UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	)
	)
Proposed Rule to Regulate	) Petition of Professor Charles J. Morris
Captive-Audience Meetings	) and other labor-law related professors
that Provides Grounds For	)
Setting Aside a Section 9	)
Representation Election and	)
Ordering a New Election	)

RULEMAKING PETITION

Contacts:

Primary Petitioner, **Charles J Morris**
Professor Emeritus, Southern Methodist University,
Desman School of Law
5085 Caminito Exquisito
San Diego, CA 92130
Phones: (858) 793-1095
(858) 525-5004
FAX: (858) 793-1095
Email: cjmmorris@aol.com

Primary Co-Petitioner, **Paul M. Secunda**
Professor, Marquette University Law School
P.O. Box 1881
Milwaukee, WI 53201
Phones: (414) 288-6497 (w)
(414) 828-2372 (c)
FAX: (414) 288-6975
Email: paul.secunda@marquette.edu

TO THE HONORABLE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD:

Petitioners named below respectfully submit this rulemaking petition for the Board's consideration.

I. PETITIONERS AND THEIR AUTHORITY

Petitioners are one-hundred and six (106) individual academic professors of labor law and/or employment relations. Each Petitioner is an "*interested person*" within the meaning of Section 2(1) of the NLRA, Section 553(e) of the Administrative Procedure Act (APA),[1] Section 551(2) of the APA,[2] and Section 102.124 of the NLRB Rules and Regulations, Part 102.[3] This petition is submitted pursuant to those rules and particularly to Sections 124 and 125 of Part 102 of the NLRB Rules and Regulations, which read as follows:

> **Sec. 102.124** *Petitions for issuance, amendment, or repeal of rules*.—Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original and seven copies of such petition shall be filed with the Board in Washington, D.C., and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.
>
> **Sec. 102.125** *Action on petition*. Upon the filing of such petition, the Board shall consider the same and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the petition be denied in

[1] 5 U.S.C. § 553(e): "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

[2] 5 U.S.C. § 551(2): "'person' includes an individual, partnership, corporation, association or public or private organization other than an agency."

[3] 29 CFR § 102.124.

whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

The Petitioners are the following:

Primary Petitioner:

Charles J. Morris, Professor Emeritus, Southern Methodist University, Dedman School of Law.

Primary Co-petitioner:

Paul M. Secunda, Professor of Law and Director, Labor and Employment Law Program, Marquette University Law School.

Other Co-Petitioners:

David Abraham, Professor, University of Miami School of Law.

Steven E. Abraham, Professor, State University of New York at Oswego.

Lisa Blomgren Amsler, Keller-Runden Professor of Public Service, Indiana University School of Public and Environmental Affairs.

Mark Anner, Associate Professor and Center Director, Center for Workers' Rights, School of Labor and Employment Relations, Penn State University.

Bradley A. Areheart, Associate Professor, University of Tennessee College of Law.

Rick Bales, Dean, Ohio Northern University College of Law.

Mark Barenberg, Isador and Seville Sulzbacher Professor and Co-Director Columbia Program on Labor Policy, Columbia Law School.

Janice R. Bellace, Samuel Blank Professor of Legal Studies, Wharton School, University of Pennsylvania.

Jason R. Bent, Associate Professor, Stetson University College of Law.

Peter Berg, Professor and Associate Director for Academic Programs, School of Human Resources and Labor Relations, Michigan State University.

Elaine Bernard, Executive Director Labor and Worklife Program, Harvard University Law School.

Susan Bisom-Rapp, Professor of Law, Thomas Jefferson School of Law.

Kate Bronfenbrenner, Senior Lecturer, School of Industrial and Labor Relations. Cornell University.

James J. Brudney, Professor, Fordham University School of Law.

Robert Bruno, Director of Labor Education Program, Professor of Labor and Employment Relations, School of Labor and Employment Relations, University of Illinois, Urbana-Champaign.

William Canak, Professor, Middle Tennessee State University.

Kenneth Casebeer, Professor of Law Emeritus, University of Miami School of Law.

Paul F. Clark, Professor and Director School of Labor and Employment Relation, Pennsylvania State University.

Carin Clauss, Professor Emerita, university of Wisconsin Law School.

Alexander Colvin, Martin F. Scheinman Professor, School of Industrial and Labor Relations, Cornell University.

Lance Compa, Senior Lecturer, School of Industrial andLabor Relations, Cornell University.

Angela B Cornell, Director of the Labor Law Clinic, Clinical Professor of Law, Cornell Law School.

Roberto L. Corrada, Professor, University of Denver College of Law.

Marion Crain, Vice Provost Washington University, St. Louis, Wiley B. Rutledge Professor, Director Center for Interdisciplinary Study of Work & Social Capital, Washington University School of Law.

Charles B. Craver, Freda H. Alverson Professor, George Washington University School of Law.

Kenneth G. Dau-Schmidt, Willard and Margaret Carr Professor of Labor and Employment Law, Maurer School of Law, Indiana University (Bloomington).

Mathew Dimick, Associate Professor, State University of New York at Buffalo, School of Law.

Clifford B. Donn, Professor, Le Moyne College.

Michael C. Duff, Associate Dean of Student Programs and External Relations, Centennial Distinguished Professor of Law, University of Wyoming College of Law.

Adrienne E. Eaton, Professor and Chair, Labor Studies and Employment Relations, Rutgers University.

Rebecca Ellis, Professor Emerita, Orfalea College of Business, California Polytechnic State University.

Cynthia Estlund, Catherine A. Rein Professor, New York University School of Law.

Fred Feinstein, Former Visiting Professor and Senior Fellow, University of Maryland School of Public Policy.

Barbara J. Fick, Associate Professor of Law, University of Notre Dame Law School.

Janice Fine, Associate Professor, Rutgers University School of Management and Labor Relations.

Richard Michael Fischl, Professor, University of Connecticut School of Law.

Catherine Fisk, Chancellor's Professor of Law, University of California Irvine School of Law.

Ruben J. Garcia, Professor of Law, University of Nevada, Las Vegas.

Charlotte Garden, Associate Professor, Seattle University School of Law.

Julius Getman, Professor Emeritus, University of Texas School of Law.

Michael J. Goldberg, Professor, Widener University Deleware Law School.

Stephen B. Goldberg, Professor Emeritus, Northwestern University School of Law.

Alvin L.Goldman, Professor Emeritus, College of Law, University of Kentucky.

Jennifer Gordon, Professor of Law, Fordham University School of Law.

Robert A. Gorman, Kenneth Gemmill Professor Emeritus, University of Pennsylvania Law School.

Joseph R. Grodin, Distinguished Emeritus Professor, University of California, Hastings College of the Law.

James A. Gross, Professor, School of Industrial and Labor Relations, Cornell University.

Seth D. Harris, Distinguished Scholar, School of Industrial andLabor Relations, Cornell University.

L. Camille Hebert, Carter C. Kissell Professor of Law, Moritz College of Law, The Ohio State University.

Jeffrey Hirsch, Geneva Yeargan Rand Distinguished Professor, Associate Dean for Academic Affairs, University of North Carolina School of Law.

