

**“Labor and employment Law Under the Biden Administration: The Agency Report Part II”**  
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**Labor and a Biden NLRB**

**Mark Gaston Pearce**

Visiting Professor/ Executive Director Workers’ Rights Institute  
Georgetown Law

**Introduction**

In the area of labor law and reform the Biden administration appears to be hitting the ground running. From the President’s first day dismissal of Trump appointee Peter Robb from the position of General Counsel of the National Labor Relations Board (NLRB or Board) to the support of the Protecting the Right to Organize Act (PRO Act) and the Amazon organizing campaign, America might be experiencing the most labor friendly president since Franklin Delano Roosevelt. How will this change of administration and apparent change of philosophy regarding worker rights affect NLRB decisions of the prior four years? This paper looks at what the changing of the guard might mean for a few key cases issued during the Trump administration. Also under examination will be the most current effort towards labor law reform presently before the Senate, the PRO Act.

**Pete is No Repeat: The Replacement of Peter Robb as General Counsel**

The dismissal of Peter Robb and the appointment of Peter Sung Ohr as Acting General Counsel of the NLRB by President Biden sent shock waves through the labor management community. The reactions ran the gamut from outrage to jubilation.

Regarding challenges to the president’s authority to dismiss Robb, this, I believe is a tempest in a teapot. The National Labor Relations Act (NLRA or Act) provides no limitation on the president’s authority to remove the General Counsel, stating only that “[t]here shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years.” 29 U.S.C. § 153(d). The Supreme Court has long held that a statutorily-fixed term of office is a limitation on the officeholder’s length of service, *not* a limit on the president’s authority to remove the officer during that term<sup>1</sup> and “[i]n the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.”<sup>2</sup> This assessment was reached by President Harry S. Truman when he asked for

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<sup>1</sup> See *Parsons v. United States*, 167 U.S. 324, 342 (1897).

<sup>2</sup> *Keim v. United States*, 177 U.S. 290, 293–94 (1900).

the resignation of then NLRB General Counsel, Robert Denham after the passage of the Taft-Hartley amendments to the NLRA. Subsequently, the Eisenhower administration in 1954 explored the idea of removing President Truman's General Counsel (appointed in 1950), and Assistant Attorney General Lee Rankin wrote a formal opinion concluding that the General Counsel could be removed.<sup>3</sup> More recently in 1983, during the Regan administration, Chief Justice John Roberts, when he was then a lowly associate White House counsel, penned a memo concluding that the "clear answer" to the question of whether the President has the authority to remove the NLRB General Counsel is that "the General Counsel serves at the pleasure of the President."<sup>4</sup>

But was the decision to remove Robb truly a surprise? According to a recent article in the Nation,<sup>5</sup> a [new report](#) by the nonpartisan US Government Accountability Office (GAO) provides compelling reasons for Biden's firing of Robb. The GAO found that Robb was dismantling the agency from the inside. He reduced staff size, destroyed employee morale, and failed to spend the money appropriated by Congress. This all occurred while Robb was pursuing what many in labor described as an anti-worker, pro-corporate [agenda](#). The NLRB's staffing fell 26 percent between fiscal year 2010 and fiscal year 2019, from 1,733 to 1,281. The personnel losses were disproportionately in the NLRB's field offices, where unfair labor practice charges are investigated, and union representation elections are held. The staffing problem was greatly exacerbated during Robb's time in office. For the eight years preceding Robb, the agency filled 95 percent of vacancies in the headquarters and 73 percent in the field offices. But under Robb, staffing in the field dropped by 144 people, and only 13 people—a mere 9 percent—were hired to fill these vacancies.

### **No Potted Plant!**

Peter Sung Ohr is NLRB born and bred. Having started as a field attorney in the NLRB's Honolulu resident office, he moved through the ranks and was working as a Deputy Assistant General Counsel in the NLRB's Division of Operations-Management prior to his appointment to regional director of Region 13 Chicago. As head of the Chicago regional office, Ohr was responsible for presenting many important issues to the Board, including the highly publicized

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<sup>3</sup> J. Lee Rankin, Assistant Attorney General, OLC, *Authority of the President to Remove the General Counsel of the National Labor Relations Board 2* (Feb. 23, 1954).

<sup>4</sup> See Memo from J. Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3 (July 18, 1983).

