1987

The National Labor Relations Act at the Crossroads

Edward Silver

Joan McAvoy

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/frr/vol56/iss2/3
THE NATIONAL LABOR RELATIONS ACT
AT THE CROSSROADS

EDWARD SILVER*

JOAN MCAVOY**

[It would seem that the case for abolishing the NLRB cannot be evaded.
—Professor Sylvestre Petro, 1953†

[A]n employer bent upon opposing unionization is not even inconvenienced by the present law in carrying out his anti-union activities.
—AFL-CIO Committee on the Evolution of Work, 1985‡

INTRODUCTION

Despite such criticism, the National Labor Relations Act (the “Act” or “NLRA”)¹ has provided the basic framework governing labor management relations in the private sector for over fifty years.² Periodically the subject of criticism³, the Act and the National Labor Relations Board (“NLRB” or the “Board”) today are again the target of strong attack.⁴ Nonetheless, while some changes may be necessary, the Act and the Board should be retained. Both have survived for over half a century, and it is now likely that their centennial will be celebrated rather than their demise.

The NLRA⁵ is the “starting point for contemporary American labor law.”⁶ Enacted in 1935 to promote unions and collective bargaining,⁷

---

* Chairman, Proskauer Rose Goetz & Mendelsohn, New York, New York; B.S. St. John’s University, 1941; LL.B. with distinction, Cornell University, 1948; Member, New York City Board of Collective Bargaining, 1968-; Director, American Arbitration Association, 1972-.


† Petro, Amending the Taft-Hartley Act, 4 Lab. L.J. 67, 156 (1953).


3. See, e.g., Elkouri, Employer Free Speech, 4 Lab. L.J. 78, 84 (1953) (“Section 8(c) [of the NLRA] was not necessary as enacted, and it is doubtful whether any employer ‘free speech’ provision was warranted at all.”); Rose, Is the NLRB Tampering With Freedom of Speech?, 15 U. Pitt. L. Rev. 462, 491 (1954) (“To assume that the employer is inherently evil, as the Board has . . . is a demonstration of vicious class-hatred which is most untrue . . .”).

4. See infra text accompanying notes 33-40.


this Act followed "a procession of bloody and costly strikes" resulting from the failure of the previously enacted National Industrial Recovery Act ("NIRA"), which had relied principally on persuasion and voluntary compliance.

Since 1935, Congress has amended the NLRA several times to reflect changes in national labor policy and correct perceived abuses of the system. In 1947, the Taft-Hartley Amendments shifted the focus of the Act to balancing the power between labor and management and protecting the rights of employees. Numerous significant changes were made, notwithstanding the strong opposition of labor. In 1959, Congress enacted the Landrum-Griffin Amendments to correct various abuses by unions and management uncovered by a Senate committee through investigation and hearings. In 1974, the most recent group of amend-

7. The Act gave workers three significant rights considered essential to equalizing bargaining power between labor and management: (1) the right to organize; (2) the right to bargain collectively; and (3) the right to engage in concerted activities such as strikes and picketing. See National Labor Relations (Wagner) Act, ch. 372, § 7, 49 Stat. 449, 452 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3273 (1985) [hereinafter "Legislative History NLRA"].

8. 79 Cong. Rec. 2371 (1935) (Senator Wagner commenting on § 7(a)), reprinted in 1 Legislative History NLRA, supra note 7, at 1312.


10. 79 Cong. Rec. 2368-70 (1935), reprinted in 1 Legislative History NLRA, supra note 7, at 1311-12.


12. Section 7 was amended to give employees the right to refrain from original § 7 activities, with one limited exception. Compare Taft-Hartley Act, ch. 120, § 7, 61 Stat. at 140 (employees may refrain from collective activities although they may be required to join a labor organization as a condition of employment), with Wagner Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985)) (no explicit right to refrain from § 7 activities). The amendments excluded supervisors from the coverage of the Act. Taft-Hartley Act, ch. 120, § 14, 61 Stat. at 151. The Taft-Hartley Act also increased the size of the Board from three to five members. Id. § 3, 61 Stat. at 139. The Office of the General Counsel was separated from the Board, and the General Counsel was given the power to make all enforcement decisions. Id. New sections were added creating union unfair labor practices and setting forth the duties of the parties in collective bargaining. Id. § 8, 61 Stat. at 141-42. Sections on mandatory and discretionary injunctions were added. Id. § 10, 61 Stat. at 149. A new section was added giving state laws that prohibited or limited union shops precedence over the new union shop proviso in § 8(a)(3). Id. § 14, 61 Stat. at 151. Another new section authorized suits in court for violation of labor contracts and suits by or against labor organizations. Id. § 301, 61 Stat. at 156. See 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 3-9, 15-16 (1985).


15. H.R. Rep. No. 741, 86th Cong., 1st Sess. 6 (1959), reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 759, 764 (1985) [hereinafter Legislative History LMRDA]. Landrum-Griffin amended the Act in various ways. It created a new union unfair labor practice by prohibiting picketing in certain defined circumstances. LMRDA, § 602, 73 Stat. at 539 (1959). Landrum-Griffin also created a number of significant legal rights for employees and duties for unions that were not part of the NLRA. These included: (1) a "bill of rights" for union
ments extended the coverage of the Act to nonprofit hospitals and established additional procedures covering collective bargaining in the health care field.\textsuperscript{16}

While the Act originally was the cornerstone of American labor policy, when reviewed today in the context of other legislation, the Act is no longer as significant as it once was. There are many other federal\textsuperscript{17} and state statutes,\textsuperscript{18} as well as judicial decisions,\textsuperscript{19} which also form the basis


19. In recent years, some courts have created exceptions to the employment-at-will doctrine. Under that doctrine, absent a written contract to the contrary, employment of a person who is employed for an unspecified period of time is terminable at the will of the employer. Exceptions to this general rule have been based on (1) public policy, see, e.g., Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985) (recognizing employee's right not to be discharged for testifying truthfully); Ludwig v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985) (recognizing employee's right not to be discharged for obeying subpoena), (2) the theory of implied contract, see, e.g., Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984) (recognizing implied contract arising out of provisions in company handbook); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (recognizing covenant of good faith in at-will employment contract), or (3) various tort theories, see, e.g., D'Ulisse-Cupo v. Board of Directors of Notre Dame High School, 202 Conn. 206, 520 A.2d 217 (1987) (upholding employee's cause of action for negligent misrepresentation).

of our nation's labor policy. Nevertheless, the Act remains an important statute for the private sector.

Without question, it has been responsible for a number of positive contributions to American law and society. As declared by one union activist, "collective bargaining itself is now recognized as a firmly established and viable institution with the potential for making significant contributions in resolving the problems of workers and other organized groups in society."

The acceptance of collective bargaining was a prime objective of the Act, which gave most private sector employees the legal right to organize and bargain collectively through their chosen representatives without domination or coercion by either management or labor. By providing employees with a framework within which they collectively may express themselves, the Act has enhanced immeasurably the power of employees and their representatives in our society.

Because workers have availed themselves of the benefits of the Act, unions are a major force of economic and political power. They have power not only in relation to employees at the bargaining table, but also in the political arena, both as advocates for legislation that affects the American worker and as contributors to political campaigns. Today, organized labor is fifty percent larger than it was at the end of World War II, even though the unionized percentage of the workforce has fallen.

For all essential purposes, the NLRA has succeeded in eliminating the problem of employer-dominated unions, which were commonplace prior to the Wagner Act. Though management has been criticized for vigorously resisting unionization, the percentage of union claims of employer domination and assistance has been substantially reduced.