Ann C. Hodges, Professor, University of Richmond School of Law.

Alan Hyde, Distinguished Professor and Sidney Reitman Scholar, Rutgers University School of Law.

Harry Katz, Jack Sheinkman Professor, School of Industrial and Labor Relations, Cornell University.

Karl Klare, George J. & Kathleen Waters Matthews Distinguished University Professor, Northeastern University School of Law.

Thomas Kochan, George Maverick Bunker Professor of Management, Professor of Work and Employment Research and Engineering Systems, Co-Director, MIT Sloan Institute for Work and Employment Research.

Gordon Lafer, Associate Professor Labor Education & Research Center, University of Oregon.

Arthur S. Leonard, Professor, New York Law School.

Ariana R. Levinson, Associate Professor, University of Louisville School of Law.

David Lewin, Neil H. Jacoby Professor Emeritus, Anderson School of Management, University of California Los Angeles.

Nelson Lichtenstein, MacArthur Foundation Chair in History, Director Center for the Study of Work, Labor and Democracy, University of California Santa Barbara.

David B. Lipsky, Anne Evans Estabrook Professor of Dispute Resolution, Stephen H. Weiss Presidential Fellow, Director, Scheinman Institute on Conflict Resolution, School of Industrial and Labor Relations, Cornell University.

Anne Marie Lofaso, Professor of Law, West Virginia University College of Law.

John Logan, Professor and Director of Labor and Employment Studies, San Francisco State University.

Deborah Malamud, AnBryce Professor of Law, New York University Law School.

Joseph A. McCartin, Professor and Director, Kalmanovitz Initiative for Labor and the Working Poor, Georgetown University.

Marcia L. McCormick, Professor and Director of William C. Wefel Center for Employment Law, Saint Louis University School of Law.

Robert A. McCormick, Professor Emeritus, Michigan State University College of Law.

Robert McKersie, Professor Emeritus, MIT Sloan School of Management.

Carlin Meyer, Professor Emeritus, New York Law School.

Gary Minda, Professor of Law Emeritus, Brooklyn Law School.

Bruce Nissen, Director of Research, Florida International University Center for Labor Research.

Craig A Olson, LER Alumni Professor, School of Labor & Employment Relations, University of Illinois (Urbana/Champaign).

Maria L. Ontiveros, Professor, University of San Francisco School of Law.

Michael M. Oswalt, Assistant Professor, Northern Illinois University College of Law.

Gary Peller, Professor of Law, Georgetown University Law Center.

James Gray Pope, Professor of Law, Rutgers Law School.

William J. Puette, Director West O'ahu Center for Labor Education & Research, University of Hawaii.

Robert J. Rabin, Professor Emeritus, Syracuse University College of Law.

Joel Rogers, Sewell Bascom Professor, University of Wisconsin Law School.

César F. Rosado Marzán, Associate Professor of Law, IIT Chicago-Kent College of Law

Susan J. Schurman, Distinguished Professor, School of Management and Labor Relations, Rutgers, State University of New Jersey.

James G. Scoville, Professor Emeritus, Industrial Relations Center, University of Minnesota.

Ron Seeker, Professor, School of Industrial and Labor Relations, Cornell University.

Joseph E. Slater, Eugene N. Balk Professor of Law and Values, University of Toledo College of Law.

Peggie R. Smith, Charles Nagel Professor of Employment & Labor Law, Washington University, St. Louis, School of Law.

Howard Stanger, Professor, Department of Management, Wehle School of Business, Canisius College.

Theodore J. St. Antoine, James E. and Sarah A. Degan Professor Emeritus, University of Michigan Law School.

Katherine Stone, Arjay and Francis Miller Distinguished Professor of Law, UCLA School of Law.

Robert N. Strassfeld, Professor of Law, Case Western Reserve University School of Law.

Charles A. Sullivan, Professor of Law, Director Rodino Law Library, Seton Hall Law School.

Chris Tilly, Professor of Urban Planning and Director, Institute for Research on Labor and Employment, University of California Los Angeles.

Lowell Turner, Professor of International and Comparative Labor, Academic Director, the Worker Institute, School of Industrial and Labor Relations, Cornell University.

Lea VanderVelde, Josephine Witte Professor of Law, University of Iowa College of Law.

Lea B. Vaughn, Professor of Law, University of Washington School of Law.

Joan Vogel, Professor of Law, Vermont Law School.

Paula B. Voos, Professor, School of Management and Labor Relations, Rutgers University.

Marley S. Weiss, Professor of Law, University of Maryland Francis King Carey School of Law.

Martha S. West, Professor Emerita, University of California Davis School of Law.

Hoyt N. Wheeler, Distinguished Professor of Management Emeritus, Moore School of Business, University of South Carolina.

Paul Whitehead, Professor of Labor Studies and Employment Relations, Pennsylvania State University Law School.

Michael J. Wishnie, William O. Douglas Professor of Law and Deputy Dean of Experiential Education, Yale Law School.

Noah Zatz, Professor, UCLA School of Law.

Rebecca E. Zietlow, Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law.

Roland Zullo, Associate Research Scientist, University of Michigan.

All Petitioners appear in their individual capacities only, not as spokespersons or agents for any institution with whom they may be associated. Affiliations are given for identification purposes only.

II. PROPOSED RULE

Petitioners hereby petition the National Labor Relations Board (NLRB or Board) to promulgate and issue under its authority granted by Sections 6 and 9 of the National Labor Relations Act (NLRA or Act) the following rule:

> Where an employer who is subject to the jurisdiction of the National Labor Relations Act does not specifically allow union solicitation during working time, if that employer—by or through any of its agents, officials, or supervisors—engages in a meeting or meetings with its employees during working time to express opposition to union representation prior to the holding of a Section 9 representation election and refuses to provide the affected union, if requested, with an equivalent opportunity to address employees, such conduct shall be deemed to have impaired the employees' freedom of choice in the selection of their representative; therefore, if the union loses that election, such conduct shall constitute sufficient grounds for setting aside the results of that election and ordering a new election. The time-period for application of this rule shall begin when the employer first becomes aware that union organizing among its employees is likely to begin or has already begun and shall end on the date on which the representation election is held. This period, however, may be extended to an earlier date, not to exceed six months, if the employer has earlier engaged in any of the above conduct that has had a continuing adverse effect on employees' free choice and the outcome of the election.

III. STATEMENT OF GROUNDS IN SUPPORT OF THIS PETITION

This petition and its proposed rule are long overdue because such a petition—or an equivalent objection to conduct affecting an election in a representation case (R-case) where the union has lost an election following employer-conduct such as that targeted herein—could have been filed and the resulting rule promulgated within a reasonable period of time following the Board's decision in the 1966 case of *General Electric Co. and McCulloch Corp.* (hereinafter *General Electric).*[4]

A. The Problem

The rule proposed herein addresses the anti-democratic phenomenon of what has come to be called a "*captive-audience meeting*," which, according to a current management consulting firm that boasts of being "the preeminent firm in countering union organizing campaigns,"[5] "is *management's most important weapon* in [a union-election] campaign"[6] This device provides employers with an unfair but effective means to deny employees their guaranteed Section 7 right to "bargain collectively through representatives of their own choosing." Indeed, as one commentator observed,

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[4] 156 NLRB 1247 (1966). *See infra* at notes 36 & 63-69.