<sup>5</sup> Lynn Rhinehart, *Biden Is Rebuilding the National Labor Relations Board: A new report shows why the president had no choice but to fire the Trump-appointed general counsel of the NLRB*, THE NATION (Apr. 6, 2021), <https://www.thenation.com/article/politics/gao-nlrp-peter-robb-biden/>.

decision and direction of election in *Northwestern University 13-RC-121359*<sup>6</sup> where he initially found that the student football players met the definition of employee under the and therefore had the right to organize into a union.

Within days of dismissing Peter Robb, President Joe Biden named Ohr Acting General Counsel to the NLRB, a position in which he is currently serving. When asked about his intentions in that interim capacity, the Acting General Counsel stated that he did not intend to be a potted plant!<sup>7</sup> In February 2021, Ohr issued [MEMORANDUM GC 21-02, Rescission of Certain General Counsel Memoranda](#) rolling back a number of policies of his predecessor Peter Robb, and in March of this year issued [MEMORANDUM GC 21-03, Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines](#). In the memorandum, the Acting General Counsel reaffirmed that a focus of the General Counsel's office would be on the means to safeguard employee rights to engage in protected, concerted activity in order to redress an employer's retaliatory response. He stated he looked forward to robustly enforcing the Act's provisions that protect employees' Section 7 rights, acknowledging that recent decisions issued by the current Board have restricted those protections. Notably, the majority opinions in two decisions—*Alstate Maintenance*<sup>8</sup> and *Quicken Loans*<sup>9</sup>—applied “mutual aid or protection” narrowly. Nevertheless, the Board majority has left avenues for demonstrating mutual aid or protection that should be fully utilized. He also made clear that he includes within the *inherently concerted doctrine* discussions concerning workplace health and safety as well as racial discrimination. In the future, he will be considering these and other appropriate applications of the inherently concerted doctrine in suitable cases.

### ***Browning-Ferris and the Joint Employer Rule aka Lazarus meets Rasputin***

Soon after achieving a majority, the NLRB under the Trump administration used rulemaking in an effort to neutralize the Obama Board's joint-employer standard, announced in *Browning-Ferris Industries of California*, 362 NLRB 1599 (2015). *Browning-Ferris* expanded the

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<sup>6</sup> The Board subsequently made the unanimous decision to decline to assert jurisdiction over Northwestern University grant-in-aid scholarship football players, in part because Northwestern University was the only private sector school in the entire Big 10 conference, and one of only 17 private sector schools in the entire 125 School NCAA Division 1 Football subdivision. The representation petition was accordingly dismissed. See *Northwestern University*, 362 NLRB No. 167 (Aug. 17, 2015)

<sup>7</sup> Robert Iafolla, No 'Potted Plant,' Top NLRB Lawyer Wields Power in Interim Role, BLOOMBERG L. (Mar. 3, 2021, 7:28 PM), <https://news.bloomberglaw.com/daily-labor-report/no-potted-plant-top-nlr-b-lawyer-wields-power-in-interim-role>.

<sup>8</sup> 367 NLRB No. 68 (2019).

<sup>9</sup> 367 NLRB No. 112 (2019).

joint-employer test to consider reserve and indirect control over essential terms and conditions of employment.

Rulemaking on this issue was deployed after a failed attempt in *Hy-Brand Industrial Contractors, Ltd* 365 NLRB No. 156 (2017) to reverse *Browning-Ferris* while it was pending before the D.C. Circuit. However, due to a conflict of interest by Member Emanuel *Hy-Brand* was vacated<sup>10</sup> and subsequently redecided<sup>11</sup> without Emanuel's participation. *Browning-Ferris* remaining intact and under review by the court. Undeterred, the Trump Board in September 2018 issued an NPRM that recommended codifying the approach taken in *Hy-Brand*.

However, in December 2018 the D.C. Circuit substantially enforced the Obama Board's 2015 *Browning-Ferris* decision,<sup>12</sup> emphasizing that the common law permits consideration of those forms of reserve and indirect control that play a relevant part in determining the essential terms and conditions of employment." The court underscored that the employer-employee relationship was steeped in the common law and that interpretation of the common law was the province of the courts. Moreover, it issued the following admonition to the Board:

The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary. That presumably is why the Board has thrice asked this court to dispose of the petitions in this case during its rulemaking process. Like the Board, and unlike the dissenting opinion (at pp. 4–8), we see no point to waiting for the Board to take the first bite of an apple that is outside of its orchard.<sup>13</sup>

The court remanded *Browning-Ferris* back to the Board to clarify the essential terms and conditions of employment over which BFI exercised indirect authority.