The very existence of the Act has had a deterrent effect on improper cause of action in tort to redress abusive discharge on grounds that "such a significant change in our law is best left to the Legislature". But see Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1952) (employee who did not have contract for specific term was allowed cause of action for breach of contract based in part on employee's reliance on provisions in personnel policies and procedures handbook which promised dismissal for just and sufficient cause only). See generally Comment, The Employment-At-Will Doctrine: Time to Collapse Another Citadel, 11 U. Dayton L. Rev. 399 (1986).

22. L. Baillet, supra note 20, at 79.
23. During debates on what became the "Wagner Act," Senator Robert Wagner estimated that 45 percent of American workers were enlisted in company unions. 78 Cong. Rec. 4229-30 (1934), reprinted in 1 Legislative History NLRA, supra note 7, at 23.
24. A major AFL-CIO study reports: "A study of organizing campaigns in the private sector shows that 95 percent of employers actively resist unionization, and 75 percent of all employers hire so-called 'labor-management consultants' to guide their efforts to avoid unionization at an estimated cost of over $100,000,000 annually." AFL-CIO Committee on the Evolution of Work, The Changing Situation of Workers and Their Unions 10 (1985).
25. For example, the percentage of § 8(a)(2) charges filed declined from 9.2% in 1955, 20 NLRB Ann. Rep. 161 (1955) (Table 2), to 3.8% in 1985, Conference with Jo-
conduct by employers and unions. Without the Act, some parties on both sides undoubtedly would return to the "law of the jungle."

While the Board, with some justification, has been criticized for its backlog of cases, consistently over many years the overwhelming majority of all unfair labor practice cases have been settled prior to trial, affording the parties a speedy resolution of their dispute. Moreover, at least ninety percent of the cases that the Board actually decides have been unanimous under every administration. Thus, even though there have been controversies over particular decisions, the Act has provided the parties with overall stability through the years.

Beyond this, the Act, as designed, is quite flexible. It permits the Board both to answer new legal questions arising under the Act and to review and revise previous interpretations, based on its own experience.


Section 301 has provided federal courts with a significant role in developing a substantive body of federal labor law relating not only to collective bargaining agreements, but also to the union's duty of fair representation. See Bowen v. United States Postal Service, 459 U.S. 212 (1983) (affirming the existence of a union's implied § 301 duty of fair representation); Vaca v. Sipes, 386 U.S. 171 (1967) (same). At the same time, the Supreme Court has made it clear that the states retain their traditional police power with respect to violence, overt threats of violence and mass picketing. See Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 748-49 (1942).


30. See, e.g., Harter Equip., Inc. and Operating Eng'rs, Local 825, 280 N.L.R.B. 71, 122 L.R.R.M. 1219 (1986) (holding that, absent specific proof of anti-union motivation, employer did not violate §§ 8(a)(3) and (1) by hiring temporary replacements after locking out permanent employees for the purpose of bringing economic pressure in support of a legitimate bargaining position).
and the effectiveness of earlier rulings. In addition, the Act is capable of adaptation to changing conditions in American society. For example, the Board will be ruling on a case involving a drug-testing program in the workplace.

Notwithstanding the accomplishments and contributions of the NLRA, there are many who disparage the Act. Some of the recent criticisms by union representatives have been quite pointed. AFL-CIO Secretary Tom Donahue has stated that the Act is an "abject and utter failure." AFL-CIO President Lane Kirkland said that current Board members are "advocates of the most retrograde element of the employer society." United Mine Workers President, Richard Trumka, testified


This flexibility, however, has its price, and some commentators have criticized the frequency of reversals of Board precedent. See infra text accompanying notes 77-86.


Quality of Work Life Programs, such as the one in Ona Corp., are cooperative programs in which labor and management work together to achieve greater productivity. Abandoning the traditional posture of confrontation, labor and management participants strive together to solve problems. In some cases, executives do not wear neckties, because ties are perceived as symbols of traditional authority that interfere with open and direct communication. Schlossberg & Fetter, U.S. Labor Law and the Future of Labor-Management Cooperation, 3 Lab. Law. 11, 12 (1987). According to the AFL-CIO Committee on the Evolution of Work, in 1983 there were more than one thousand QWL programs under way in many forms: "labor-management committees, participatory management, employee involvement, shop-floor democracy, consultation schemes, quality circles, autonomous work groups, quality of work teams, profit-sharing arrangements, and so forth." AFL-CIO Committee on the Evolution of Work, The Future of Work 10 (1983).

As described by Schlossberg and Fetter, one problem is NLRA § 8(a)(2), which was enacted to outlaw employer domination of company unions. Schlossberg & Fetter, supra, at 25. That section provides, in pertinent part, that it shall be an unfair labor practice for an employer "[t]o dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Wagner Act, § 8(2), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(2) (1982)). Schlossberg and Fetter point out that a company payment for any of the activities of union representatives on a QWL committee (such as transportation on a company plane) might be deemed a violation of this section. Schlossberg and Fetter, supra, at 35-36.

Schlossberg and Fetter also take the position that NLRA § 9(a) may pose a problem. Id. at 32-34. See generally Craver, The Vitality of the American Labor Movement in the Twenty-first Century, 3 U. Ill. L. Rev. 633, 672-778, 683-88 (1983) (discussing the reasons for, and potential problems associated with, increased labor participation in corporate management); Address by Wilford Johansen, University of Arizona's 23rd Annual Labor-Management Conference 19 (Mar. 25, 1987) (stating that QWL Programs do "present a serious and complex challenge" and "[i]n certain areas the Board itself may be powerless to effectuate needed changes, and an Act of Congress may be required") (available in the files of the Fordham Law Review).


34. Transcript of the news conference held by AFL-CIO President Lane Kirkland on
that the NLRA "is acting right now as a cruel hoax to the American worker."\textsuperscript{35} Finally, union attorney Laurence J. Cohen stated that the Board "has been taken over by pirates who are methodically scuttling the Act which they are charged to protect."\textsuperscript{36}

Not all of the criticism has come from labor. In 1984, the House Committee on Government Operations found that delays in decision-making by the Board and the case backlog "have frustrated and jeopardized the purposes of the National Labor Relations Act and have caused workers to lose faith in the system."\textsuperscript{37} Judge Abner Mikva has expressed the view that "union members believe the NLRA provides inadequate protection when they confront management."\textsuperscript{38} Former Board chairman and management attorney Guy Farmer stated: "[T]he 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 . . . ."\textsuperscript{39} Finally, Professor Clyde Summers asserted that "the legal rules developed by the Board and the courts do not express or implement the premises and purposes of the statute."\textsuperscript{40}

Dissatisfaction with the NLRA and the Board is not unique to the Reagan Administration. Many of the problems on which critics focus today have been raised before. For example, there have been periodic

\begin{footnotesize}
\begin{enumerate}
\item\footnote{February 17, 1987, at the winter meeting of the AFL-CIO Executive Council in Bal Harbor, Florida, at 3 (available in the files of the Fordham Law Review).}
\item Daily Lab. Rep. (BNA) No. 205, at E-1 (Oct. 23, 1984); see generally Bernstein & Gold, \textit{Mid-Life Crises: The NLRB at Fifty}, 1 Dissent 213, 213 (1985) (stating there is truth to claims that "Ronald Reagan has 'packed' the NLRB in management's favor to an unprecedented degree, converting it ideologically into a weapon against the labor movement").
\item H.R. Rep. No. 1141, 98th Cong., 2d Sess. 18 (1984). There is some indication that in recent years unions have decreased their use of the Board. For example, in 1984 and 1985, the total number of cases filed with the Board decreased (although it increased slightly by 1.7% in 1986). R. Collyer, \textit{NLRB General Counsel's Report Summarizing Operations in Year 1986}, Daily Lab. Rep. (BNA) No. 38, at D-1 (Feb. 27, 1987). The number of representation cases filed has decreased each year since 1980. Conference with John Truesdale, NLRB Executive Secretary, May 20, 1987.
\end{enumerate}
\end{footnotesize}
complaints about the serious delay in the administration of justice due to the backlog of pending cases. During previous administrations, there were also strong negative reactions to the decisions of newly appointed Board members that reversed earlier Board rulings. Finally, the Board’s reliance on case-by-case adjudication to develop labor policy, without utilizing its rulemaking powers, has been the subject of discussion and criticism for decades.