[5] Labor Relations Institute, Inc., *Home Page,* http:lrionline.com/about-us/ (last visited Oct. 11, 2015).

[6] *Id*., at http:lrionline.com/anti-union-campaign-tips-how-many (last visited Apr. 1, 2010), cited in Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65 (2010) (hereinafter Hartley). Emphasis added. *See also* Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 IND. L.J. 123, 123 (2012) ("[T]hese speeches are one of the most effective anti-union weapons that employers currently have in their arsenal"). (Hereinafter Secunda.)

when employers are "[f]aced with the threat of unionization, *the most favored employer tactic is a speech*—or more likely, a series of speeches—by a senior company official to assembled employees on company time and premises."[7] This is the tactic to which this proposed rule is addressed. It is a practice that employers tend to use almost reflexively whenever their employees are engaged in union organizing or seem likely to become so engaged. Although this process is usually referred to as "captive-audience speech," its methodology includes more than just speeches. It includes—and this proposed rule covers—any mandatory meeting during working time between supervisors or other employer representatives and employees—either one-on-one or as a group—where an anti-union message is communicated and where the company maintains a rule prohibiting union organizing during working time while denying the union similar access to those same employees. These meetings are totally controlled by the employer. Failure of employees to attend or their engaging in what the employer deems disruptive conduct, including asking unwanted questions, can result in discharge without redress.[8]

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[7] Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment,* 16 BERKELEY J. EMP. & LAB. L. 356 (1995). *See* Hartley, *supra* note 6 at 67 ("During the weeks preceding a union representation election, when communication with bargaining unit employees is most critical, the workplace captive audience meeting is the employer's forum of choice"). *See also* Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 80-82 (Sheldon Friedman et al eds, 1994)

[8] *See* J.P. Stevens & Co., Inc., 219 N.L.R.B. 850 (1975), ***aff'd in part*** J.P. Stevens & Co. Inc. v. Textile Workers Union of Am., 547 F.2d 792 (4th Cir. 1976) (discharge of 22 employees for disruptive conduct at captive audience meeting held not unlawful).

Captive audiences thus provide companies with an easy means to suppress employees' pro-union tendencies. NLRB Members Liebman and Walsh, in their dissent in *Harborside Healthcare,*[9] described—with illustrations from several Board cases—typical pre-election captive-audience scenes that present an accurate account of captive-audience conduct that employers commonly practice, all of which were deemed legal and not the basis for setting aside the result of an election. The following are six of those cases.

In *NVF Co*.,[10] the company's general manager conducted systematic preelection interviews with groups of five or six employees in his own office, interviewing approximately 160 of 172 employees in less than a month before the election, which the union—as in all of these cases—lost.

In *Flex Products,*[11] two days before the election the company president delivered several anti-union speeches to groups of employees, which he followed the next day with individual meetings with about 120 of the 164 employees who were eligible to vote in the election. The president met alone with those employees, one at a time. Most of the meetings lasted about five minutes each, though some were longer. The Board's hearing officer found that "the interviewer was the highest official in the company, the president; and the tenor of the speaker's remark was 'decidedly anti-union and a

[9] 343 N.L.R.B. 906, 916-917 (2004).

[10] 210 N.L.R.B. 663 (1974).

[11] 280 N.L.R.B. 1117 (1986).

solicitation for a “no” vote on the next day.”[12] Nevertheless, in accordance with prevailing law,[13] the Board found such conduct perfectly legal and not a violation of laboratory conditions[14] required for an election. This case provided a model for achieving union-avoidance that is still being followed.

Three additional cases provided similar stories. In *Frito Lay, Inc.,*[15] supervisors were sent on 10-12 hour "ride-alongs" with individual employee truck drivers. In *Andel Jewelry Corp.*,[16] the employer's chief financial officer conducted daily meetings with employees in each department for the last 2-1/2 weeks before the election. In *Associated Milk Producers,*[17] the plant manager spoke individually to nearly every eligible employee at their work stations the morning of the election. In *Electro-Wire Products,*[18] the employer's president spoke to at least half of the unit’s employees individually at their work stations on election day. The foregoing six cases obviously

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[12] *Id.*, at 1118.

[13] *See* Livingston Shirt Corp., 107 NLRB 400 (1953), and *infra* at notes 54-56. It was not deemed a violation of the 24-hour rule of Peerless Plywood Co., 107 N.L.R.B. 427 (1953), treated at note 58 *infra*, because the final-day individual meetings were not massed assemblies of employees within 24 hours prior to the election. 280 N.L.R.B. at 1117.

[14] *See* General Shoe Corp., 77 N.L.R.B. 124 (1948), discussed *infra* at notes 32-34.

[15] 341 N.L.R.B. 515 (2004).

[16] 326 N.L.R.B. 507 (1998).

[17] 237 NLRB 879 (1978), and because it was not a mass meeting it was not deemed a violation of the *Peerless Plywood* 24-hour rule, notes 41 & 58 *infra*.

[18] 242 N.L.R.B. 960 (1979)), which was not deemed a violation, *citing Associated Milk Producers*, *supra* note 17.

provided employers and professional union-busters[19] with all the precedent needed for successful indoctrination of captive employees to discourage or defeat their efforts to unionize.

It should be noted, however, that a captive audience meeting is not objectionable because of the content of its communication—which usually avoids containing any Section 8(c) actionable threat of "reprisal or force or promise of benefit"[20]—but because it denies the union comparable access to the employees, thus making a mockery of what should be a fair and democratic election process. Although the traditional free-speech remedy for false or offensive speech is supposed to be responsive speech, captive-audience speech, with its mandatory listening, does not allow for a union response. That is a correctable condition, however, as this petition will demonstrate.

B. Railway Labor Act Comparison

What the rule proposed herein is intended to accomplish under the NLRA has long prevailed under the other Federal labor-relations statute, the Railway Labor Act (RLA).[21] Under that statute, over which the National Mediation Board (NMB) has jurisdiction regarding union representation, the above-described captive-audience pre-election conduct is not tolerated in airline and railway election campaigns. The NMB

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[19] A common designation; *see e.g.*, confirmation-hearing testimony of then soon-to-be Board Member Albert Beeson who stated that he had "free speeched" employees into voting against a union, and that "you could say. . .that I was a union buster." JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994 101 (1995).

