September 1985

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Vedder, Price, Kaufman, Kammholz & Day

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SPECIAL TOPIC: FIFTIETH YEAR ANNIVERSARY OF THE NLRB

The following two essays are presented in commemoration of the NLRB's Fiftieth year anniversary. Both authors have had extensive experience in the labor field and more specifically in association with the NLRB.

TRANSFER OF NLRB JURISDICTION OVER UNFAIR LABOR PRACTICES TO LABOR COURTS

GUY FARMER*

I. INTRODUCTION

Since its inception in 1935 and continuing after the balancing amendments of 1947, the National Labor Relations Board (the "Board" or "NLRB") has been the center of a storm that refuses to subside. During the almost fifty years of its existence, the Board has grown immensely in size and power over labor-management relations. Its personnel and budget has grown steadily. Its jurisdiction has been expanded steadily from basic industries to virtually the smallest of businesses. The Board has decided thousands of cases, and yet the law remains unstable, vacillating, and unpredictable.

During its history, the Board has changed composition and course with every passing political administration, and those political changes have been accompanied by major changes in decisional policy, bringing on each time a storm of criticism from either management or labor depending on which feels its ox is being gored by a particular decision. One such recurring onslaught on the Board, this time by the unions, is now in progress.

The Board has contributed to its own problems by its adventurous decisional policy, which leads it to extend its substantive jurisdiction to grapple with new issues that would better be left to resolution through arbitration or the collective

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bargaining process. Each new policy encourages a new inflow of cases which has led to the accumulation of such a large backlog of cases that the Board is simply unable to cope with it.

The upshot is that the Board has inflicted upon itself its own death wound. It is unable to function in such a way as to implement the laudable purposes of the National Labor Relations Act (the “Act” or “NLRA”) of resolving controversies between management and labor, protecting the rights of employees to freedom of choice, providing expeditious means of conducting employee election, protecting employers from illegal boycotts and illegal strikes, and resolving crippling jurisdictional disputes.

The most startling indictment of the Board as an institution is that during its long history, not one Board has escaped bitter criticism by either labor or management. There has never been a consensus that any particular Board was efficient, fair, and impartial. This, it seems clear, raises a serious public question as to whether the Board should be continued, or whether other means should be found to achieve an expeditious, fair, predictable, and impartial administration of this important statute.

II. THE GENESIS, STRUCTURE, AND OBJECTIVE OF THE ACT AND ITS AMENDMENTS

There are several reasons for the Board’s lack of success, not necessarily all of them the fault of the Board itself. The blame must be shared by other institutions, both public and private, as well as by defects in the Board’s internal structure. Before identifying some of these factors, it is appropriate to briefly describe the history and purpose of the National Labor Relations Act itself.

A. The Act: Its History and Purposes

The NLRA, then commonly referred to as the Wagner Act, was first enacted under the Roosevelt administration in 1935. This coincided with a period of intense labor-management strife at a time when unions were attempting to obtain recognition and status in major industries. There was labor strife, massive strikes, and violence. Labor had virtually no legal rights and no legally available means for organizing employees, for peacefully obtaining legitimate bargaining rights, and no protection from discharge of employees in the major industries for joining together to achieve collective bargaining rights.

With support from the Roosevelt administration, Congress’ response to this was the passage of the Wagner Act in 1935. In a sense this was a one-sided, pro-union statute because it gave absolutely no rights to employers—no rights to prevent secondary boycotts, illegal sit-down strikes, hot-cargo agreements, coercion

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of employees by unions, and the like. The focus was not on those particular problems but exclusively on union and employee rights.

The Wagner Act, however, did bestow upon employees the right to join unions, the right to have Board-conducted elections to select bargaining representatives in units found appropriate by the Board, the right to protection against discrimination for union membership and activity, and the right to bargain collectively with their employers. A three-member Board was established to enforce those rights. The Board decisions in the unfair labor practice cases were made subject to review by the circuit courts of appeals. The Board-conducted elections were not subject to direct appeal to the courts, but could be appealed in a round-about way by the employer refusing to accept the Board’s certification of a union and thereafter being cited by the Board for a refusal to bargain. This decision could then be appealed to the circuit courts of appeals.