Nonetheless, on February 26, 2020, the NLRB published its final rule interpreting what it means to be a "joint employer" under the Act.<sup>14</sup> The NLRB's new rule gave lip service to the D.C. Circuit's admonition to "color within the common-law lines identified by the judiciary"<sup>15</sup> by, in essence, dwelling on the Obama Board's failure to do so in *Browning-Ferris* when it did not appear to limit its consideration of indirect control to essential terms and conditions of employment. The Board then issued a rule which acknowledges the need to consider indirect and reserved

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<sup>10</sup> *Hy-Brand Industrial Contractors, Ltd*, 366 NLRB No. 26 (Feb. 26, 2018).

<sup>11</sup> *Hy-Brand Industrial Contractors, Ltd*, 366 NLRB No. 94 (June 6, 2018) (Board affirming ALJ's single employer finding).

<sup>12</sup> *Browning-Ferris Indus. Inc. v. NLRB.*, 911 F.3d 1195 (D.C. Cir. 2018).

<sup>13</sup> *Id.* at 1208–09.

<sup>14</sup> *Joint Employer Status under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 26, 2020).

<sup>15</sup> *Browning-Ferris*, 911 F.3d at 1208.

authority, “but only to the extent [they] supplement[] and reinforce[] evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.”<sup>16</sup>

Requiring that the consideration of indirect and reserved authority be limited to supplementing and reinforcing evidence of direct and immediate control over a particular essential term and condition of employment is a condition absent from the D.C. Circuit's analysis in *Browning-Ferris*. In fact, such a condition cabins the consideration of indirect and reserved authority so tightly that the rule seems inconsistent with the court's observation that common law focuses on the extent of control, not on the mechanism for its exercise.<sup>17</sup> It would not be at all surprising if, on this point, the Board finds itself defending yet another rule in federal court.

On July 29, 2020, after term of the lone Democrat, Lauren McFerran expired, a three member all Republican Board (with Emanuel recused) issued what was in effect a two-member supplemental decision of BFI<sup>18</sup> in response to the remand from the D.C. Circuit. The supplemental decision did not address the subject of the courts remand, instead this two member panel refused to apply the 2015 BFI test retroactively on grounds that it was manifestly unfair, even though such retroactive application is regularly done in representation matters. The Board, in this supplemental decision did not consider the joint employer question under the old test (which was also argued by the GC in the 2015 case). On February 11, 2020, after Member McFerran's return to the Board, a majority denied a request for reconsideration. McFerran dissented stating, “[r]ather than comply with the court's remand, the Board sought to evade it”. The Board did not grapple with the court's indirect control questions and failed to square its conclusion that the test should not apply retroactively with Board and court precedent.

On March 19, 2021, the Charging Party filed a petition for review of the Board's supplemental decision with the D.C. Circuit and a scheduling order was issued by the court on the same date.

One might wonder whether the court might reach the question of the joint employer rule's validity in the *Browning-Ferris* proceeding. It's not likely, as the decision of the Board does not directly implicate the rule. Regardless, it is evident that the labor-management community has yet to hear the dulcet tones of an overweight opera singer because “it ain't over”.

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<sup>16</sup> 85 Fed. Reg. 11184 at 11235.

<sup>17</sup> *Browning-Ferris*, 911 F.3d at 1219 & n.13.

<sup>18</sup> 369 NLRB No. 139 (July 29, 2020).

## **MV Transportation and the Duty to Bargain over Unilateral Changes**

A new Board majority is likely to provide an opportunity to take another look at *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) relating to an employer's duty to bargain over unilateral changes. There, the NLRB abandoned the previous standard, which required the employer to bargain over any material changes to a mandatory subject of bargaining, unless the union gave a "clear and unmistakable waiver" of its right to bargain. The Board replaced the "clear and unmistakable waiver" standard with the broader "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the NLRA.

Under the "contract coverage" or "covered by the contract" standard, the Board no longer requires that the "agreement specifically mention, refer or to address the employer decision at issue." Rather, the Board will examine the plain language of the parties' collective-bargaining agreement to determine whether the change made by the employer was within the compass or scope of contractual language, thus granting the employer the right to act unilaterally. If such was the case, the Board would honor the plain terms of the parties' agreement and the employer will not have violated the NLRA by making the change without bargaining. However, if the agreement does not cover the employer's disputed action, the employer will be found to have violated the Act unless it demonstrates that the union waived its right to bargain over the change or that it was privileged to act unilaterally for some other reason.