[20] *See* discussion *infra* regarding the *Livingston Shirt* case at notes 13 & 54-57**.**

[21] 45 U.S.C. §§ 151-88.

maintains that "[s]uch conduct is inherently coercive"[22] and in violation of the "laboratory conditions" required for a fair election—that concept of "laboratory conditions" having been borrowed from this Board's *General Shoe*[23] decision. When a union under the RLA loses an election following a carrier's captive-audience conduct, the NMB's standard remedy is to order a new election. For example, that is what the NMB ordered in a 2010 *Delta Airlines* case[24] where it quoted from its 1962 decision in *Allegheny Airlines*[25] to explain a proposition that could be equally applicable to workers anywhere:

> When rank and file employees are interviewed . . . in small groups by carrier officials. . . discussion of antiunion opinions take on a meaning and significance which they might not otherwise possess. The coercive effect may be subtle, but it is nonetheless present. Such a technique in and of itself is conduct which interferes with a free choice by employees of a representative.[26]

That NMB prohibition and practice regarding captive-audience conduct has apparently been successful, for there have not been many such cases. The absence of such conduct might even be a significant factor—though not the only factor— that accounts for high union-membership among airline and railroad employees. The most recently available NMB reports show that for years 2011-2012 the combined union-

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[22] Zantop International Airlines, Inc., 6 NMB 834, 836 (1979)

[23] General Shoe Corp., 77 N.L.R.B. 124 (1948).

[24] Delta Air Lines, Inc., 37 NMB 281, 312-13 (2010). *See also* Delta Air Lines, Inc., 27 NMB 484, 508 (2000) ("even though content of communications was non-coercive and did not contain material misrepresentations, the mandatory, small, and one-on-one meetings impaired free-choice and tainted laboratory condition.")

[25] Allegheny Airline, Inc., 4 NMB 7 (1962).

[26] *Id.,* at 13.

membership density for both railroads and airlines was 62 percent;[27] among the 146 air carriers with a total of 540,000 employees, union density in 2012 was 56 percent,[28] and among the 567 railroads with a total of 176,000 employees, union density in 2011 was 83 percent.[29] Those percentages contrast starkly with union membership of only 6.6 percent in the general private-sector,[30] most of which is under NLRA jurisdiction.

Why does the NLRB not follow the same rule as the NMB regarding captive-audience pre-election conduct? The apparent reason is that too many affected parties, including unions, evidently either forgot or were unaware that since shortly after the 1966 *General Electric* decision[31] such a rule could have been available. That R-case rule, like the above NMB rule, would have been based on the previously noted time-honored *General Shoe*[32] doctrine, that "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election even

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[27] NMB response to Freedom of Information Act (FOIA) request, file No. F-1656, March 23, 2015. "This percentage is calculated as 56% of the airline employees plus 83% of the railroad employees divided by the total number of employees."

[28] *Id*., from "Airlines for America, formerly The Air Transport Association."

[29] *Id.* "This figure is calculated as the total of class 1, other local or small railroads based on the average number of craft and classes per category of railroad times the number of railroads in the respective category. The average of craft and classes is based on an average of 7 Class 1 and 2 small or local railroads. The total of Class 1 is 196 (28 times 7) and local railroads is 1,078 (539 times 2). Local railroads are all class 2, 3 and 4 carriers."

[30] BLS Economic News Release, Jan. 23, 2015 (USDL-15-0072), Table 3.

[31] *Supra* note 4 and *infra* notes 36, & 63-69.

[32] General Shoe Corp., 77 N.L.R.B. 124 (1948). Although this is a leading NLRA case, it is often cited and followed by the NMB. *E.g.,* see notes 22-26 *supra*.

though the conduct may not constitute an unfair labor practice."[33] Thus, the criteria that apply in a representation-election case need not be identical to those applied in an unfair-labor-practice (ULP) case. As the Board in *General Shoe* declared, "[i]n election proceedings, it is the Board's function to provide a *laboratory* in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees;"[34] thus, an alleged "free-speech" issue that would likely be raised pursuant to Section 8(c)[35] regarding an employer's captive-audience conduct in a ULP case—notwithstanding its inapplicability—is definitely not relevant to the determination of conduct that might be deemed a violation of laboratory conditions for a fair election, such as the conduct targeted in this petition. Accordingly, establishment of a captive-audience R-case rule under the NLRA similar to the aforesaid NMB rule—which relies on the same *General Shoe* laboratory-conditions concept— should be a "no-brainer."

C. Background

Promulgation of this rule is indeed long overdue. As NLRB and judicial case-history reveals, such a rule could have been issued any time within a reasonable period following the Board's 1966 *General Electric* decision. That consolidated case[36] was

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[33] *Id.,* at 126.

[34] *Id.*, at 127. Emphasis added.

[35] *See infra* at notes 54-57 & 75-77.

[36] The case involved two separate employers with separate facts. *See* note 4 *supra* and notes 63-69 *infra*.

specifically intended to produce a rule of adjudicatory origin[37] that would have addressed, at least in part, the captive-audience issue which the Supreme Court left open in the *Nutone*[38] case after the Board's reversal in *Livingston Shirt*[39] of *Bonwit Teller,*[40] which had prohibited most captive-audience meetings. A review of those cases and their backgrounds, plus the related *Peerless Plywood*[41]decision, will set the stage for what was expected to happen in 1966 when the Board issued its decision in *General Electric*.

During the first twelve years following passage of the NLRA, captive meetings where employees were required to listen to anti-union speeches were deemed unlawful in violation of Section 8(1),[42] as illustrated by *Clark Bros. Co*.[43] Indeed, an earlier Board decision, *Pennsylvania Greyhound, Inc*.,[44] had held that an employer's "advice" to

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[37] *See* NLRB v. Bell Aerospace Co*.,* 416 U.S. 267, 294 (1974) ("the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.").

[38] NLRB v. United Steelworkers of America (Nutone & Avondale), 357 U.S.357 (1958).

[39] Livingston Shirt Corp., *supra* note 13.

[40] Bonwit Teller, Inc. v. NLRB, 197 F.2d 240, cert. denied 345 U.S. 905 (1952). *See* the Board's decision on remand at 104 NLRB 497 (1953). *See also infra* at note 67.

[41] Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[42] As § 8(a)(1) (29 U.S.C. § 158(a)(1) was designated before the Taft-Hartley amendments.

[43] 70 N.L.R.B. 802 (1946).

[44] Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B., *enforced as modified*, 91 F2d 178 (3rd Cir. 1937), *rev'd on other grounds*, 303 U.S. 261 (1938).

employees not to join an outside union interfered with, restrained, and coerced employees in violation of their Section 7 rights, hence violated Section 8(1). In *NLRB v. Virginia Electric and Power Co*.,[45] however, the Supreme Court changed the direction of the law regarding employer participation in the unionization process. Recognizing the Constitutional role of free speech, the Supreme Court there held that an employer's statements about unions should not be evidence of an unfair labor practice unless they appeared to be coercive. *Virginia Electric* thus established that an employer need not remain neutral during the unionization process.