The “one-sided” nature of the Wagner Act had two unfortunate consequences. One was that its failure to deal with union abuses caused employers to brand it as pro-union and unfair. The other was that since the Act obviously benefited labor greatly and adversely affected management, the unions came to believe as a matter of faith that the Board belonged to them and existed for their benefit only, and that the administration of the Act, including the decisions of the Board in litigated cases, should be heavily tilted in favor of the union cause. The original Board and its staff in its early years appeared generally to accept the unions’ unspoken ownership claim. The major decisions decided by the Board in those early years were generally slanted strongly in favor of the unions and, as a result, many were upset by the courts.

Even the constitutionality of the Act was strongly questioned. However, under threat of “Court-packing” by President Roosevelt, the Supreme Court, in a five-to-four decision written by Chief Justice Hughes, upheld the constitutionality of the Act in the famous Jones and Laughlin case. Following this decision, the Board, which had been rendered virtually inactive by court injunctions, suddenly began to enforce the Wagner Act with vigor.

The Board members (then three in number) were appointed by the President and confirmed by the Senate. In consequence, during the long Roosevelt regime, followed by Truman, and continuing until the election of a Republican President, Eisenhower, in 1952, the Board members were appointed by Democratic Presidents. It is fair to say that these appointments were political, and the members were consciously selected to perpetuate the pro-union cast of the Board. Thus the union’s “remote” control of the Board continued. This added fuel and momentum to the crescendo of criticism by employers and their legal counsel. They had felt mistreated for many years and were determined that the advent of a Republican administration would bring about a change in the Board, pulling its administration back towards the middle ground.

The primary problem was the administration of the Act, for even before the election of President Eisenhower, major changes had already occurred in the substantive provisions of the statute itself. During President Truman’s tenure in office, the Congress, in 1947, enacted over his veto the Labor-Management Relations Act, popularly known as the Taft-Hartley Act.\(^3\) This Act retained most of the provisions of the Wagner Act, but added a number of other significant provisions to give balance to the statute. These amendments for the first time imposed prohibitions against certain union conduct considered unfair and disruptive. The Taft-Hartley provisions included: (1) a ban on secondary boycotts attempting to involve innocent and neutral employers in disputes in which they had no part, (2) protection of free speech rights of employers in union election campaigns, (3) protection of employees from union coercion, (4) definition of the duty to bargain, (5) procedures for employees to decertify a union, (6) procedures for resolving jurisdictional disputes, (7) a prohibition of “hot cargo” agreements, and (8) various other changes intended to curb anti-social union conduct.

Procedurally, another important change for the better was made. The Taft-Hartley Act attempted to separate the prosecuting function from the judicial function (both of which were exercised by the Board under the Wagner Act) by creating an independent office of General Counsel, appointed by the President, approved by the Senate, and independent of the Board. This was done to correct the situation under the Wagner Act whereby the Board had control of both issuing complaints and deciding them, exposing the Board to the charge of being both prosecutor and judge in the same case. Under Taft-Hartley, the General Counsel was authorized to issue or refuse to issue complaints without appeal to the Board or anyone. The Board still retained independent authority to decide the case and retained full authority over representation cases. This was without question an essential change.

Both this change and the substantive changes in the Taft-Hartley amendments were clearly appropriate. Indeed, except for certain defects in the manner in which the Board and General Counsel have administratively diffused the separation of powers, the NLRA as amended is fundamentally a fairly well-balanced statute. What is lacking is objective, non-political, impartial administration. This element is not present due to certain factors which I shall discuss.

B. Why the Board Has Failed to Achieve the Act’s Objectives

The mission of the Board under the statute is clear. It is to administer the Act efficiently, expeditiously, fairly, and impartially as it was written and intended by Congress. This type of professional, objective administration of the Act would help assure its effectiveness and public acceptance. This is not an impossible task because the Act is as clearly and unambiguously written as most statutes. Standing in the way are the Board’s overreaching its jurisdiction to encompass many small enterprises not deserving national attention, the Board’s lack of knowledge about

industrial life and the practical workings of collective bargaining, and a built-in bias and partiality due to the political climate in which the Board functions. Of these, the most pernicious of all is the politicizing of the Board during its history. Each of these deficiencies shall now be considered.