While much of the recent criticism has been partisan and overly strident, the fact remains that, stripped of the rhetoric and hyperbole, some of it simply cannot be ignored. We believe the time is ripe for a dialogue to ascertain whether any structural changes in the Act itself or changes in enforcement by the NLRB would make the Act and the Board more effective.

We propose that a tripartite, private sector conference, attended by representatives of labor, management and government be held under the auspices of the American Bar Association’s Labor Law Section, its Committee on NLRB Practices and Procedures, or another ABA committee created especially for this purpose. While participants at the conference would discuss a wide variety of possible changes, areas of particular in-

41. E.g., Bartosic, supra note 27, at 650-55 (discussing “institutionalized delay” from time of filing to Board decision); Tobriner, The Taft-Hartley Act After Three Years, 1 Lab. L.J. 1164, 1215 (1950) (“[H]earings on unfair labor practice charges often do not take place until after a lapse of six to nine months. As a result, during the interval, the enforcement of the act is frustrated . . . .”); Revised Findings of the Chairman’s Task Force on the NLRB, 6 (1976) (“The backlog of cases pending for hearing and decision by ALJs has mounted in recent years and is seriously delaying justice for the parties.”).

42. As one commentator noted:

The views which were publicly expressed by the new appointees clearly showed their dissatisfaction with past Board rulings generally. Consequently, considerable changes have been made and the reaction has been as expected—labor claiming that its dire predictions have come true; management heralding the trend but denouncing its limited scope.

Note, The NLRB Under Republican Administration: Recent Trends and Their Political Implications, 55 Colum. L. Rev. 852, 852 (1955) (footnote omitted). See generally Morris, The Case for Unitary Enforcement of Federal Labor Law—Concerning A Specialized Article III Court and the Reorganization of Existing Agencies, 26 Sw. L.J. 471, 477 (1972) (“[T]here is truth in the general accusation regarding political swings of the pendulum, for the policy shifts can be easily documented.”) (footnote omitted)).

43. E.g., Congressional Oversight of Administrative Agencies (NLRB): Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 916-18 (1968) (statements of Judge Henry J. Friendly that Board’s failure to use rulemaking powers is source of many administrative problems); H.R. Rep. No. 1141, 98th Cong., 2d Sess. 16 (1984) (“Where a majority of the Board wishes to make substantial changes in the underlying Board law in so many areas, it should do so by using its rulemaking authority . . . .”); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729, 753 (1960-61) (“The Board’s view that the role which it performs is one to which the rule-making process is not well adapted is patently unsound.”); Samoff, Coping with the NLRB’s Growing Caseload, 22 Lab. L.J. 739, 745-46 (1971) (rulemaking would “discourage filings and reduce substantially the bulk of the charges which are withdrawn or dismissed”); Summers, Politics, Policy Making and the NLRB, 6 Syracuse L. Rev. 93, 106 (1954) (“Adjudication is used as a clumsy substitute for rule making.”).
terest and scrutiny would be the case backlog problem,\textsuperscript{44} the effect on labor and management of retroactive and frequent reversals of Board precedent,\textsuperscript{45} the Board's historic failure to utilize its rulemaking powers (other than on a limited basis),\textsuperscript{46} the Board's policy of intracircuit nonacquiescence,\textsuperscript{47} and various proposals to establish a Labor Court.\textsuperscript{48} A report issued following the conclusion of such a conference could be a subject of future Congressional hearings.

ISSUES TO BE CONSIDERED AT THE PROPOSED ABA CONFERENCE

A. The Backlog Problem

There has been a case backlog at the Board from time to time since at least 1950.\textsuperscript{49} Between 1974 and 1984, the backlog continued to grow.\textsuperscript{50} It reached a peak in February 1984, when 1,647 cases were pending before the Board.\textsuperscript{51} Concerns over the backlog resulted in repeated congressional oversight hearings that criticized the Board for its case backlog.\textsuperscript{52} By April 1, 1987, the backlog figure had been reduced to 889 cases pending before the Board.\textsuperscript{53} This figure, however, is still substantially above what the Board traditionally has considered an "acceptable" backlog of four hundred to five hundred cases.\textsuperscript{54} One issue for discussion at the tripartite conference is what should be considered an acceptable case backlog.

The delay in processing cases creates frustration for employees, unions, and employers alike. For employees, a remedy granted after a substantial time lapse "will bear little relation to the human situation which gave rise to the need for Government intervention."\textsuperscript{55} For both unions

\textsuperscript{44} See infra text accompanying notes 49-76.
\textsuperscript{45} See infra text accompanying notes 77-88.
\textsuperscript{46} See infra text accompanying notes 89-111.
\textsuperscript{47} See infra text accompanying notes 112-64.
\textsuperscript{48} See infra text accompanying notes 168-89.
\textsuperscript{49} R. Flanagan, Labor Relations and the Litigation Explosion 92 (1987).
\textsuperscript{50} For fiscal year 1983, the median time lapse for the processing of an unfair practice case from the Administrative Law Judge ("ALJ")'s decision to the Board's decision was 194 days. This, however, was only the median. In 25\% of the cases, the Board took 271 days to reach a decision. H.R. Rep. No. 1141, 98th Cong., 2d Sess. 7 (1984). In 10\%, the Board took 494 days or more. Id.
\textsuperscript{51} Conference with Joseph Moore, Acting NLRB Executive Secretary (July 6, 1987).
\textsuperscript{53} Conference with Joseph Moore, Acting NLRB Executive Secretary (July 6, 1987).
\textsuperscript{54} NLRB Case Backlog (Part 2): Hearing Before a Subcomm. of the Comm. on Gov't Operations, 98th Cong., 2d Sess. 52 (statement of Donald L. Dotson, Chairman, NLRB).
\textsuperscript{55} Advisory Panel on Labor-Management Relations Law, Report to the Senate Comm.
and employees, "[d]elay works against organizing efforts and against people who would like to join labor unions."\(^{56}\) Delay also can be disadvantageous to employers since a company's potential monetary liability rises while a case is pending before the Board and the courts.\(^{57}\) Moreover, lengthy delay in the decisionmaking process can leave the labor-management community for a protracted time without knowledge of what their rights and duties are in the eyes of a Board whose members have substantially changed.

\textit{Indiana and Michigan Electric Co. and Local Union No. 1392, International Brotherhood of Electrical Workers}\(^{58}\) provides a recent example of egregious delay in the decisionmaking process. The issue before the Board was whether management had a duty to arbitrate grievances filed during a contractual hiatus period (that is, after the contract expired and before a new contract took effect). The decision of the Administrative Law Judge ("ALJ") was made on July 31, 1981; oral argument before the Board took place more than two years later, in November 1983. Despite the importance to both labor and management of knowing what the law is in this complex area, the Board did not render its decision for yet another three and one-half years!\(^{59}\) There can be no acceptable explanation for having taken nearly six years to adjudicate this case.