In March 2021, NLRB Chair Lauren McFerran stated at a recent ABA conference that *MV Transportation* clashes with the NLRA's stated aim of facilitating smooth labor relations by promoting bargaining. She expressed the view that bargaining over matters that have not been expressly waived is at the core of the collective bargaining obligation.

One can expect that either the Acting General Counsel or the General Counsel may pursue cases advocating a return to the "clear and unmistakable waiver" standard that was Board law for nearly 70 years prior to the "contract coverage" standard of *MV Transportation*.

### ***General Motors/Atlantic Steel/Clear Pine Moldings: A Needed Change or Overreach***

Previous to the Board's recent decision in *General Motors LLC*, 369 NLRB No. 127 (July 20, 2020), the NLRB used a variety of standards that were situationally specific in determining what was considered acceptable behavior during protected activity.

The NLRB used the 40-year-old *Atlantic Steel*<sup>19</sup> standard for employees' interactions with management, and the 37-year-old *Clear Pine Molding Standard*<sup>20</sup> for conduct and statements made on a picket line and yet another standard for social media posts.<sup>21</sup>

These standards came about because the Board recognized that an employee's exercise of their rights under Section 7 may lead to a loss of protection under particular situations where there is a need by an employer to maintain a respectful and orderly workplace, free from abuse.

Business groups, however, have contended that these multiple tests have become increasingly out of step with accepted workplace behavior. It is argued that these tests afford employees broad leeway for their impulsive behavior when engaging in activities protected under the Act and often result in an escape from disciplinary sanctions after having engaged in highly offensive conduct.

The pushback from labor is derived from an understanding that the NLRA was created primarily to protect workers union-related speech and prohibit private employers from discriminating against or disciplining workers for engaging in union activity. Labor and its advocates support the fact that the NLRB has historically protected vulgar, profane, and opprobrious language uttered during the course of protected concerted activity because the language of the shop is not the language of polite society.<sup>22</sup> The Board and courts have long recognized, "[t]he protections Section 7 [of the National Labor Relations Act] affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses."<sup>23</sup>

Then there is *Cooper Tire & Rubber Co. v. NLRB*, No. 16-2721 (2017) and *Consolidated Communications, Inc. v. NLRB*, No. 14-1135 (D.C. Cir. Sept. 13, 2016) where respectively, racial epithets and derogatory sexual comments made by picketers were insufficient justification for their termination under the NLRB standard established in *Clear Pine Molding*. The NLRB majority (I among them) followed extant Board precedent,<sup>24</sup> and treated racial epithets and derogatory

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<sup>19</sup> 245 NLRB 814, 816 (1979).

<sup>20</sup> 268 NLRB 1044, 1046 (1984).

<sup>21</sup> *Linn v. Plant Guards Local 114*, 383 U.S. 53, 58 (1966); *Pier Sixty, LLC*, 362 NLRB. 505 (2015).

<sup>22</sup> *Dreis & Krump Mfg., Inc.*, 221 N.L.R.B. 309, 315 (1975).

<sup>23</sup> *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

<sup>24</sup> See, e.g., *Calliope Designs*, 297 NLRB 510 (1989); *Detroit Newspapers*, 342 N.L.R.B. 223 (2004); *Airo Die Casting, Inc.*, 347 N.L.R.B 810, 811–12 (2006).

sexual remarks in the same manner as vulgar, profane, and opprobrious language made without violence or a threat of violence.

The *Clear Pine Molding* standard was upheld in *Cooper Tire and Consolidated Communications* by the Eighth and D.C. Circuits, respectively. Noteworthy, however was the concurrence by Judge Patricia Millett in the *Consolidated Communications* case. She criticized the NLRB's past jurisprudence as being insensitive to the effect of certain conduct on those being victimized. "The sexually and racially disparaging conduct that Board decisions have winked away encapsulates the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status...giving strikers a pass on zealous expressions of frustration and discontent makes sense. Heated words and insults? Understandable. Rowdy and raucous behavior? Sure, within lawful bounds. But conduct of a sexually or racially demeaning and degrading nature is categorically different".<sup>25</sup>