1. Continued Expansion of Jurisdiction

The Board's expanding jurisdiction over a vast array of enterprises not deserving of national attention is a major factor in the Board's ineffectiveness. One who undertakes too much accomplishes nothing. All that is required for the Board to take jurisdiction over a non-retail business is for it to have an annual outflow or inflow of goods or services amounting to $50,000.00 or more. This standard includes virtually every small non-retail enterprise in the country. Any retail establishment is swept in when its gross business is at least $50,000.00 a year. Again, this standard is so minimal that it must include virtually every retail establishment. The other standards, expressed generally in dollar amounts of gross business, sweep in virtually all apartment houses, employer associations, newspapers, all businesses in the District of Columbia, restaurants, radio and television stations, hotels and motels, country clubs, office buildings, shopping centers, private colleges, symphony orchestras, non-profit charitable organizations, nursing homes, hospitals, day or child care centers, religiously sponsored organizations, and others. The Board's jurisdictional broom reaches into every corner of almost any activity resembling a business, leaving out very few.

The Board's jurisdictional standards provide no significant restrictions on cases that can be brought to the Board, explaining, in large part, the Board's mammoth case load. But perhaps more important, the Board's adventurous excursions into new and uncharted fields of law invite the filing of more and more cases and operate to flood the Board with cases which must be disposed of. Each time the Board announces a new principle of law, the case load enlarges. One small example is the Board's decision that an employee called in by a supervisor to an interview that could result in discipline is entitled to have a representative present. There is no way of counting the number of new cases that have rushed to the Board as a result of this dubious and controversial ruling. This is only one of many examples. Instead of exercising restraint in the cases it decides, the Board, with the cooperation of the General Counsel, has in the past continued to push the Act to its outer limits, both jurisdictionally and substantively. This not only contributes to the huge case load, it also creates continuing instability and controversy.

There are many issues which are best left for the parties to resolve through collective bargaining, the encouragement of which, as the preamble to the Act states, is the ultimate purpose of the Act. The Board could make a substantive cut in

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4 It is recognized that the Board is now bound to certain minimum standards by statute. However, the Board can continue to expand its jurisdiction; it merely cannot contract it. But the statute can be amended. The Board has, in fact, amended its jurisdictional standards to new types of enterprises.
its backlog of cases by heeding this statutory language and not involving itself with problems more suitable for settlement through the bargaining process or arbitration. The Board should not concern itself with matters in which it has scant knowledge and little or no expertise.

The long-standing controversy within the Board over the years concerning the wisdom and propriety of referring cases involving contract interpretations to arbitration is an even better example. The Board, over bitter dissent, approved referral in the case of Collyer Insulated Wire.\(^1\) The Board later abandoned the Collyer doctrine and recently reinstated it. Faithful adherence to Collyer will allow competent arbitrators to decide hundreds of cases which would otherwise further impede the flow of cases through the Board. The same is true of what is known as the Spielberg doctrine, adopted in the 1955 case of Spielberg Manufacturing Co., in which the Board decided to give full faith and credit to an arbitrator's award already rendered, but only if it met severe criteria. In practice, the Board has frequently refused to apply the Spielberg doctrine to resolve unfair labor practice cases.

2. Lack of Judicial Impartiality in Interpreting the Act

It is essential that the Board decide the cases coming before it with objectivity and lack of bias. Without the accomplishment of this objective, all other reforms are useless. Every party appearing before the Board deserves an impartial decision—no more and no less.

Yet, there are those who argue that, since a purpose of the Act is to promote collective bargaining, the Board's mission is to adopt policies and decide cases in a manner that will help unions organize and bargain collectively. This is a distortion of the Act and its purposes. The Act is a law adopted by Congress with specific language spelling out the rules that apply in the labor-management relationship. It provides for and protects the right of unions to organize and bargain collectively. It establishes procedures for employees to register their choice of union or non-union. It does not mandate unionism or collective bargaining; it provides safeguards to protect employees in making a free choice to reject or accept unions and collective bargaining.

The fair and impartial interpretation and enforcement of these provisions of the Act will achieve the congressional purpose as a whole. That is the Board's task and the Board's sole obligation. Because the original Wagner Act was one-sided and aided unions in achieving their goals, unions have always thought they should own the Board, and thus seek preferential treatment. Impartiality is not what the unions seek. Rather they seek preference. Generally, the Board has acquiesced in the union's position and displayed, over the greater part of its fifty-year history,
a pro-union bias. This is unfortunate and has prevented the Board from receiving from management or from labor what it needs to function effectively.

The exhibition of a pro-union or pro-employer bias will encourage one or the other group to take special interest issues to the Board which should be resolved between themselves. The use of the Board as an instrument to obtain objectives not attainable through collective bargaining is also a factor that contributes in many ways to the failure of the parties to settle disputes as Congress intended—through the give and take of collective bargaining.

