- Cases involving the rights of contractor employees, who work on another employer's property, to have access to the premises to communicate with co-workers or the public, where the issues are not resolved by the Board's decision in *New York New York Hotel and Casino*, 356 NLRB No. 119 (2011).
- Cases involving mandatory arbitration agreements with a class action prohibition that are not resolved by *D.R. Horton* or subsequent Advice memoranda.
- *Beck* issues regarding:
 - the chargeability of job targeting program expenses.
 - the chargeability of legislative expenses (see *United Nurses*, 359 NLRB No. 42 (2012)).
 - the chargeability of organizing expenses in complex cases.

Group 3: Other case-handling matters to be submitted:

- Injunction Litigation matters:
 - Requests for authorization to file a 10(j) petition.

- 10(j) recommendations in all cases involving: (1) complaints seeking a *Gissel* bargaining order; (2) discharges during organizing campaigns (GC 10-07); (3) first contract bargaining (GC 11-06); and (4) successorship cases.
- Requests for authority to seek contempt of a 10(j) or 10(l) order.
- Recommendations regarding appeal in 10(j) or 10(l) cases in which a district court denied injunctive relief.
- Notice of any Notice of Appeal filed in a 10(j) or 10(l) case.
- Subpoena authorization issues:
 - Requests to issue investigative subpoenas post-complaint.
 - Requests for an investigative subpoena to identify an employer that placed a “blind” newspaper advertisement seeking job applications (see OM 98-65).
 - Requests to issue investigative subpoenas where a serious claim of privilege is likely to be raised (e.g., subpoenas to the press, witnesses whose chosen counsel the Region would exclude from the interview) (see CHM (ULP) Sec. 11770.4).
 - Cases where, following issuance of any subpoena, intervening circumstances present enforcement problems.
 - Cases where the Region is considering denying the request of a private party for enforcement of subpoena.
- Cases where the Region lost an ALJD on an Advice-authorized legal theory and the Region does not want to take exceptions; cases where new evidence was introduced at the hearing that could call into question the continued validity of the Advice-authorized legal theory; and cases where an ALJD raises novel or complex questions even if the case was not previously submitted to Advice.
- Formal Settlement Agreements that the Region recommends accepting unilaterally (see CHM Sec. 10164.8).
- EAJA cases where the Region wishes to pay a claim.
- Other case-handling matters requiring Advice approval that are referenced in the case-handling manual (see CHM Sec. 10264.5 (naming an attorney as respondent or agent); CHM Sec. 11731.3 (*St. Gobain* blocking charges); CHM Sec. 10123.1 (reinstating charges outside the 10(b) period); CHM Sec. 10164.3 (attempts by respondents to withdraw from formal settlements); CHM Sec. 10240 (CD cases where parties have not utilized an agreed-upon method of resolution); CHM Sec. 11753.2 (motions for reconsideration); CHM 10132.1 (settlement notices posted

for less than 60 days); CHM Sec. 10132.4 (issues regarding the extent of electronic notice-posting); CHM Sec. 10124.4 (settlements with novel remedies); CHM Sec. 10280.2 (GC's attorneys fees); CHM Sec. 10394.10 (novel situations regarding the production of witness statements); CHM Sec. 10120.1 (approval of withdrawals in Advice-authorized cases)).

12. Other cases from 2012-13 that continue to bear watching

As noted above, the Supreme Court's impending decision in *Noel Canning* will largely determine the viability of a series of precedent-setting decisions from 2012-13 from the previous Board. While no major changes have occurred in these new areas as yet, a summary of those decisions are outlined here. Whatever the Court does, the new Board may still adhere to the principles underlying these decisions even if they are nullified by the Court. If they are, fresh cases may take their place but the decisional outcome may remain the same.

Union dues checkoff survives contract expiration

In *WKYC-TV*, 359 NLRB No. 30 (December 12, 2012), the NLRB overturned 50 years of precedent by ruling that an employer's obligation to check off union dues continues after the expiration of a collective bargaining agreement. In a 3-1 decision, the Board reversed *Bethlehem Steel*, 136 NLRB 1500 (1962) which established that an employer had no obligation to continue a dues checkoff provision after the contract expired. This had been basic labor law for half a century.