A three-member, all-Republican NLRB issued a ruling in *General Motors LLC*, 369 NLRB No. 127 (July 20, 2020) (GM) – a case involving the in-plant conduct of an employee union representative and the application of the *Atlantic Steel* standard. The GM ruling radically changed the Board's standards for assessing whether and when conduct can cause lose NLRA protection in contexts beyond workplace confrontations with management. The decision implicates picket lines and social media communications. Moreover, the GM decision was issued without dissent while there were two vacant Democratic seats. It is noteworthy that the decision issued only nine days before the lone Democrat was confirmed for a second term.<sup>26</sup> After the issuance of the *General Motors* decision one Bloomberg reporter noted:

The ruling by the all-male, all-Republican three-member panel takes on particular significance and relevance in light of the ongoing national conversation about racism and sexism spurred by the #MeToo and the Black Lives Matter protest movements. In the past week, Cisco Systems Inc. [fired several workers](#) for alleged racist comments during an all-hands meeting on racism in America, and television host and multimedia entrepreneur Nick Cannon was fired by Viacom CBS for making anti-Semitic comments on his podcast.<sup>27</sup>

The GM decision has given private-sector employers plenty more leeway to dole out discipline or fire workers for racist, sexist, and other profane speech or conduct in the context of workplace activism and union-related activity. However, the Board decided to apply a 40-year-old

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<sup>25</sup> *Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016) (Millett, P., concurring).

<sup>26</sup> Current chairman Lauren McFerran's term as Member of the NLRB ended December 16, 2019. On July 29, 2020, the Senate confirmed her for a second term. *General Motors* was issued in her absence.

<sup>27</sup> Hassan Kanu, *NLRB's GM Ruling Gives Employers More Slack to Punish Speech*, BLOOMBERG L. (July 21, 2020, 6:29 PM), <https://news.bloomberglaw.com/daily-labor-report/nlrbs-gm-ruling-gives-employers-more-slack-to-discipline-speech>.



one-size-fits-all test while abandoning a series of setting-specific rulings that previously had applied to conduct or speech during encounters with management, on picket lines, and on social media. The test, known as the *Wright Line* standard, based on a case of the same name decided in 1980<sup>28</sup> (one year after the decision in *Atlantic Steel*) requires proof that the worker's protected union activity was a motivating factor in their discipline. The test then shifts the burden to the employer to demonstrate they would have taken the same action in the absence of that activity.

**Addressing and fixing the analysis of racist and sexist speech in the context of workplace activism is unquestionably overdue.** The lack of recognition within the *Clear Pine Molding* standard that racial and sexual remarks are, from the perspective of the recipient, "reasonably tend to coerce or intimidate"<sup>29</sup> was a serious flaw in the standard.

But here is the problem. The *Wright Line* test replaces previous tests that would take into account factors such as whether an outburst of profanity was provoked by the employer's unfair labor practices, and another test specific to strike settings that permitted some forms of profanity because of the heated nature of a picket line. In so doing, it also creates a coercive atmosphere where employees will be intimidated from asserting their rights for fear of being disciplined because of the strength of their language.

Rather than strengthening worker protections under the Act, this new test is likely to erode the protections for employee speech made in the course of protected activity. Further, this test would protect employers against concerted activity directed at their own discriminatory conduct—effectively immunizing their actions—at the expense of employees who are potentially already marginalized in the workplace. According to American Federation of Teachers union president Randi Weingarten, "[e]mployees who are fighting back against racism will be fired if an employer thinks a word is not genteel enough...It's a way of thwarting speech, and it's a way of thwarting activism."<sup>30</sup>

There is a recognized need for the NLRA to find harmony with Title VII of the Civil Rights Act, but not at the expense of the worker voice. Scholar Molly Gibbons in her comment for the *Washington Law Review*, proposes, and I agree, that achieving harmony of the NLRA with Title VII should not be through overreach, but by way of a requirement that the Board shape its rulings

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<sup>28</sup> *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981).

<sup>29</sup> *Consol. Commc'n*, 837 F.3d at 7.

<sup>30</sup> Josh Eidelson & Hassan Kanu, *It's Now Even Easier to Fire U.S. Workers for What They Say*, BLOOMBERG L. (July 30, 2020, 6:14 AM), <https://www.bloomberg.com/news/articles/2020-07-30/it-s-now-even-easier-to-fire-u-s-workers-for-what-they-say>.

around the parameters for lawful workplace conduct and employer behavior set forth under federal anti-discrimination laws.