The next major event in this development was the enactment of Section 8(c) in the 1947 Taft-Hartley Act, which provided that

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit. [46]

The Board's first response to that provision, contained in *Babcock & Wilcox,*[47] was that 8(c) "makes it clear that the doctrine of the *Clark Bros*. case no longer exists as a basis for finding unfair labor practices" in the conduct of a captive audience meeting.[48] Later, however, the Board decided in its 1952 *Bonwit Teller* decision that an employer who

[45] 314 U.S. 469 (1941).

[46] 29 U.S.C. § 158(c).

[47] 77 N.L.R.B. 577 (1948).

[48] *Id.*, at 578.

discriminatorily applies its otherwise valid no-solicitation rule[49] by making anti-union speeches to its employees on its premises during working hours, "while refusing to accord, upon reasonable request, a similar opportunity to address the employees to the labor organization against which such speeches are directed,"[50] violates Section 8(a)(1).

Bonwit Teller, however, had a short life. What quickly followed from the newly seated Republican-majority Labor Board was issuance in 1953 of its first revisionist decision,[51] *Livingston Shirt Corp*., which reversed Bonwit *Teller* and thus allowed captive-audience speech-making to flourish for the next 63 years. The *Livingston* majority declared that

> in the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful, because of the character of the business [e.g. retail sales]), an employer does not commit an unfair labor practice if he makes a preelection speech on company time and premises to his employees and denies the union's request for an opportunity to reply.[52]

That same day, in *Peerless Plywood,* the Board issued a *General Shoe* rule that prohibited both employers and unions from delivering captive-audience speeches to massed employee groups on company time during the last twenty-four hour period

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[49] *Supra* note 40, *and see* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

[50] 104 NLRB at 498.

[51] *See* Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L 1, 15-43 & n. 187 (2012)

[52] *Supra* note 13 at 409.

preceding an election. This was deemed grounds for setting aside an election but not an unfair labor practice.

The articulated rationales for those two landmark decisions highlight the immediate issues in this petition. Because the employer in *Livingston* had a valid no-solicitation rule that prohibited union activity during working hours, the union and General Counsel contended that by engaging in anti-union captive-audience conduct, Livingston was discriminatorily applying that no-solicitation rule, for the union had not been given an equal opportunity to address those employees. The majority's responsive reasoning was that "Section 8(c) of the Act specifically prohibits us from finding that an uncoercive speech, whenever delivered by the employer, constitutes an unfair labor practice."[53] Their Opinion conceded, however, that any alleged ULP relating to a captive audience "must necessarily be rested on the theory that the employer's vice is not in making the speech but in denying the union an opportunity to reply on company premises."[54] In order to tie that denial to their concept of free speech, they asserted that "[i]f the privilege of free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation."[55] To which Member Murdock, in a comprehensive dissent, countered that

> Absent an opportunity. . . to hear contrary facts and contentions under reasonably equal circumstances, the ability of employees to choose fairly between asserting and not asserting their statutory rights to self-organization was seriously impaired. The employer's refusal of the union

[53] 107 N.L.R.B. at 405.

[54] *Id.*

[55] *Id.*, at 406.

> request, perforce, thus resulted in an interference and restraint of the rights of its employees as guaranteed in Section 7.[56]

Accordingly, the vice was not in the employer's speech but in the act of denying the union a right to respond.

The *Peerless Plywood* ruling of that same day asserted that in union election campaigns "last minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which free election is designed to reflect."[57] Accordingly, notwithstanding that unions do not have the opportunity to deliver such speeches on company time, the majority announced a rule that

> employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hour before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed.[58]

Peerless Plywood's significance, however, far exceeds its limited application to the twenty-four hour pre-election period, because in the majority's effort to justify its ruling it conceded that although the Board had "*abandoned the Bonwit Teller doctrine in complaint cases...this does not*, however, *dispose of the problem as it affects the conduct of an election*."[59] This was indeed a telling concession from Republican-

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[56] *Id.*, at 415. *See also* text at note 75 *infra*.

[57] 107 N.L.R.B. at 429.

[58] *Id.*

[59] *Id.*

majority Board Members Guy Farmer, Philip Ray Rogers, and Ivar Peterson, which allowed Member Murdoch, the lone Democratic Member, to stress in his *Peerless Plywood* dissent—*without challenge*—that

> If this Board has the power, as the majority believes, to tell the employer that he cannot make a speech at all on company time and premises within 24 hours of an election, under pain of having the election set aside, then certainly it could not be argued that the Board does not have the power to tell the employer that if he elects to make such a speech at any time during the period preceding the election and does not grant the union's request for an opportunity to speak under similar circumstances, the Board will set aside the election. *As I read the majority opinion they do not contend that the Bonwit Teller doctrine must be abandoned in representation cases, but to the contrary recognize that this is not so*.[60]

Thereafter, the Supreme Court In its 1958 *Nutone* decision upheld the basic validity of no-solicitation rules, stating that they "are not in and of themselves violative of the Act, for they may duly serve production, order and discipline."[61] The Court, however, declined to lay down an absolute rule regarding an employer's failure to conform to its own no-solicitation rule, for there was no showing in the cases before it that the employees, or the unions on their behalf, had requested an exception to those rules. It therefore left open the issue of whether an employer commits an unfair labor practice when it violates its own otherwise valid no-solicitation rule by engaging in anti-union solicitation, such as in captive-audience speeches, declaring that "[a]ll we hold is

[60] 107 NLRB at 435. Emphasis added; underlining in original. The majority did not express any disagreement with that reading.

[61] *Supra* note 38 at 361, *citing Republic Aviation, supra* note 49.

that there must be some basis, in the actualities of industrial relations, for such a finding."[62]

D. The Unfulfilled *General Electric* Remedy

In a long-overdue, yet partial, response to the Court's open issue in *Nutone*, the Board chose the *General Electric* case in which to focus on conduct that might justify setting aside an election in response to captive-audience conduct—but not on whether such conduct constituted an unfair labor practice. With a disclosed intent to address that limited R-case issue, it posed the following questions:

> I. Can a fair and free election be held where an employer makes an antiunion speech on company time and premises, in the period immediately preceding an election, and the union involved is not afforded the opportunity, which it seeks, to reply under similar circumstances?
>
> II. If an opportunity to reply is appropriate, what should be the crucial period? For how long a period prior to a scheduled election may an employer make a speech, without granting the union involved an opportunity to reply?
>
> III. What are the relevant factors in determining whether an opportunity to reply is necessary? For example, is the size of the unit material?[63]

Describing the facts in the two cases being reviewed, the Board, noting the similarity of the employers' conduct and the unions' responses, observed that In each of the cases

> the Employer, shortly before a scheduled representation election, made a noncoercive speech to assembled employees, urging them to vote against union representation. The speeches were made on company premises and the employees were paid for time spent in attendance. In each case

[62] *Id.* at 364. *See* Supreme Court's text at note 76 *infra*

[63] 156 NLRB 1247 at 1249. These questions are addressed in part by the rule proposed herein.