In reversing this long standing precedent, the Board majority (Pearce, Griffin and Block) found that the 1962 Board had no rational basis for ever saying that the provision should expire and that instead the dues check off clause, like any other term and condition of employment, should continue as part of the status quo, even if the agreement itself has expired.

Duty to bargain with union over disciplinary actions prior to first contract

In *Alan Ritchey Inc.*, 359 NLRB No. 40 (December 14, 2012), the NLRB ruled that an employer must bargain with a union before imposing disciplinary discipline on a unit employee after the union has been certified but before a first contract has been negotiated. A Board panel of Chairman Pearce and Members Griffin and Block ruled that, like other terms and conditions of employment, discretionary discipline is a

mandatory subject of bargaining and employers cannot impose certain types of discipline unilaterally.

The Board summarized its basic conclusions as follows:

Accordingly, where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintained the fixed aspects of the disciplinary system and bargain with the union over the discretionary aspects (if any), e.g. whether to impose discipline in individual cases, and, if so, the type of discipline to impose. The duty to bargain is triggered before the suspension, demotion, discharge or analogous sanction is imposed, but after the imposition for less sanctions, such as oral or written warnings.

While this seems clear in concept upon first reading, the Board's remaining explanations are anything but clear when trying to explain what the nature of that pre-imposition bargaining will look like:

At this stage, the employer need *not* bargain to agreement or impasse, if it does so afterward. In exigent circumstances, as defined, the employer may act immediately, provided that, promptly thereafter, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects. Finally, if the employer has properly implemented its disciplinary decision without first reaching agreement or impasse, the employer must bargain with the union to agreement or impasse *after* imposing discipline.

In elaborating on what this means, the Board explained that this duty would involve "sufficient advance notice to the union to provide for "meaningful discussion concerning the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion."

It will also entail providing the union with relevant information, if a timely request is made, under the Board's established approach to information requests. The aim is to enable the union to effectively represent employees by providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties have not reached agreement, the duty to bargain continues after the imposition of the discipline.

Moreover, the Board said there will be some "exigent circumstances" where the employer has "a reasonable, good faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel and in these cases, no pre-imposition bargaining need occur.

Finally, the Board said that the employer “need not await an *overall* impasse in bargaining before imposing discipline so long as it exercises its discretion within existing standards.”

After fulfilling its pre-imposition duties as described above, the employer may act, but must continue to bargain concerning its action, including the possibility of rescinding it, until reaching agreement or impasse.

Among its other reasoning, the Board stated that bargaining over such decisions make sense because “to hold otherwise and permit employers to exercise unilateral discretion over discipline after employees select a representative ... would render the union that purportedly represents the employees impotent.”

Duty to disclose witness statements to union

In 1978, the Board, in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978) had held that an employer did not have to turn over to the union “witness statements” obtained during investigations into allegations of misconduct. See also *New Jersey Bell*, 300 NLRB 42 (1990).

In *American Baptist Homes of the West d/b/a Piedmont Gardens*, 359 NLRB No. 46 (December 21, 2012). In *Piedmont*, the Board officially overruled *Anheuser-Busch, Inc.*, *supra* and stated that unions were not to be automatically denied access to witness statements obtained by the employer but instead the Board would utilize a “balancing test” in assessing union requests for the names and statements of witnessed interviewed during a company investigation.

The Board majority (Pearce, Griffin and Block) found that “the rationale of *Anheuser-Busch* is flawed.” The Board majority noted that unions are entitled to “relevant information necessary to the union’s proper performance of its duties... including information that the union needs to determine whether or not to take a grievance to arbitration.” However, if an employer asserts that the relevant information is “confidential,” then the Board balances the union’s need for the information against any legitimate and substantial confidentiality interests established by the employer. *Detroit Edison Co. v. NLRB*, 440 U.S.301 (1979).

We recognize that, in some cases, there will be legitimate and substantial confidentiality interests that warrant consideration, including the risk that employers or unions will intimate or harass those who have given statements, or that witnesses will be reluctant to give statements for fear of disclosure. But the same risks are presented by disclosure of witness names, for which there is no exemption, even where an employer asserts a good faith concern of confidentiality, threats, or coercion.