3. Lack of Knowledge and Experience of How Collective Bargaining Works

Few if any Board members have engaged in collective bargaining. The same may be safely said about the General Counsel and the staff in general. This does not disqualify them from serving on the Board, so long as they approach their task with knowledge of their limitations, but it does hamper their effectiveness. The Board should recognize its limitations and exercise great caution, for example, in making a finding of bad faith bargaining by one of the parties based on the cold record. Yet the Board has made hundreds of decisions that an employer has bargained in bad faith in the past on the basis of the bare record alone and on the basis of some Board-invented concepts that are frequently bizarre. Since the Act mandates good faith bargaining, concededly the Board must consider this issue when it comes before the Board. But certainly, many decisions have gone far overboard in finding that an employer has engaged in surface bargaining—made proposals no self-respecting union would accept and like. A high degree of proof should be required in making these judgments. The Supreme Court has made it plain that the parties should have maximum freedom to propose and to reject at the bargaining table, as section 8(d) clearly provides. Section 8(d) specifically provides that neither party is required to make concessions or counter-proposals, but the Board has found bad faith for precisely one or both of those reasons.

One important side effect of the Board intervening in bargaining cases is that there is a strong tendency for a union not satisfied with its progress in bargaining to attempt to win a victory away from the bargaining table and before the Board.

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7 This is not uniformly true. There are five Board members appointed for five year terms. The result is that any incoming President has an opportunity to appoint at least a majority of the Board, giving that majority control of the course the Board takes. Each administration seeks to appoint Board members who shape the administration's philosophy. The result is a readily apparent change in Board decisions from one administration to the other. This causes sudden shifts in policies and decisions on the same issues, resulting in continuing criticism of the Board, first by management, then by union, and the process continues to repeat itself. The recent Board under President Reagan has a conservative staff and, in reversing some decisions made by the prior Board labelled as "pro-union," has brought down a flood of bitter criticism by unions.

8 For example, the Board has found bad faith in making certain proposals on the theory that no self-respecting union would accept them despite the fact that the same union in another plant has accepted the same proposals.

Many bad faith bargaining cases fall in this category. Again, this has the effect of adding to the Board’s already unmanageable case load and paralyzing the Board from deciding cases expeditiously. The General Counsel must also share the blame for failing to use common sense and judgment in issuing complaints in these tactful cases.

4. The Intervention of Politics in the Board’s Decisions

Just as is exhibited by the Supreme Court, Board members will differ strongly on policy issues. But the Board’s policy-making responsibilities are insignificant when compared with the policy issues that the Court must face. The Board’s only legitimate function is to interpret the Act, and the Act’s language and legislative history rather clearly delineates the congressional interest. Yet, the Board, after fifty years of existence, continues to reverse itself again and again on the same issues (and at times in the same cases) and to be indecisive and unpredictable on numerous issues of primary importance to the parties. One Board majority has reversed decisions on major issues of interpretation made by a prior Board, only to have a later Board return to the original decision. This manifestation of vacillation and lack of stability subjects the Board to the valid criticism of bias and lack of impartiality. The Board goes in one direction or the other depending on the general philosophy of the current members at any given time, which generally coincides with the philosophy of the administration under which they serve.

This criticism has merit and undermines public confidence in Board decisions. It also creates instability in labor-management relations. Yet, this instability is almost, if not entirely, unavoidable given the structure of the Act. The Board members (now five in number) are appointed by the President in office and confirmed by the Senate. They each serve for staggered five year terms, one being named as chairman by the President. They cannot be removed without cause. This means that every President serving for four years has four shots at appointing four Board members, thereby changing the Board’s entire complexion.

The Board is an independent agency and not subject to control in decision-making by the President or the Congress. Nor do I suggest that any direct control is attempted to be exercised. My experience is that it is not. The President, however, has traditionally appointed Board members whom he at least believes share his general philosophy. However, if the Senate is controlled by a different party, prudence dictates that the President appoint as members persons who have a sufficient degree of acceptability by the Senate to receive approval. This has some ameliorating effect when the Senate is controlled by a different party than the White House. But the ameliorating effect is not nearly enough to ensure the appointment of competent, impartial members, and the record is clear on this.