Likewise, such harmonizing would not allow an employer to terminate employees for all offensive conduct. Many instances of profanity or crude behavior are not actionable under Title VII, [footnote omitted] and that same behavior would remain protected under the NLRA. As a result, even if Title VII governed conduct in the workplace alongside the NLRA, there remains room for passionate advocacy.<sup>31</sup>

If the Board seeks to meet its obligation to protect employees' Section 7 right to engage in protected concerted activity, policies that tend to suppress such activity fail in that charge. Given that the GM decision reflects a lopsided perspective of a three-member Board, issued in the absence of Democrats or dissent, modifications to this holding should be expected.

### **Rulemaking to exclude Graduate Students from the Acts Protection Abandoned**

The Trump Board continued a trend of using rulemaking as a way to entrench its favored position on contentious policy questions in its notice of proposed rulemaking on students' status as employees under the Act.<sup>32</sup> Under the proposed rule, students who perform services at a private college or university related to their studies will be held to be primarily students with a primarily educational, not economic, relationship with their university, and therefore not "employees" within the meaning of Section 2(3) of the Act.<sup>33</sup> This rule was intended to overrule *Columbia University*<sup>34</sup> and reinstate the rule of *Brown University*<sup>35</sup> on a more permanent basis.

Member McFerran in her dissent found no good basis in law, policy, or in fact to remove such rights. She maintained that the Board can and should adhere to the *Columbia* decision and affirm the right of student employees to engage in collective bargaining, asserting that the majority had revived old arguments rightly rejected by the Board in *Columbia* as well as *New York University*, which first found student employees protected.<sup>36</sup>

Before the rule could go into effect, the Board announced on March 15, 2021 that it would be withdrawing the rule from consideration, citing a desire to "focus its limited resources on

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<sup>31</sup> *Id.* at 1535.

<sup>32</sup> See *Jurisdiction—Nonemployee Status of University and College Students Working in Connection with Their Studies*, 84 Fed. Reg. 49691 (Sept. 23, 2019).

<sup>33</sup> 29 U.S.C. § 152(3); Michael Bertoncini et al., *NLRB Proposes Rule to Exclude Student Workers at Private Colleges, Universities From NLRA Coverage*, JDSUPRA, <https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=6716bd14-43df-4ac6-8c0b-42a9a8f0c2fe>.

<sup>34</sup> 364 NLRB No. 90 (2016); see also *New York University*, 332 NLRB 1205 (2000).

<sup>35</sup> 342 NLRB 483 (2004).

<sup>36</sup> Bertoncini et al., *supra* note 33 (Member McFerran, dissenting).

competing Agency priorities, including the adjudication of unfair labor practice and representation cases currently in progress.” With the withdrawal of the proposed rule, *Columbia* will remain controlling precedent and there will be a surge in student petition filings. One might speculate that following the expiration of NLRB Member William Emanuel’s term in August 2021, President Biden will have the authority to establish a new (presumably Democratic) majority of the NLRB. Perhaps in light of that, the Board decided to withdraw this rulemaking proceeding to preserve its resources that would likely be used to reverse course once a new majority is in place.

### **The Pro Act**

On May 8, 2019 soon after becoming executive director of Georgetown Law School’s Workers’ Rights Institute, this author testified before the House of Representatives Committee on Education and Labor’s Subcommittee on Health, Employment, Labor and Pensions regarding the inadequacies of the NLRB’s statutory remedies. I noted that, among other weaknesses, the NLRA provides only limited remedies for violations. Section 10(c) of the NLRA limits the remedies to a cease-and-desist order and, in the event of an unlawful firing, reinstatement with back pay, along with a required notice posting. By comparison, victims of race or sex-based discrimination are eligible for compensatory and, in some cases, punitive damages under Title VII of the Civil Rights Act. Claimants owed unpaid wages or overtime can recover liquidated damages in addition to their lost wages under the Fair Labor Standards Act.