We find no basis to assume that all witness statements, no matter the circumstances, warrant exemption from disclosure. Rather we find it more appropriate to apply the same flexible approach that we apply in cases involving witness names. That test requires that if the requested information is determined to be relevant, the party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party's need for the information. See *Detroit Edison*, 440 U.S. 301, 318-320 (1979); *Jacksonville Area Association for Retarded Children*, 316 NLRB 338, 340 (1995). The Board considers whether the information withheld is sensitive or confidential based on the specific facts of each case. See *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006). As stated above, the party asserting the confidentiality defense may not simply refuse to furnish the requested information but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995)

Prohibition on confidentiality during investigations:

Banner Estrella Medical Center, 358 NLRB No. 93 (July 30, 2012)

In this case, the employer's human resources consultant routinely would ask employees making a complaint not to discuss the matter with their coworkers while the company's investigation was going on. The Board found such a blanket approach to be in violation of the Act by restricting employees from discussing working conditions and matters under investigation.

To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs the employees' section 7 rights.... In this case, the judge found that the Respondent's prohibition was justified by its concern with protecting the integrity of its investigations. Contrary to the judge, we find that the Respondent's generalized concern with protecting the integrity of its investigations was insufficient to outweigh employees' Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent's burden "to first determine whether in any given investigation witnesses needed to be protected, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up." [Citing *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011).

In order to minimize the impact on section 7, the employer has the burden of first determining whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to

prevent a cover up. This will call for a more particularized use of the “keep it confidential” directive, and may, in addition, require employers to modify existing sexual harassment and other policies that categorically state that all investigations are confidential or that those interviewed in any investigation should not discuss the investigation with anyone.

13. Deferral standards: Call for Briefs

On February 7, 2014, the Board invited interested people and organizations to file briefs on the question of whether the board should retain, modify or abandon its existing standards for deferring to arbitration awards under collective bargaining agreements. *Babcock & Wilcox Construction Co*, NLRB, No. 28-CA-22625, *invitation to file briefs* (2/7/14).

The previous General Counsel has asked the Board to adopt a new post-arbitral deferral standard in 8(a)(1) and (3) cases. Under the existing standard, the Board defers to an arbitration award when (1) the arbitration proceedings are fair and regular; (2) all parties agree to be bound; and (3) the arbitral decision is not repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Further, the arbitral forum must have considered the unfair labor practice issue.

The Board deems the unfair labor practice issue adequately considered if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. *Olin Corp.*, 268 NLRB 573 (1984). The burden of proof rests with the party opposing deferral.

The General Counsel had asked the Board to adopt a different standard. Under his proposal, the party urging deferral would bear the burden of demonstrating that (1) the collective bargaining agreement incorporates the statutory right, or the statutory issue was presented to the arbitrator, and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board would defer unless the award was clearly repugnant to the Act.

To aid in the consideration of this issue, the Board now invites the filing of briefs in order to afford the parties and interested *amici* the opportunity to address the following questions.

1. Should the Board adhere to, modify, or abandon its existing standard for post-arbitral deferral under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984)?
2. If the Board modifies the existing standard, should the Board adopt the standard outlined by the General Counsel in GC Memorandum 11-05 (January 20, 2011) or would

some other modification of the existing standard be more appropriate: e.g., shifting the burden of proof, redefining “repugnant to the Act,” or reformulating the test for determining whether the arbitrator “adequately considered” the unfair labor practice issue?

3. If the Board modifies its existing post-arbitral deferral standard, would consequent changes need to be made to the Board’s standards for determining whether to defer a case to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984); and *Dubo Mfg. Corp.*, 142 NLRB 431 (1963)?

4. If the Board modifies its existing post-arbitral deferral standard, would consequent changes need to be made to the Board’s standards for determining whether to defer to pre-arbitral grievance settlements under *Alpha Beta*, 273 NLRB 1546 (1985), review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987); and *Postal Service*, 300 NLRB 196 (1990)?

In answering these questions, the parties and *amici* are invited to submit empirical and other evidence.

Briefs not exceeding 50 pages in length shall be filed with the Board in Washington, D.C. on or before March 25, 2014. The parties may file responsive briefs on or before April 8, 2014, which shall not exceed 25 pages in length. No other responsive briefs will be accepted.