The speed with which the President nominates and the Senate confirms individuals to fill vacancies on the Board can cause or alleviate delay in processing cases. For example, from December 1979 until May 1984, eleven individuals served as Board members.\(^{60}\) During this same approximate period, the Board operated with a full complement of members only fifty percent of the time.\(^{61}\) One position remained vacant from August 1983 until May 1985.\(^{62}\) The combination of high turnover and

---


\(^{57}\) Id. at 4; see also NLRB v. J.H. Rutter-Rex Mfg., 396 U.S. 258, 264-65 (1969) (sustaining a Board backpay award covering approximately seven years, notwithstanding the employer's argument that length of period was due primarily to Board's delay in seeking enforcement).

\(^{58}\) 284 N.L.R.B. No. 7 (1987) (slip op.).

\(^{59}\) The Board finally held that the arbitration clause in the expired contracts was not broad enough to negate the presumption favoring survival of the arbitration commitment. \textit{Id.} at 20. The Board further ruled, however, that the rights involved in each of the specific grievances at issue were not arbitrable because they did not "arise under" the contract—that is, they were triggered by events or conduct that occurred after contract expiration and did not accrue or vest to some degree during the life of the contract within the meaning of \textit{Nolde Bros., Inc. v. Local No. 358, Bakery \\& Confectionary Workers Union}, 430 U.S. 243 (1977). 284 N.L.R.B. No. 7, at 23.

\(^{60}\) NLRB Case Backlog (Part II): Hearing Before a Subcomm. of the Committee on Gov't. Operations, 98th Cong., 2d Sess. 45 (statement of Donald L. Dotson, Chairman, NLRB).

\(^{61}\) \textit{Id.} at 56.

\(^{62}\) Conference with Joseph Moore, Acting NLRB Executive Secretary (July 6, 1987).
delay in the appointment process obviously contributes to case backlog. In response to this problem, one House committee concluded that “a legislative change in the National Labor Relations Act may be warranted to provide for a [permissible] carryover of membership to keep a member on board until a successor has been appointed.” The President has accelerated the appointment process considerably, so there is no present crisis over Board appointments. Nonetheless, consideration should be given to an amendment that would avoid future significant gaps in Board membership.

The Board itself also could alleviate the case backlog by changing the internal procedure for reassigning cases after a Board member has departed. Members hear cases in three-person subpanels consisting of two members and a chairman. Each utilizes a staff of twenty to twenty-five attorneys, who work on the cases assigned to the member. At present, when a member leaves the Board, his staff is reassigned to the Chairman of the NLRB (or if the Chairman declines, to another Board member) until the new member arrives. These staff attorneys, however, may or may not continue to handle the departed member’s cases. Cases assigned to the departing member as chairman of a three-person subpanel normally are worked on for the Board Chairman by the departing member’s staff. Any case originally assigned to the departing member as a member of a three-person subpanel, however, is reassigned to another Board member without the benefit of or use of staff who originally had reviewed and worked on the case. As noted by one congressional committee, “this process is not very efficient and creates needless duplication of effort.” A new procedure that would utilize the attorneys who already had worked on such cases in the review process could be devised.

In addition, the Board should consider abolishing its custom of circulating courtesy copies of proposed decisions to non-subpanel members for review in cases that do not overrule precedent. Under current practice, subpanels circulate courtesy copies of decisions to non-subpanel members. Until all nonpanel members sign off on the case, it cannot be released. This obviously increases the flow of paperwork across the

---

64. For example, Member Dennis left the Board in June 1986, and Member Cracraft filled the vacancy five months later, in November 1986. Conference with Joseph Moore, Acting NLRB Executive Secretary (July 6, 1987). The acceleration of the appointment process undoubtedly was the result of widespread criticism from the labor-management community.
67. Id.
68. Id. at 13.
69. Id.
70. Id.
71. Interview with Robert Hunter, former Board member (May 11, 1987).
72. Id.
desks of non-subpanel members and slows resolution of disputes. Therefore, for more routine cases, the Board should consider abandoning this kind of courtesy review procedure. In the alternative, it might choose to establish a time limit for courtesy review of such cases, following which the case may be released regardless of whether a non-subpanel member has acted.

Another potential internal improvement would be to allow the Board to issue subpanel decisions agreed to by two Board members after thirty days' notice to the third panel member who, under current unwritten procedure, has the power to hold up the case indefinitely until he or she has written a separate dissenting or concurring opinion. Still another change aimed at speeding up decisionmaking would be for the Board, in appropriate cases, to render affirmatory decisions specifically designated as having no precedential value. The ability of the Board to render such decisions would eliminate the need for Board members to draft lengthy opinions that concur in the result reached by an ALJ, but differ with one or more of the ALJ's rationales. There is precedent for this kind of approach in the rules of the United States courts of appeals providing that unpublished opinions and orders are not to be cited as precedent.73

Several legislative changes also could alleviate delay in the decision-making process. First, Congress could amend the Act to make decisions of the ALJs final unless two or more Board members grant a petition for certiorari filed within thirty days following an ALJ's decision.74 This would constitute a major change in the Act and a novel approach to administrative law procedure. Second, Congress could enact mandatory timetables within which decisions by ALJs, Regional Directors and the Board must be rendered. There is precedent for this approach in certain trade legislation.75 Third, the Act could be amended to make Board orders self-enforcing unless either party seeks judicial review within a limited time period following a Board decision.76 This would expedite the process of arriving at a final judicial resolution of a dispute. Any of these measures would help to reduce the backlog problem.

73. See, e.g., D.C. Cir. R. 8(f); 2d Cir. R. 0.23; Fed. Cir. R. 18(a).
76. There is precedent for this approach in the statutory provisions governing judicial review and enforcement of orders of the Federal Occupational Safety and Health Review Commission. Under 29 U.S.C. § 660(b) (1982), if no petition for review is filed within sixty days of the Commission's order, the Secretary of Labor may file a petition for enforcement, and the "clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition." Id. If the employer fails to comply, the next step is a contempt proceeding. The statute further provides that even if an aggrieved party seeks judicial review of an order in a timely manner, the commencement of review proceedings "shall not, unless ordered by the court, operate as a stay of the order of the Commission." 29 U.S.C. § 660(a) (Supp. III 1985).
Labor representatives have vehemently denounced the Reagan Board for its interpretations of the Act that reverse precedent established during previous administrations. Although recent criticism may be more harsh than usual, particularly because the unions now are struggling for new members, the fact remains that previous Boards have changed precedent too.

77. See supra text accompanying notes 33-40; see also Page, The Rise, Decline and Resurrection of American Labor Law: A Critical Assessment of the NLRA at Age Fifty, 36 Lab. L.J. 594, 597 (1985) ("The Reagan/Dotson Board has far exceeded the expectations of even the wildest Right-to-Work or Heritage Foundation union-hater. It has reversed more long-standing precedents than any previous Board.").