It is, I believe, fair to say that history has established that Boards operating under Democratic administrations are demonstrably more pro-union and liberal, and Boards appointed under Republican administrations less pro-union and more conservative. This result is due, not to the particular administration’s exercise of
direct control over the Board, but because the party in power tends to appoint members who share whatever may be viewed as the attitudes and philosophies of that administration. This is certainly normal. It is not venal. It is reality. But, it does not contribute to the credibility and acceptability of the Board.

The politicizing of the Board is not the fault of individual Board members but is an inevitable result of the political system. There is nothing new about it. It has existed since the Board's creation. Ever since the office of President was occupied by Democrats during the earlier part of the Board's existence when the major principles were being established, unions have been the primary beneficiaries of the political factor. But now, under a Republican President, the criticism of the Board by unions and congressional committees has reached a crescendo. The House Committee on Government Operations has recently held hearings and issued a report criticizing the delays in deciding cases and the actions of the present Board in reconsidering cases decided by the prior Board. In the interest of fairness, it should be pointed out that the prior McCulloch and Fanning Boards, under Democratic administrations, reconsidered and reversed several major decisions made by the Republican Boards that preceded them. The practice is not new, nor should the present Board have to bear the brunt of the criticism for a condition that has been a characteristic of the Board.

What these events illustrate are the built-in political influences on the Board, and no amount of tinkering with the Act will eliminate them. Nor is it, in fact, a characteristic peculiar to the Board. The same political influences pervade all of the many so-called independent agencies established by Congress. Some are more controversial than others. The primary reason for the greater intensity of the controversy surrounding the Board is that the Board is in the middle between labor and management. The conflicts between these two special interests groups have always been intense, heated, and frequently hostile and bitter. Judging the Board in the context of its contribution to reducing the scope and heat of the conflict, the Board, over time, can only be judged as a failure. This is not an indictment of the Board or any particular Board member, but of the system, which lends itself to litigation rather than mutual agreement. This leads parties to seek to achieve their bargaining objectives through the Board rather than through the processes of true collective bargaining which the Act contemplated.

We should not mislead ourselves into believing that the problem would be solved if only some way could be found to reduce the backlog to halt the reconsideration of a handful of cases, and to expedite the final decision of Board cases. This would certainly be desirable and a part of any solution. But it would only provide a partial solution. Since the real problem is politicalization, the answer must be to depoliticize the administration of the Act. Deciding cases more swiftly, but still wrongly, is not the solution.

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III. PROPOSED SOLUTION

A. The Need to Depoliticize the Board

The House Committee on Government Operations, in a recent report, states that the “Board is in a crisis,” and attributes the crisis to the unmanageable backlog and the consequent delay in issuing decisions. There is no argument that the Board is in a crisis or that the backlog and resulting delay in issuing decisions impose undue hardships on unions, employers, and employees alike.

The present Board, however, should not take the blame for the backlog or the crisis. These are conditions that have been building for many years throughout the Boards’ history.

The Board itself is largely powerless to correct the problem, given the other conditions that contribute to the growing caseload which I have mentioned. The unmanageable and ever-growing caseload dramatizes the Board’s failure, but it by no means defines the reasons for the crisis. If by some act of magic, the backlog could be made to go away, nothing basic would be accomplished that would free the Board from its real problem. This problem is that the Board is functioning in an atmosphere where political factors are predominant. The pro-union bias which has characterized the Board throughout most of its existence had its roots in the early years of the Wagner Act, when the Board was a conscious ally of the labor movement. It must be remembered that the unions fought tooth and nail against the Tart-Hartley Act, calling it the “Slave Labor Act” and for many years had Taft-Hartley at the top of their agenda for repeal.

So, the problem is that the political system within which the Board functions does not produce impartial members, but produces partisans, for they are selected on the basis of their philosophy—conservative or liberal, pro-union or pro-employer.

Everyone should agree (but I am not sure that they do), that bias—pro-union or pro-employer—should be a disqualifying factor. If a way can be found to depoliticize the administration of the Act, the other negative attributes of its administration, the big backlog and the other problems plaguing the Board, could be curbed or greatly alleviated. The problem is how to do it.