I also expressed that there are serious procedural obstacles to relief under the current structure of the NLRA. The investigative process is reactive rather than proactive. The process presumes knowledge of law and rights on the part of the worker that often does not exist. Proving that an employer has unlawfully terminated an employee or otherwise significantly interfered with that employee’s rights under the NLRA can be a lengthy process encompassing agency investigation evaluation and prosecution before an administrative law judge (ALJ). The ALJ’s decision commonly takes at least a year to issue, at which point the respondent has the right to file an appeal to the NLRB, and typically does so. A decision from the Board typically takes two years or more. An order from the Board is not self-enforcing and therefore it must be enforced in a federal court of appeals. By the time the Board’s order is enforced, several years may have elapsed, and a fired worker has frequently found a new job. For this reason, although 1,270 employees were offered reinstatement in fiscal year 2018, only 434 accepted such offers.<sup>37</sup>

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<sup>37</sup> See *Reinstatement Offers*, NLRB, <https://www.nlr.gov/news-outreach/graphs-data/remedies/reinstatement-offers> (last visited Apr. 25, 2021).

The NLRA encourages collective bargaining. However, research has shown, within one year after an election, only 48 percent of newly organized units have obtained first collective bargaining agreements. After two years, that number rises to 63 percent, and by three years to 70 percent. Even after three years, only 75 percent of units have reached a first contract.<sup>38</sup> During my time as a Board Member, I frequently encountered cases that demonstrated an urgent need for better protection for workers during their first-contract negotiations. One example is a case called *Somerset Valley Rehab Ctr and Nursing Ctr*.<sup>39</sup> There, the employer refused to bargain and deprived employees of a collective bargaining agreement for **7 years** after the union was certified as the representative of the employees. It took many legal proceedings and enforcement by the Third Circuit.

The PRO Act has passed the House twice and is presently before a Senate that has a razor thin Democratic majority. Among the legislative reforms that the PRO Act provides are:

- **Civil penalties for employers who violate workers' rights** as well as individual liability for corporate officials. This includes the award of **monetary damages** to workers who are illegally fired or suffer other serious economic harm.
- **Requires pursuit of federal court injunctions** to get illegally fired workers back in their jobs while their retaliation cases are pending.
- **A clear definition of protected concerted activity that encompasses group and class action grievances.**
- **A private right of action** so that illegally discharged workers can file civil lawsuits against their employers and are not wholly dependent on the NLRB to pursue their cases.
- **A set process to follow when negotiating a first-union contract**, and if they can't reach an agreement, they go to mediation then binding arbitration.
- **Prohibition from permanently replacing workers** when they strike, and workers are no longer banned from engaging in so-called "secondary" activity, such as boycotts, seeking leverage in negotiations.
- **Adoption of the ABC test** to determine employee status so workers can't be wrongly deprived of their organizing and bargaining rights by being misclassified as supervisors or independent contractors.

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<sup>38</sup> See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute Briefing Paper #235 (May 20, 2009), available at <https://www.epi.org/files/page/-/pdf/bp235.pdf>.

<sup>39</sup> 1621 Route 22 W. Operating Co., v. NLRB, 725 F. App'x 129 (3d Cir. 2018).

- **A ban on captive audience meetings** so workers will no longer be coerced into hearing their employer's anti-union messages. It requires employers to allow workers to use company email systems for organizing purposes unless there are compelling business reasons for disallowing this use.
- **Streamlining election procedures** through restoration of the Obama-era election rules which limit the ability of employers to challenge workers' proposed bargaining units, and reduce pre-election litigation and delay caused by these employer tactics
- **Prompt disclosure of union-busting activities** and closes the loophole through which employers and consultants have evaded reporting. Three out of every four employers hire third-party union-busters to help them with their campaigns, sometimes spending hundreds of thousands of dollars, or more.<sup>40</sup> Employers overall spend at least \$340 million each year on anti-union consultants.<sup>41</sup>

Many say that due to the filibuster and due to the failure of the Employee Free Choice Act, the PRO Act has a snowballs chance in hell of passing. Well, I was just in Buffalo and while it is by no means hell, a snowball still stood a great chance in late Spring.

All things considered; this may well be the Spring of America's greatest discontent. After the experience of the pandemic, the collective actions regarding workplace issues at Google, the emergence of the Alphabet Union, the Fight for 15, the #MeToo and Black Lives Matter movements and Amazon unionization effort, there may be a renewed desire for labor reform emanating from a new, younger, and politically sensitive worker force. The PRO Act might not pass in its entirety, but there is a good chance that critical pieces, like stronger enforcement, compensatory damages, and union election reform might see life as a rider to need-to-have legislation.

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<sup>40</sup> Bronfenbrenner, *supra* note 38.

<sup>41</sup> Celine McNicholas et al., *Unlawful: U.S. Employers Are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, ECON. POL'Y INST. (Dec. 11, 2019), <https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/>.