78. For example, in Rossmore House and Hotel Employees and Restaurant Employees Union, Local 11, 269 N.L.R.B. 1176 (1984), aff'd, 760 F.2d 1006 (1985), the Reagan Board overruled PPG Indus., Lexington Plant, Fiber Glass Div. and Chauffeurs, Teamsters and Helpers Local Union No. 391, 251 N.L.R.B. 1146 (1980) and similar cases "to the extent they find that an employer's questioning open and active union supporters about their union sentiments, in the absence of threats or promises, necessarily interferes with, restrains, or coerces employees in violation of Section 8(a)(1) of the Act." Rossmore House, 269 N.L.R.B. at 1177-78 (footnote omitted). In Meyers Indus., Inc. and Kenneth P. Prill, 268 N.L.R.B. 493 (1984), enforcement denied sub nom. Prill v. NLRB, 755 F.2d 941, cert. denied, 474 U.S. 948 (1985), the Reagan Board explicitly overruled Alleluia Cushion Co. and Jack G. Henley, 221 N.L.R.B. 999 (1975) and its progeny and adopted a new standard for concerted activity covering only "some kind of group activity." Meyers, 268 N.L.R.B. at 494, 497. In Taracorp Indus., a division of Taracorp Inc. and Fred Elmore, 273 N.L.R.B. 221, 223 (1984), the Reagan Board overruled Kraft Foods, Inc. and General Teamsters Local Union No. 528, 251 N.L.R.B. 598 (1980) and its progeny, holding that henceforth the Board will not impose make-whole remedies for Weingarten violations, which involve a denial by an employer of an employee's request for union representation at an investigatory interview. Id. at 222. In Gourmet Foods, Inc. and Warehouse Employees of St. Paul, Minn., Local Union No. 503, 270 N.L.R.B. 578 (1984), the Board overruled all previous cases "in which the Board found it had statutory remedial authority to issue nonmajority bargaining orders and in which the Board has exercised that authority." Id. at 583 (footnote omitted). In the view of the Reagan Board, then, nonmajority bargaining orders are not within the remedial discretion of the Board.


80. For example, in post-arbitration deferral cases, which involve how much weight the Board should give an arbitrator's award in a subsequent unfair labor practice case, the Board's record over time shows a series of reversals under different Boards.

The general standard was set initially by the so-called Eisenhower Board in Spielberg Mfg. Co. and Harold Guenberg, 112 N.L.R.B. 1080 (1955), which held the Board would defer to an arbitrator's award so long as that decision was "not clearly repugnant to the purposes and policies of the Act." Id. at 1082. Next, the Kennedy Board in Raytheon Co. and Jane Reikard, 140 N.L.R.B. 883 (1963), enforcement denied, 326 F.2d 471 (1964), said it would not defer to an arbitrator's decision unless the arbitrator had carefully considered the unfair labor practice issue in the arbitration. Id. at 884-85. The Nixon Board, however, overruled this decision in Electronic Reproduction Serv. Corp.; Madison Square Offset Co. and Xerographic Reproduction Center, Inc. and District 65, Wholesale, Retail, Office & Processing Union, 213 N.L.R.B. 758 (1974), and essentially
Proponents of the present system argue that one of the strengths of the Act is that it is flexible enough to adapt to changed conditions, and, moreover, that Board decisions should reflect the policies and approaches of the President who has appointed the majority of Board members. In fact, the Act itself actually provides for this kind of response to the political process by creating one opening on the Board each year.

Over three decades ago, Professor Clyde Summers summarized the case for a politically responsive Board as follows:

This agency reaction to changes in the political climate is not necessarily bad. Ought not government, in the making of policies, reflect majority will? Should not administrative agencies, within the area of discretion granted them, choose the policy which most accurately expresses the desires of the majority? To do so is to make democracy more responsive, an especially significant contribution when government tends to become remote. It is true that our principal instrument for expressing majority will is Congress speaking through legislation. However, there is serious doubt whether Congress is capable of expressing small shifts or gradual changes. Amendments to the National Labor Relations Act make long jumps, tending to go beyond the existing balance point of public opinion. The Board, by bending to the wind can enable the same statutory words to serve a range of shifts, thus avoiding the necessity of frequent changes.

Critics of the current system object to such “bending to the wind” because parties contemplating a course of action cannot know what the law ultimately will be, given the length of time it takes to get a decision returned to the old Spielberg standard. Id. at 762. In 1980, however, the Carter Board overruled Electronic Reproduction Service in Suburban Motor Freight, Inc. and Ralph Singleton, 247 N.L.R.B. 146 (1980), and generally returned to the holding in Raytheon. Id. at 146 & n.7. The Carter Board then went even further in Professional Porter & Window Cleaning Co., Div. of Propoco, Inc. and Margaret Bailey, 263 N.L.R.B. 136 (1982), aff'd, 118 L.R.R.M. 2966 (1983), which limited deference to an arbitrator's award where the arbitrator had procedurally disposed of issues in the same manner as the Board would have. Id. at 137-38. Subsequently, the Reagan Board, in Olin Corp. and Local 8-77, Oil, Chemical and Atomic Workers Int'l Union, 268 N.L.R.B. 573 (1984), overruled Suburban Motor Freight and Propoco and returned to the Eisenhower Board's Spielberg standard. 268 N.L.R.B. at 574 & n.8. See generally, Morris, supra note 42, at 477 n.38 (listing NLRB decisions that illustrate how policies shifted when presidents changed).

81. Bartosic, supra note 27, at 660 (“In my opinion, the national labor policy should by an evolutionary process be responsive to political, economic and social changes.”); Bierman, Reflections on the Problem of Labor Board Instability, 62 Den. U.L. Rev. 551, 558 (1985) (“[I]f the President may ultimately be held politically responsible for an administrative agency’s actions, it is reasonable for him to appoint agency members who will best promote his political ideologies and goals.”); Winter, Judicial Review of Agency Decisions: The Labor Board and the Court, 1968 Sup. Ct. Rev. 53, 65 (a politically responsive NLRB shows “desirable flexibility” given “the difficulties Congress faces in enacting labor legislation”).


84. Id.
from the Board, the uncertainty about who will be in the White House, and what position Board members appointed by a new President might have on labor law and policy. Lawyers trying to advise clients can relate the present state of the law, but no one really knows what the law, often retroactively applied, might be several years hence. The situation is best illustrated by the Hollywood Ceramics-Shopping Kart schism, involving the important issue of misrepresentation during union elections. In addressing this issue, the Board reversed itself three times in five years. Without question, neither lawyers nor their clients can know whether legal advice given today will remain good advice tomorrow.

One way to reduce these Board-created legal gyrations is to create

85. See Deluxe Metal Furniture Co. and Sheet Metal Workers Int'l Assoc., 121 N.L.R.B. 995, 1006-07 (1958) (adopts the traditional judicial practice of applying each pronouncement of a rule of law to (a) the case in which the issue arises and (b) all pending cases "in whatever stage"); see generally NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 10 & n.10 (1974) ("a court reviewing an agency decision following an intervening change of policy by the agency should remand the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act"); Certainteed Corp. v. NLRB, 714 F.2d 1042, 1056 (11th Cir. 1983) ("Barring some extraordinary circumstance, this court will not disturb the purely administrative determination that giving retrospective or prospective effect to a policy change best effectuates the purposes of its governing act."); Zimmerman, Restoring Stability In the Implementation of the National Labor Relations Act, 1 Lab. Law. 1, 9 (1985) ("The Board's frequent policy shifts and retroactive applications of major questions of statutory interpretation have subjected parties to present disadvantage for their past conduct.")

86. In Hollywood Ceramics Co. and United Brick and Clay Workers of Am., 140 N.L.R.B. 221 (1962), the Board decided that

an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

Id. at 224 (footnote omitted). The Board further held that "even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election[s]." Id.