B. A Suggestion for Change

The following suggestion is not by any means a new thought. It has been proposed before, but it is an idea whose time may finally have come. An outline of the suggestion is as follows:

1. Election Cases

   a. Separate the enforcement of the unfair labor practice provisions of the Act from its representation (election) responsibilities.

   b. Keep the Board in existence to handle and supervise the election cases. The system of regional offices of the Board would be kept intact to handle the
election cases, subject to the control, supervision, and review by the Board. Make the Board decisions in election cases subject to quick and direct review by a new Labor Division of the United States District Courts. This division would handle labor cases only and would appoint sufficient judges to ensure that they are able to keep up with the flow of cases and thus eliminate the backlog. Have the regional office personnel hear the election cases and make the original decisions subject to expedited review by the Board. Relieved of any responsibility for unfair labor practice cases, the Board should have no problem keeping current with the election cases. Give the Board the power to refuse to review election cases unless a substantial issue of law not already decided or a clear deviation from established Board policy is presented. Permit appeals to the Labor Division of the District Court within fifteen days. Make the decision of the Labor Division of the District Court final. Do not automatically stay the elections, but where appeal is taken impound the ballots until the district court acts. Allow no further appeal to hold up the election and certification or decertification of the union.

This procedure would allow for expeditious disposition of election cases and provide ample due process for the parties. It should pose no time problem because the Board would be freed of responsibility from the unfair labor practice cases which now occupy so much of its time.

2. Unfair Labor Practice Cases

The above proposal would free the Board's hands to deal with election cases only. With respect to unfair labor practices, the following proposal is outlined:

a. Provide that the new Labor Division has jurisdiction to hear and decide unfair labor practices cases directly and eliminate the present law judges. The number of judges required could be readily determined by examining the caseload, estimating the productivity of a district court judge, and appointing in each district as many district court judges as needed to hear and dispose of the cases filed in that district without delay. Jury trials and discovery in the Labor Division would be eliminated and the parties would proceed to trial without delay.

b. The authority to issue or refuse to issue complaints would be vested in a special division of the U.S. Attorney's Office, headed by an Assistant U.S. Attorney. A sufficient number of the U.S. Attorney's staff would be assigned to the Labor Division of the U.S. Attorney's Office to receive charges, investigate them, explore and settle cases where appropriate, bring complaints, and try the unfair labor practice cases before a judge of the Labor Division of the District Court. The U.S. Attorney would have the authority to hire investigators, if necessary, to assist the attorneys in investigating any unfair labor practice charges. Any person would have the right to file a charge and have it considered.

c. The office of General Counsel would be abolished, and the unfair labor practice cases handled as already described.

d. The charging party, upon motion, would be allowed to intervene in the proceeding in the district court.
e. The decision of the district court would be final unless appealed within thirty days to any court of appeals, to which a Board decision may now be appealed. The Rules of Appellate Procedure would apply to such appeals.

f. The Rules of Supreme Court Procedure would apply to petitions for certiorari and all proceedings before the Supreme Court.

C. Proposal Advantages

The advantage of these proposals are many. Earlier, I enumerated the reasons for the backlog and the reasons for the failure of the Board to establish a consensus of credibility by unions and employers. I mentioned the Board’s ever expanding jurisdictional policies and the politicizing of the Board due to the circumstances of each member’s appointment and the short length of their terms. Transferring the Board’s work to the courts, in the manner proposed, would greatly minimize and virtually eliminate all these problems.

The courts would have no incentive to enlarge jurisdiction, and the enabling statute could define jurisdiction in more narrow terms. This would eliminate hundreds of cases while still allowing litigation and resolution of the truly important cases. The new system would be managed by judges who would have no appetite to expand their jurisdiction in the labor field. The rise of institutionalism would be eliminated because judges would hear and decide the cases with full knowledge of the facts, thus eliminating the twenty-five to thirty legal assistants now assigned to each Board member. The administrative law judges would be eliminated and the cases would be heard directly by district court judges with experience and knowledge of labor law. This would result in great savings in time and costs and would produce better decisions. The proposed system would eliminate the backlog by the appointment of a sufficient number of judges to the Labor Division of the District Courts to keep abreast of the flow of cases. Incidentally, it would have the additional advantage of discouraging frivolous cases like those which are now filed in large numbers to delay elections, while hoping for victory in a baseless unfair labor case before a friendly Board.

By freeing the Board to deal with election cases only, the decisions in these cases, presently a large bone of contention for the unions, would be greatly expedited and would receive the attention of the Board, which is now doing little more than rubber-stamping Regional Directors’ decisions.