> the [union] requested an opportunity to reply under similar circumstances—on company premises with employees paid by the employer for time spent in attendance—and its request was denied.[64]

Both unions lost their elections, whereupon they and the *amici* unions supporting them argued that the employers' denial of equal-opportunity requests prevented the holding of fair and free elections, therefore the elections should be set aside and new elections conducted.[65] Furthermore, although neither employer maintained an unlawful or broad no-solicitation rule, the unions also contended "that existing Board law [was] inadequate, that *Livingston Shirt*[66] should be overruled, and that the Board should return to the doctrine of *Bonwit Teller, Inc.*"[67]

Instead of resolving even the limited issue that it originally intended for *General Electric*, however, the Board declined to order new elections, giving as its reason that it had—on that same day—issued its decision in *Excelsior Underwear, Inc*.,[68] which established what came to be known as the *Excelsior* rule. That rule required that the employer in a representation-election case would provide the NLRB regional director within seven days following a consent-election agreement or declaration of an election with a list containing the names and addresses of all eligible voters, which would then be turned over to the union-party to the election. Based on that ruling, the Board in

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[64] *Id.,* at 1250.

[65] *Id.* They also argued that unions "should be allowed to campaign on the employer's premises, so long as they do not interfere with production." *Id.,* at 1251.

[66] Livingston Shirt Corp., *supra* note 13.

[67] *See* text accompanying note 50 *supra*.

[68] 156 NLRB 1236 (1966).

General Electric stated that it was declining to reschedule the elections or to resolve the pending requests for promulgation of a "captive audience" rule. What is significant, however, was its accompanying indication that this decision was only *conditional* and *tentative*. Its explanation for the co*nditionality* was

> [i]n light of the increased opportunities for employees' access to communication which should flow from *Excelsior,* but with which we have, *as yet, no experience*, and because we are not persuaded on the basis of our current experience that other fundamental changes in Board policy are necessary to make possible that free and reasoned choice for or against unionization. . . .[69]

And its explanation for the *tentative* status of that determination was that "we prefer *to defer* any consideration of current Board doctrine in the area of plant access until after the effects of *Excelsior* become known."[70]

Those effects, of course, became known many decades ago. It has long been common knowledge that In comparison with the relevant effect of the anti-union communicating power of employers in captive-audience encounters, E*xcelsior* has had virtually no effect, which was well illustrated by the previously reviewed cases cited in the *Harborside Healthcare* dissent, all post 1966 cases*.*[71]

Re-examination of *Excelsior's* relevant effect—which is *none* and not in dispute—is indeed past due. Having made voter names and addresses available, that decision may have helped unions find and contact a limited number of employees through

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[69] 156 NLRB at 1251. Emphasis added.

[70] *Id*. Emphasis added.

[71] *See supra* at notes 9-18.

impersonal mailings or by expensive and time-consuming home visits (which often create resentment as an invasion of privacy), and such lists have been helpful in checking voter-eligibility at election times; but these narrow and relatively unrelated benefits cannot be realistically compared with time-sensitive face-to-face mandatory captive-audience speeches on company time and premises or with supervisors' one-on-one confrontations with employees.[72] Furthermore, the longstanding example of NMB holdings that captive-audiences violate the "laboratory conditions" required for airline and railroad fair elections[73]—which might relate to the greater success of unions winning elections under the RLA—provide additional grounds to support issuance of comparable holdings under the NLRA.

E. The Problem's Solution

It will be recalled that the Republican-majority Board Members in *Peerless Plywood* conceded in their unchallenged implied agreement with dissenting member Murdock's conclusion, that "*they do not contend that the Bonwit Teller doctrine must be abandoned in representation cases, but to the contrary recognize that this is not so.*"[74] In other words, there is no real controversy about the legality of setting aside and reordering an election in response to a captive-audience speech where the union has

[72] Although *Excelsior* contacts may now be slightly speeded-up and somewhat improved by the Board's new rule that requires adding telephone numbers and email addresses where available, that information is still impersonal, hence grossly inferior to face-to-face contact and thus not comparable to an employer's communications here in issue. *See* representation case rule-change, 79 Fed. Reg. No. 25 (Feb. 6, 2014), 29 CFR § 102.62.

[73] *Supra* at notes 22-26.

[74] At notes 59 & 60 *supra*. Emphasis added; underlining in original.

been denied an equal opportunity to respond, thus violating the "laboratory conditions" required for a fair election.

That is all that the rule proposed herein seeks to accomplish, which is that *Bonwit Teller* should be essentially reinstated in *representation* cases only, notwithstanding that Petitioners are strongly of the view that *Livingston Shirt* was wrongly decided because Section 8(c) "free speech" is clearly not a relevant factor in captive-audience violations. As Member Murdoch there pointed out,

> The Board [in *Bonwit Teller*] did not find that the employer could not deliver an antiunion speech to employees assembled on company time and property. The Board did find that, once an employer had chosen such a method of influencing the employees, a refusal of an equal opportunity to the union constituted interference and restraint of the employees' rights.[75]

It is thus the discriminatory withholding of union access to employees, not the employer's speech that violates the Act. *Livingston Shirt*, therefore, should eventually be overruled with a return to something approaching the *Bonwit Teller* doctrine.[76] Nevertheless, that is not the objective of this petition. Although total reversal of *Livingston Shirt* would be legally appropriate, the usual opponents of unionization would surely contest that unfair-labor-practice designation as a violation of Section 8(c). Therefore, despite the invalidity of such opposition, a ULP approach would be unduly time-consuming, whereas the current proposal, which applies to elections only—with no

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[75] 107 N.L.R.B. at 414.

[76] It will be recalled, *supra* at notes 61 & 62 that in *Nutone* the Supreme Court qualified its holding. It stated in full that: "We do not imply that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labor practice. All we hold is that there must be some basis, in the actualities of industrial relations, for such a finding." 357 U.S. at 364.

ULP application— should be less controversial, yet still highly effective. Accordingly, Petitioners urge the Board to *apply* the *General Shoe* doctrine to captive-audience conduct forthwith,[77] but to make no determination at this time as to whether such conduct violates Section 8(a)(1).

The rule here proposed should have wide appeal because of its democratic nature. And its legal authority should not pose a problem, especially considering its initial recognition expressed by the three distinguished Republican Board members in *Peerless Plywood*.

F. Conclusion

For the reasons outlined above, the R-case rule here proposed should be adopted. Compliance with this rule will result in employers either voluntarily refraining from engaging in captive-audience conduct, or choosing—notwithstanding the re-ordered election remedy contained in the rule—to engage in such conduct, in which event the union will be entitled to comparable access to the employees for presentation of its pro-union messages. In either event, NLRB elections will be substantially more democratic than they are at present.

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[77] The Board long ago, at least for a brief period, actually applied the *General Shoe* doctrine to certain conduct that could now be covered by the proposed rule. *See* Economic Machinery, Inc., 111 N.L.R.B. 947 (1955), ("The technique of calling the employees into the Employer's office individually to urge them to reject the Union is, in itself, conduct calculated to interfere with their free choice in the election. This is so, regardless of the noncoercive tenor of an employer's actual remarks." *Id.* at 949.). *See also* Oregon Frozen Food Co., 113 N.L.R.B. 881 (1955), and Mrs. Baird's Bakeries, Inc., 114 N.L.R.B. 444 (1055). For comment, *see* Secunda, *supra* note 6, at 138, who also "maintains that the Obama Board is likely to revisit the captive audience speech doctrine for the first time in decades." *Id.*, at 145. This petition provides that opportunity.