In 1977, in Shopping Kart Food Market, Inc. and Retail Clerks Union local 99, 228 N.L.R.B. 1311 (1977), the Board overruled Hollywood Ceramics, holding that the Board no longer would set aside elections on the basis of misleading campaign statements. Id. at 1313. Under the new standard, Board intervention would occur only "in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." Id.

The following year Shopping Kart was overruled by General Knit of Cal., Inc. and United Steel Workers of Am., 239 N.L.R.B. 619 (1978), which restored Hollywood Ceramics. 239 N.L.R.B. at 623. However, four years later, in 1982, the Board in Midland Nat'l Life Ins. Co. and Local 304A, United Food and Commercial Workers Union, 263 N.L.R.B. 127 (1982) overruled General Knit and Hollywood Ceramics and restored Shopping Kart. 263 N.L.R.B. at 132-33. In Midland, the Board also ruled that it would apply the new [Shopping Kart] rule "[i]n accordance with our usual practice ... 'to all pending cases in whatever stage.'" Id. at 133 n.24 (quoting Deluxe Metal Furniture Co. and Sheet Metal Workers Int'l Assoc., 121 N.L.R.B. 995, 1007 (1958)).
longer terms for Board members, such as seven or even ten years. In addition, greater use of rulemaking probably would deter frequent dramatic changes. In any event, so long as the Board continues to operate by adjudication on a case-by-case basis, serious consideration should be given to the New York City Bar Association's proposal that when the Board reverses prior doctrine, the “new policy [should] not be applied retroactively except to the parties in the case in which the policy reversal is announced and other cases then pending before the Board.” Implementation of this proposal at least would alleviate somewhat the inequities inherent in applying new Board precedent retroactively to parties who acted in reliance on the reversed doctrine.

C. Rulemaking

There has been substantial criticism over the years concerning the NLRB’s failure to utilize rulemaking for policy formulation. Some critics would achieve greater certainty in the state of the law by having the Board utilize its rulemaking power to address various substantive questions. Under this view, the Board would cease to rely completely on the case-by-case adjudication method that all Boards have used to shape federal labor policy.

Under the NLRA and the Administrative Procedure Act ("APA"), the Board has the power to engage in rulemaking to formulate labor policy. Rulemaking requires the Board to (1) place a general notice of proposed rules in the Federal Register, (2) give interested persons the opportunity to participate in the rulemaking process through written comments, and (3) “incorporate in the rules adopted a concise

87. Congressional Oversight of Administrative Agencies (NLRB): Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 905 (1968) (testimony of Judge Henry J. Friendly that longer terms for Board members would enhance the attractiveness of those posts for good people).
89. See, e.g., supra, note 43; Subrin, Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units, 32 Lab. L.J. 105 (1981). Judges and even Board members also have criticized the Board for not making greater use of its rulemaking powers. See, e.g., NLRB v. Wyman-Gordon Co., 394 U.S. 759, 779, 781 (1969) (Harlan & Douglas, JJ., dissenting in separate opinions) (the use of rulemaking would result in more responsible administrative action); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966) (Board should use rulemaking powers to "fill in the interstices" of regulatory statutes”) (quoting SEC v. Chenery Corp., 332 U.S. 194, 202 (1947)); St. Francis Hosp., 271 N.L.R.B. 948, 955 (1984) (Dennis, Member, concurring) (if Board were to use its rulemaking powers, there would be more stability in the relevant industry and less litigation).
90. See, e.g., articles cited supra at note 43; Subrin, supra note 89, at 113 (advocating certainty through rulemaking).
The APA also authorizes the Board to proceed by case-by-case adjudication, which is what the Board historically has preferred. Over the years, the NLRB has exercised its rulemaking power in substantive areas only to a very limited extent on certain jurisdictional questions. In 1987, however, in what one Board member termed an “historic event," the NLRB, voting three-to-two, decided to engage in rulemaking to determine appropriate bargaining units in the health care industry.

Dr. Bernard Samoff, former Regional Director of NLRB Region Four in Philadelphia, has asserted that greater use of substantive rulemaking most likely would help reduce the caseload and thus cut down on the backlog problem. Dr. Samoff wrote that Board use of rulemaking “should discourage filings and reduce substantially the bulk of the charges which are withdrawn or dismissed." According to Dr. Samoff, “the bulk of the charges trigger a full-blown process. Rulemaking allows the staff either to dispose of charges promptly upon ascertaining a few facts (that is, commerce jurisdiction, statute of limitations), or to advise prospective filers that a rule governs their particular situation.” Dr. Samoff further wrote that rulemaking “should diminish the pervasive role of lawyers. They would have fewer opportunities and incentives to file with the hope of discovering factual and legal distinctions.”

In 1985, former Board Member Don Zimmerman made the following persuasive argument for rulemaking:

By using rulemaking on a major question of statutory interpretation, the Board would be impelled to focus its attention on the entire spectrum of interrelated issues. It also would lay down governing rules at one time rather than by the protracted adjudicatory process that often leaves management and labor long unenlightened about the applicable standard of conduct.

In 1984, the House Committee on Government Operations concluded that rulemaking would be appropriate when the Board, responding to

93. 5 U.S.C. § 553(b), (c) (1982).
95. See NLRB Rules, 29 C.F.R. §§ 103.1-103.3 (1986) (providing jurisdictional standards for private colleges and universities and symphony orchestras and stating that Board will not assert jurisdiction over dogracing and horseracing industries).
99. Id. at 746.
100. Id. at 748 (footnote omitted).
101. Zimmerman, supra note 85, at 7; see also Summers, supra note 43, at 105 (“This piecemeal process [of case-by-case adjudication] makes perspective difficult, for it tends to obscure the fact that policy is being made and to discourage direct discussion of the wisdom of the policy.”) (footnote omitted).
political changes, "wishes to make substantial changes in the underlying
Board law in so many areas." The Committee further stated that
"[t]he use of rulemaking would greatly speed up the re-evaluation pro-
cess, would allow participation by a greater number of parties, and would
minimize the disruption on the processing of routine cases." The Board
generally has resisted substantive rulemaking because it has perceived a need for maximum flexibility. The Board traditionally has regarded rulemaking as a cumbersome process that would retard the Board's ability to respond to changing conditions. This is especially true because courts normally would enforce Board-promulgated rules, once they were codified, even in situations where the Board had chosen to disregard a particular rule.

Proponents of case-by-case adjudication wish to preserve the Board's ability to adapt to a continually shifting political climate. They oppose establishing greater stability in labor law policy because they wish the Board to continue to be a politically responsive agency. At least one commentator has defended the Board's adjudication approach on the ground that it enables the NLRB "to minimize congressional and judicial intervention in its policies and to mitigate the impact of those intrusions that do occur." Moreover, the Supreme Court unanimously has affirmed the Board's right to proceed through adjudication rather than rulemaking.

Nevertheless, after over fifty years, the Board should be able to draw

103. Id.
104. Over two decades ago, Professor Cornelius Peck wrote that the Board engaged in "sub rosa formulation of rules in the guise of ad hoc decisions." Peck, supra note 43, at 753. Professor Peck's examples of "sub rosa rulemaking" include the contract bar doctrine and craft severance in representation cases. Id.
105. See, e.g., Gregory, The National Labor Relations Board and the Politics of Labor Law, 27 B.C.L. Rev. 39, 46 (1985) ("Board ability to adapt to continually changing labor relations is the primary benefit of adjudication"); Note, NLRB Rulemaking: Political Reality Versus Procedural Fairness, 89 Yale L.J. 982, 987, 990 (1980) (by creating policy solely through adjudication, Board is able to minimize congressional and judicial intervention).
107. As one commentator has written:

There are clear indications that when an administrative rule, either substantive or procedural, is embodied in a regulation, a court will be much less willing to sustain an agency's disregard of that rule, at least in the absence of a satisfactory explanation of why the regulation is not controlling. The concept that regulations 'have the force of law'—the analogy to legislation and to the binding effect of the governing statute—appears to have played a significant role.