Transferring unfair labor practice cases to the courts would achieve one ultimate and much needed objective. With the Labor Divisions of the District Courts and the U.S. Attorney’s offices properly staffed, and with both prosecutors and judges acting objectively as professionals rather than crusaders, the much smaller number

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11 By institutionalism, I mean the Board system under which each Board member has twenty-five or so legal assistants who read the records and briefs and report the cases orally or by memorandum to the Board. The Board then orally announces its decision and the same legal assistants reduce them to writing for the Board members to review and sign.
of meritorious cases would be brought directly to impartial judges and be decided with expedition. Eliminating all discovery is an essential element of this proposal. Discovery is not used by the Board, nor by the English courts, and is clearly unnecessary to the dispensation of justice in unfair labor practice cases where those cases are heard directly by judges knowledgeable in labor law.

Finally, and most important of all, the administration of the Act would become almost entirely depoliticized, which is the ultimate objective. Of course, it is understood that judges have their own philosophies that exert some influence on their decisions. This is a human element which cannot be wholly eliminated. But these judges would be appointed for life, a significant incentive for independence in the decisional process, as we have so often observed with the Supreme Court. By virtue of their life tenure, they could be independent of any political administration. There is no doubt that they will be immeasurably more objective and independent than Board members with five year terms and natural ambitions to achieve reappointment. Anyone familiar with the courts and the Board knows that there is a vast difference in the degree of partiality between the Board and the courts. The point does not require extensive debate. It is self-evident and recognized by all.

D. Absence of Valid Arguments Against This Proposal

Four arguments have frequently been advanced against this proposal. First, such a drastic realignment of jurisdiction will be too costly. Second, the federal district courts have no expertise in labor law. Third, the district courts will differ on the law’s interpretation, which will create chaos in administration of the Act. Fourth, federal judges will not be able to handle the Board’s backlog any better than the Board.

All of these arguments are self-serving and almost certainly false. First, the savings realized from the abolition of legal assistants, trial examiners, General Counsel personnel, and the significant reduction in regional personnel would, in my opinion, pay for the addition of more judges and the necessary prosecuting personnel. In addition, the proposed solutions are so critical to the impartial administration of the Act that any additional expenditures would, if necessary, be more than justified. I doubt, however, that there will be any significant increase in costs. The Board’s current budget is about 150 million dollars annually and growing. At the Board’s inception, its budget was about one million dollars annually, and in the mid-fifties from eight to ten million. The Board’s current budget would probably be more than adequate to fund the costs of the courts established to handle unfair labor practice cases.

Moreover, I would predict a dramatic decrease in the number of cases filed in the court system. The reason is that 50% or more of the cases now filed have no semblance of merit and are filed only for factual reasons in the hope that a friendly Board will somehow uphold them. This would not be
The argument that the courts lack expertise in labor law as compared to the Board is basically a red herring, since the Board members themselves, at the time of appointment, are generally without genuine expertise. Labor judges can be appointed with equal or greater expertise than Board members. Moreover, they can be expected to be more fair and impartial. It is my firm belief that a good, experienced, and objective judge has the capacity to fairly administer any law and correctly decide any case.

There is no doubt that judges will sometimes differ on the interpretation of a provision of the Act. But, just as in ordinary civil and criminal cases, these differences can be resolved by the courts of appeals and finally by the Supreme Court. This is provided for in the proposal for processing unfair labor practice cases in the courts.

The question is, are we going along for the next fifty years as we have in the first fifty years, witnessing a weak, ineffective, and politicized administration of our nation's basic labor laws, or are we going to make the changes necessary for the law to survive. The failure of the present structure has been demonstrated over a period of fifty years. During this period of conflict and controversy, the weaknesses of the administrative structure initiated by the passage of the Wagner Act in 1935 have been fully revealed. The Board, as a congressional committee has noted, is in a crisis and virtually at a standstill. The symptoms of failure are there for everyone to see. This fatal illness cannot be cured by a bandaid. All reason and logic leads to the conclusion that the best, if not the only, answer is to place the administration of the Act in the court system to ensure that its vital purposes be fulfilled. This is essential to both labor and management. Repeal of the Act would be a harmful and iconoclastic gesture, creating great harm and even chaos in labor-management relations.

The answer is to depoliticize and reform the administration of the Act by tearing down the old structure and building a new one. The new structure has been described. Its basic premise is to turn to the established courts, which have served the nation well since its beginning. This will most assuredly provide a more objective interpretation and acceptable enforcement of the Act as consistent with the national interest.