Indeed, these elections will henceforth be consistent with the democratic standard articulated by one of America's most eminent labor law scholars, Derek Bok, former Harvard law professor and university president.[78] He reminded us that "the Board has constantly stressed the need to preserve the employees' 'free choice.'"[79] And with specific reference to union elections, he pointed out that employees need to make a rational decision whether or not to be represented by a union, and "a rational decision implies that the employees have access to relevant information [and that] they should be free from restrictions that obstruct the flow of [that] information."[80] Regarding the Board's role in that process, he emphasized that "the Government should in justice make certain that elections will not be carried out in a manner *unfairly* prejudicial to either party."[81] And to the question of "[w]hat is the nature of *fairness* in the context of a representation election," he responded that "[i]n essence, it is a question of *equality*."[82] Accordingly, "[i]f the union is given an adequate opportunity to rebut and to issue countercharges of its own, it is hard to make out that the employer has been given an unfair advantage."[83]

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[78] Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act,* 78 HARV. L. REV. 38 (1964).

[79] *Id.*, at 46.

[80] *Id.*

[81] *Id.*, at 53. Emphasis added.

[82] *Id.*, at 54. Emphasis added.

[83] *Id.*, at 73.

With reference to the importance of *rebuttal*, Professor Bok stated that "as the opportunity to reply is enhanced, the need for regulating the content of speech tends to diminish. [Thus] an adequate opportunity to reply will go far to remove the need for expanding controls over the content of speech."[84] He emphasized that "the right to reply can, and should, be expressed in terms of rules that provide clear guidance to the parties and permit effective and inexpensive enforcement by the Board."[85] Not surprisingly, and with reference to *Livingston Shirt* and *Nutone*,[86] he recognized that "[t]he most controversial of all problems involving access to the employees arises when the employer or his agents speak to the employees on company time while prohibiting solicitation on behalf of the union."[87] His suggestion of a possible solution to this problem closely resembles, in its critical aspect, the captive-audience proposal contained in this petition. He stated that

> one possible solution would be to provide that in elections involving seventy-five or more employees, the employer could not deliver a speech to his employees during working hours within the last seven days of the campaign unless he permitted the union to do likewise, nor could he allow his supervisors to solicit during this period without relaxing his ban on solicitation by the employees.[88]

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[84] *Id.*, at 91.

[85] *Id.*, at 92.

[86] He referred to the *Nutone* case, *supra* note 38, as *Avondale Mills,* the name of the other employer in that consolidated Supreme Court decision.

[87] *Id.*, at 96.

[88] *Id.* at 102.

Professor Bok's seventy-five-employees threshold and his limiting the rule to the last seven days prior to an election probably seemed appropriate in the mid-1960s when he was writing, for captive-audience conduct at that time was not nearly the problem that it is today. But what is critically significant in his proposal for present purposes is that it is based on and incorporates exactly the same basic principles of *equality* and *rebuttal* that Petitioners propose herein.

In conclusion, Petitioners assert that promulgation of the proposed rule will inject a missing democratic element into the Board's R-case election process. This should ultimately result in more collective bargaining, which the statutory policy of the Act encourages.

Respectively submitted this 15th day of January, 2016.

Primary Petitioner, **Charles J. Morris** _____
Professor Emeritus, Southern Methodist University,
Dedman School of Law
5085 Caminito Exquisito
San Diego, CA 92130
Phones: (858) 793-1095
(858) 525-5004
FAX: (858) 793-1095
Email: cjmmorris@aol.com

Primary Co-Petitioner, **Paul M. Secunda,** Professor and Director, Labor and Employment Law Program,
Marquette University Law School
P.O. Box 1881
Milwaukee, WI 53201
Phones: (414) 288-6497 (w)
(414) 828-2372 (c)
FAX: (414) 288-6975
Email: paul.secunda@marquette.edu

Other Co-Petitioners:

David Abraham, Professor, University of Miami School of Law.
Steven E. Abraham, Professor, State University of New York at Oswego.
Lisa Blomgren Amsler, Keller-Runden Professor of Public Service, Indiana University School of Public and Environmental Affairs.
Mark Anner, Associate Professor and Center Director, Center for Workers' Rights, School of Labor and Employment Relations, Penn State University.
Bradley A. Areheart, Associate Professor, University of Tennessee College of Law.
Rick Bales, Dean, Ohio Northern University College of Law.
Mark Barenberg, Isador and Seville Sulzbacher Professor and Co- Director Columbia Program on Labor Policy, Columbia Law School.
Janice R. Bellace, Samuel Blank Professor of Legal Studies, Wharton School, University of Pennsylvania.
Jason R. Bent, Associate Professor, Stetson University College of Law.
Peter Berg, Professor and Associate Director for Academic Programs, School of Human Resources and Labor Relations, Michigan State University.
Elaine Bernard, Executive Director Labor and Worklife Program, Harvard University Law School.
Susan Bisom-Rapp, Professor of Law, Thomas Jefferson School of Law.
Kate Bronfenbrenner, Senior Lecturer, School of Industrial and Labor Relations. Cornell University.
James J. Brudney, Professor, Fordham University School of Law.
Robert Bruno, Director of Labor Education Program, Professor of Labor and Employment Relations, School of Labor and Employment Relations, University of Illinois, Urbana-Champaign.
William Canak, Professor, Middle Tennessee State University.
Kenneth Casebeer, Professor of Law Emeritus, University of Miami School of Law.
Paul F. Clark, Professor and Director School of Labor and Employment Relation, Pennsylvania State University.
Carin Clauss, Professor Emerita, University of Wisconsin Law School.
Alexander Colvin, Martin F. Scheinman Professor, School of Industrial and Labor Relations, Cornell University.
Lance Compa, Senior Lecturer, School of Industrial and Labor Relations, Cornell University.
Angela B Cornell, Director of the Labor Law Clinic, Clinical Professor of Law, Cornell Law School.
Roberto L. Corrada, Professor, University of Denver College of Law.
Marion Crain, Vice Provost Washington University, St. Louis, Wiley B. Rutledge Professor, Director Center for Interdisciplinary Study of Work & Social Capital, Washington University School of Law.
Charles B. Craver, Freda H. Alverson Professor, George Washington University School of Law
Kenneth G. Dau-Schmidt, Willard and Margaret Carr Professor of Labor and Employment Law, Maurer School of Law, Indiana University (Bloomington).
Mathew Dimick, Associate Professor, State University of New York at Buffalo, School of Law.
Clifford B. Donn, Professor, Le Moyne College.