109. Id.; Note, supra note 105, at 989.
110. Note, supra note 105, at 987, 989-98.
upon its experience and codify at least some of its labor law policy into rules of general application. The current Board is willing to experiment with rulemaking in the health care field. There should be further discussion and dialogue within the labor bar about other specific areas that should be targeted for rulemaking.

D. Intracircuit Nonacquiescence

The Board’s policy of intracircuit nonacquiescence has angered several federal circuit courts in recent years. The term "intracircuit nonacquiescence" describes "an agency's limitation of a court's ruling or interpretation to the parties before the court and subsequent refusal to apply the ruling as binding precedent in factually similar cases arising within the same circuit." Repercussions of the Board’s policy of intracircuit nonacquiescence are illustrated by several recent cases.

In Yellow Taxi Co. of Minneapolis, a Board panel, voting two to one, affirmed the decision of the ALJ, who had ruled that cab drivers who drove under a lease that explicitly defined them as independent contractors were employees under the NLRA. The Board panel held that lessee cab drivers were employees under the NLRA even though in an earlier case in the same circuit, Democratic Union Organizing Committee, Seafarers International Union of North America v. NLRB, the Court of Appeals for the District of Columbia Circuit had refused to enforce a similar NLRB holding, and instead had found lessee cab drivers to be independent contractors. In his dissent to Yellow Taxi Co., Board member Penello noted that the majority actually had agreed that the facts in Yellow Taxi were not materially distinguishable from those present in the earlier case. Board member Penello therefore argued for dismissal of the complaint on the ground that such lessee cab drivers already had been adjudged independent contractors and that the Board should follow


115. Yellow Cab Co., Local 777, Democratic Union Organizing Comm. v. NLRB, 229 N.L.R.B. 1329, 1332 (1977) (holding lessee cab drivers to be employees), enforcement denied sub nom. Local 777, Democratic Union Organizing Comm., Seafarers Int'l Union of North Am. v. NLRB, 603 F.2d 862 (D.C. Cir. 1978) (holding lessee cab drivers to be independent contractors).
the circuit court's ruling. Nevertheless, the majority ignored the circuit court's ruling and affirmed the ALJ's finding that the cab drivers were employees.

After the Board panel's decision in *Yellow Taxi*, the Court of Appeals for the District of Columbia Circuit announced its decision in *City Cab Co. of Orlando, Inc. v. NLRB*,117 in which it distinguished *Seafarers* on factual grounds and held the drivers to be statutory employees. In 1982, in light of *Orlando*, the full Board reconsidered the Board panel's previous decision in *Yellow Taxi*, and, sua sponte, by a three-to-two vote, issued a supplemental decision and order confirming its earlier ruling that the lessee taxi drivers in dispute were employees.118 Citing *Orlando*, two Board members voted to reverse the Board panel's prior finding that the facts in *Yellow Taxi* were not materially distinguishable from those in *Seafarers*.119 Taking a different position, Board member Zimmerman, concurring in the result only, wrote a separate opinion disagreeing with the court's decision in *Seafarers*.120 The remaining two members dissented on the ground that the drivers were independent contractors because the case presented facts indistinguishable from the facts in *Seafarers*.121 The employer petitioned for review in the Court of Appeals for the District of Columbia Circuit, and the Board cross-petitioned for enforcement.

In *Yellow Taxi Co. of Minneapolis v. NLRB*,122 the Court of Appeals, in a lengthy opinion with detailed analysis of both controlling and minor factors, granted the employer's petition and denied enforcement of the Board's order. The court held that its decision in *Seafarers* was controlling and "adopt[ed] by reference the relevant analysis therein."123 The court further stated that "not a single one of the five factors we relied on to distinguish *Orlando* from *Seafarers* has any dispositive force, singly or cumulatively, in the present case."124 The court then issued this strong warning:

> We admonish the Board to halt its apparently willful defiance of long established, controlling judicial precedent in independent contractor cases involving lessee cab drivers. Should the Board continue to act in

---


117. 628 F.2d 261 (D.C. Cir. 1980).


119. *Id.* at 702 n.2.

120. *Id.* at 704-06 (Zimmerman, Member, concurring). Mr. Zimmerman wrote: "With all due respect, I find that the [court's] analysis and conclusions in *Seafarers* are not cognizant of the peculiarities of the taxi industry as they pertain to the employment relationship." *Id.* at 705.

121. *Id.* at 706-08 (Van De Water, Chairman, and Hunter, Member, dissenting).

122. 721 F.2d 366 (D.C. Cir. 1983).

123. *Id.* at 373.

124. *Id.* at 378.
defiance of well established decisional law of this and other courts, we may be required to secure adherence to the rule of law by measures more direct than refusing to enforce its orders. We acknowledge that the Board is not required to conform its rulings to every decision by a court of appeals and that no absolute rule can be applied to every case. But when the law has been firmly established, as is the applicable law here, the Board in our opinion is required to give those courts greater deference than the Board did in this case.\textsuperscript{125}

The court further added: "No court can overlook an agency's defiant refusal to follow well established law."\textsuperscript{126}

\textit{Ithaca College v. NLRB}\textsuperscript{127} demonstrates similar friction between the Board and the Second Circuit. In \textit{Ithaca College} a union filed a petition with a regional office of the Board seeking certification as collective bargaining representative of the full-time and part-time faculty members of Ithaca College.\textsuperscript{128} The regional director ordered an election among all full-time faculty members.\textsuperscript{129} A three-way election was held and a runoff election between "no union" and a union was scheduled for September 1978.\textsuperscript{130}

On July 31, 1978, the Court of Appeals for the Second Circuit rendered its decision in \textit{NLRB v. Yeshiva University},\textsuperscript{131} holding that "full-time faculty at Yeshiva University were managerial or supervisory employees under the National Labor Relations Act . . . and were therefore ineligible for inclusion in the bargaining unit."\textsuperscript{132} In that decision, the court held that "Board precedents which had been routinely applied in cases involving faculty members in private institutions of higher learning were arbitrary and inconsistent with the Act."\textsuperscript{133}

Ithaca College promptly filed a motion for rehearing with the Board, requesting that the record be reopened in light of the Second Circuit's \textit{Yeshiva} decision. The Regional Director declined on the ground that "Regional Directors are bound to follow and apply Board rather than court precedent, at least until the Supreme Court speaks to the contrary or the Board decides to acquiesce in the decision of the Court of Appeals."\textsuperscript{134} "The College's request for review of the Regional Director's decision was denied by the Board . . . 'as it raise[d] no substantial issues warranting review.'"\textsuperscript{135} The run-off election was conducted as sched-

\begin{itemize}
  \item \textsuperscript{125} Id. at 383 (footnote omitted).
  \item \textsuperscript{126} Id. at 383, 384 n.39.
  \item \textsuperscript{127} 623 F.2d 224 (2d Cir.), cert. denied, 449 U.S. 975 (1980).
  \item \textsuperscript{128} Id. at 225-26.
  \item \textsuperscript{129} Id. at 226.
  \item \textsuperscript{129} Id. at 383, 384 n.39.
  \item \textsuperscript{127} 623 F.2d 224 (2d Cir.), cert. denied, 449 U.S. 975 (1980).
  \item \textsuperscript{128} Id. at 225-26.
  \item \textsuperscript{129} Id. at 226.
  \item \textsuperscript{130} Id. at 686 (2d Cir. 1978), aff'd, 444 U.S. 672 (1980).
  \item \textsuperscript{131} 582 F.2d 686 (2d Cir. 1978), aff'd, 444 U.S. 672 (1980).
  \item \textsuperscript{132} \textit{Ithaca College}, 623 F.2d at 226 (citing NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978), aff'd, 444 U.S. 672 (1980)).
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Id.
uled and the union won by a narrow margin.\textsuperscript{136}