Michael C. Duff, Associate Dean of Student Programs and External Relations, Centennial Distinguished Professor of Law, University of Wyoming College of Law.
Adrienne E. Eaton, Professor and Chair, Labor Studies and Employment Relations, Rutgers University.
Rebecca Ellis, Professor Emerita, Orfalea College of Business, California Polytechnic State University.
Cynthia Estlund, Catherine A. Rein Professor, New York University School of Law.
Fred Feinstein, Former Visiting Professor and Senior Fellow, University of Maryland School of Public Policy.
Barbara J. Fick, Associate Professor of Law, University of Notre Dame Law School.
Janice Fine, Associate Professor, Rutgers University School of Management and Labor Relations.
Richard Michael Fischl, Professor, University of Connecticut School of Law.
Catherine Fisk, Chancellor's Professor of Law, University of California Irvine School of Law.
Ruben J. Garcia, Professor of Law, University of Nevada, Las Vegas.
Charlotte Garden, Associate Professor, Seattle University School of Law.
Julius Getman, Professor Emeritus, University of Texas School of Law.
Michael J. Goldberg, Professor, Widener University Delaware Law School.
Stephen B. Goldberg, Professor Emeritus, Northwestern University School of Law.
Alvin L. Goldman, Professor Emeritus, College of Law, University of Kentucky.
Jennifer Gordon, Professor of Law, Fordham University School of Law.
Robert A. Gorman, Kenneth Gemmill Professor Emeritus, University of Pennsylvania Law School.
Joseph R. Grodin, Distinguished Emeritus Professor, University of California, Hastings College of the Law.
James A. Gross, Professor, School of Industrial and Labor Relations, Cornell University.
Seth D. Harris, Distinguished Scholar, School of Industrial and Labor Relations, Cornell University.
L. Camille Hebert, Carter C. Kissell Professor of Law, Moritz College of Law, The Ohio State University.
Jeffrey Hirsch, Geneva Yeargan Rand Distinguished Professor, Associate Dean for Academic Affairs, University of North Carolina School of Law.
Ann C. Hodges, Professor, University of Richmond School of Law.
Alan Hyde, Distinguished Professor and Sidney Reitman Scholar, Rutgers University School of Law.
Harry Katz, Jack Sheinkman Professor, School of Industrial and Labor Relations, Cornell University.
Karl Klare, George J. & Kathleen Waters Matthews Distinguished University Professor, Northeastern University School of Law.
Thomas Kochan, George Maverick Bunker Professor of Management, Professor of Work and Employment Research and Engineering Systems, Co-Director, MIT Sloan Institute for Work and Employment Research.

Gordon Lafer, Associate Professor Labor Education & Research Center, University of Oregon.
Arthur S. Leonard, Professor, New York Law School.
Ariana R. Levinson, Associate Professor, University of Louisville School of Law.
David Lewin, Neil H. Jacoby Professor Emeritus, Anderson School of Management, University of California Los Angeles.
Nelson Lichtenstein, MacArthur Foundation Chair in History, Director Center for the Study of Work, Labor and Democracy, University of California Santa Barbara.
David B. Lipsky, Anne Evans Estabrook Professor of Dispute Resolution, Stephen H. Weiss Presidential Fellow, Director, Scheinman Institute on Conflict Resolution, School of Industrial and Labor Relations, Cornell University.
Anne Marie Lofaso, Professor of Law, West Virginia University College of Law.
John Logan, Professor and Director of Labor and Employment Studies, San Francisco State University.
Deborah Malamud, AnBryce Professor of Law, New York University Law School.
Joseph A. McCartin, Professor and Director, Kalmanovitz Initiative for Labor and the Working Poor, Georgetown University.
Marcia L. McCormick, Professor and Director of William C. Wefel Center for Employment Law, Saint Louis University School of Law.
Robert A. McCormick, Professor Emeritus, Michigan State University College of Law.
Robert McKersie, Professor Emeritus, MIT Sloan School of Management.
Carlin Meyer, Professor Emeritus, New York Law School.
Gary Minda, Professor of Law Emeritus, Brooklyn Law School.
Bruce Nissen, Director of Research, Florida International University Center for Labor Research.
Craig A Olson, LER Alumni Professor, School of Labor & Employment Relations, University of Illinois (Urbana/Champaign).
Maria L. Ontiveros, Professor, University of San Francisco School of Law.
Michael M. Oswalt, Assistant Professor, Northern Illinois University College of Law.
Gary Peller, Professor of Law, Georgetown University Law Center.
James Gray Pope, Professor of Law, Rutgers Law School.
William J. Puette, Director West O'ahu Center for Labor Education & Research, University of Hawaii.
Robert J. Rabin, Professor Emeritus, Syracuse University College of Law.
Joel Rogers, Sewell Bascom Professor, University of Wisconsin Law School.
César F. Rosado Marzán, Associate Professor of Law, IIT Chicago-Kent College of Law.
Susan J. Schurman, Distinguished Professor, School of Management and Labor Relations, Rutgers, State University of New Jersey.
James G. Scoville, Professor Emeritus, Industrial Relations Center, University of Minnesota.
Ron Seeber, Professor, School of Industrial and Labor Relations, Cornell University.
Joseph E. Slater, Eugene N. Balk Professor of Law and Values, University of Toledo College of Law.
Peggie R. Smith, Charles Nagel Professor of Employment & Labor Law, Washington University, St. Louis, School of Law.

Howard Stanger, Professor, Department of Management, Wehle School of Business, Canisius College.
Theodore J. St. Antoine, James E. and Sarah A. Degan Professor Emeritus, University of Michigan Law School.
Katherine Stone, Arjay and Francis Miller Distinguished Professor of Law, UCLA School of Law.
Robert N. Strassfeld, Professor of Law, Case Western Reserve University School of Law.
Charles A. Sullivan, Professor of Law, Director Rodino Law Library, Seton Hall Law School.
Chris Tilly, Professor of Urban Planning and Director, Institute for Research on Labor and Employment, University of California Los Angeles.
Lowell Turner, Professor of International and Comparative Labor, Academic Director, The Worker Institute, School of Industrial and Labor Relations, Cornell University.
Lea VanderVelde, Josephine Witte Professor of Law, University of Iowa College of Law.
Lea B. Vaughn, Professor of Law, University of Washington School of Law.
Joan Vogel, Professor of Law, Vermont Law School.
Paula B. Voos, Professor, School of Management and Labor Relations, Rutgers University.
Marley S. Weiss, Professor of Law, University of Maryland Francis King Carey School of Law.
Martha S. West, Professor Emerita, University of California Davis School of Law.
Hoyt N. Wheeler, Distinguished Professor of Management Emeritus, Moore School of Business, University of South Carolina.
Paul Whitehead, Professor of Labor Studies and Employment Relations, Pennsylvania State Universityy Law School.
Michael J. Wishnie, William O. Douglas Professor of Law and Deputy Dean of Experiential Education, Yale Law School.
Noah Satz, Professor, UCLA School of Law.
Rebecca E. Zietlow, Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law.
Roland Zullo, Associate Research Scientist, University of Michigan.