The college refused to bargain and the regional director issued an unfair labor practice complaint.\textsuperscript{137} Ultimately, the Board granted the General Counsel's motion for summary judgment on the unfair labor practice charge, and the college appealed to the Second Circuit.\textsuperscript{138} Prior to oral argument, the Supreme Court affirmed the Second Circuit's decision in \textit{Yeshiva}.\textsuperscript{139}

In granting the college's petition for review and denying both the union's petition for review and the Board's cross-petition for enforcement, the Second Circuit addressed the Board's nonacquiescence policy as applied to the facts of this case as follows:

Of course, we do not expect the Board or any other litigant to rejoice in all the opinions of this Court. When it disagrees in a particular case, it should seek review in the Supreme Court. During the interim before it has sought review or while review is still pending, it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one. However, the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow. The Board cites no contrary authority except its own consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views. This is intolerable if the rule of law is to prevail.\textsuperscript{140}

In \textit{Allegheny General Hospital v. NLRB},\textsuperscript{141} the Court of Appeals for the Third Circuit addressed the Board's failure to follow two recent controlling decisions by the same circuit even though the Board had "conced[ed] the applicability" of that precedent.\textsuperscript{142} In condemning the Board's action, the Third Circuit noted that the facts behind one of these earlier decisions were "nearly identical to the instant case."\textsuperscript{143} In addition, two other circuits had expressly relied on the two controlling Third Circuit cases in refusing to enforce Board orders.\textsuperscript{144} In declining to follow the applicable precedent in the Third Circuit, the Board had made no attempt to demonstrate how the material facts differed from the facts of the cases in which the rules were made. Rather, it had relied on the same analysis it had presented previously to the court when those two precedential decisions were rendered.\textsuperscript{145} In short, the Board's position before the court was that it respectfully disagreed with the relevant hold-

\begin{footnotes}
\item[136.] \textit{Id}.
\item[137.] \textit{Id}.
\item[138.] \textit{Id.} at 227.
\item[139.] NLRB v. \textit{Yeshiva Univ.}, 444 U.S. 672 (1980).
\item[140.] 623 F.2d at 228.
\item[141.] 608 F.2d 965 (3d Cir. 1979).
\item[142.] \textit{Id.} at 966.
\item[143.] \textit{Id.} at 968.
\item[144.] \textit{Id.} at 969.
\item[145.] \textit{Id.} at 968.
\end{footnotes}
ings of the court.\textsuperscript{146}

In response, the circuit court reaffirmed "certain fundamental tenets of the doctrine of \textit{stare decisis}"\textsuperscript{147} and reasserted "the power of the federal judiciary to interpret statutes enacted by Congress":\textsuperscript{148}

\[\text{It is in this court by virtue of its responsibility as the statutory court of review of NLRB orders that Congress has vested a superior power for the interpretation of the congressional mandate. Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court. For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law. Such an order will not be enforced.}\textsuperscript{149}

Notwithstanding these criticisms, the current Board has given no indication that it plans to alter its policy of nonacquiescence.\textsuperscript{150}

There are several arguments in favor of the Board's nonacquiescence policy.\textsuperscript{151} The first argument is that the Board administers a national labor policy, and it would be awkward for the Board to vary its rulings on interpretations of the Act, depending on where the issue is being litigated in a particular case. Therefore, it must be governed only by the statute and rulings of the Supreme Court, regardless of the circuit court decisions.\textsuperscript{152}

A second argument is that Board acquiescence in adverse circuit court rulings would too often deny relief to parties whose position is ultimately upheld by the Supreme Court. For example, in \textit{Charles D. Bonanno Linen Service, Inc. v. NLRB},\textsuperscript{153} the Supreme Court sustained a Board
position that previously had been rejected by five circuit courts.\footnote{154}

Another argument is that the NLRA's liberal venue provisions make it impossible for an agency to predict the venue that will be chosen for the litigation.\footnote{155} Defenders of intracircuit nonacquiescence assert that since the Board is administering a national labor policy under the Act, it cannot reasonably be expected to render different interpretations of the same provision, particularly when it cannot know with certainty the judicial forum where its decision will be reviewed.

To be sure, the question of whether the Board could ascertain the forum for judicial review could be debated on a case-by-case basis. For example, in \textit{Ithaca College v. NLRB},\footnote{156} the Board argued to the Second Circuit that it was not unreasonable to deny the college a hearing following the Second Circuit's \textit{Yeshiva} decision because one of the parties might have sought judicial review before the Court of Appeals for the District of Columbia Circuit rather than in the Second Circuit.\footnote{157} In rejecting this argument, the Second Circuit found in part that if the union had filed for review in the District of Columbia Circuit, the college would have moved for a transfer to the Second Circuit and "the transfer would have assuredly occurred."\footnote{158} Though these "facts" may have been clear to the Second Circuit in the \textit{Yeshiva} case, there undoubtedly would be a variety of circumstances when the forum for judicial review could not be ascertained by the Board. Moreover, so long as the Act permits the opportunity for forum shopping, the Board generally cannot "know" in which of these forums its decision will be reviewed.

The wisdom of the Board's policy on intracircuit nonacquiescence plainly should be the subject of a dialogue on the Act.\footnote{159} After reviewing the Board's conduct in \textit{Yellow Taxi, Ithaca College} and \textit{Allegheny General Hospital}, we believe that nonacquiescence probably has gone too far. There should be certain agreed-upon circumstances under which the Board will acquiesce in the law of the circuit. For example, the Board probably should defer to controlling circuit court precedent when the facts in the Board case are not materially different from those in the case already decided by the circuit court.\footnote{160} The argument for acquiescence becomes even stronger when there is more than one recent decision by the circuit court on point, when other circuits have relied on the circuit court's decision in denying enforcement of Board orders, and when the

\footnotesize{154. 454 U.S. at 406 n.2.}

\footnotesize{155. The Act allows a plaintiff a choice of three forums: (1) the situs of the unfair labor practice, (2) the District of Columbia, or (3) any circuit where the aggrieved person "resides or transacts business." 29 U.S.C. § 160(e), (b) (1985).}

\footnotesize{156. 623 F.2d 224 (2d Cir.), cert. denied, 449 U.S. 975 (1980).}

\footnotesize{157. \textit{Id.} at 227.}

\footnotesize{158. \textit{Id.}}

\footnotesize{159. At least one commentator has proposed that Congress prohibit agency nonacquiescence within a circuit. \textit{See Note, Intracircuit Nonacquiescence, supra} note 112, at 607.}

\footnotesize{160. \textit{See Yellow Taxi Co. v. NLRB, 721 F.2d 366, 367 (D.C. Cir. 1983); Ithaca College v. NLRB, 623 F.2d 224, 226 (2d Cir. 1980).}
Board makes no effort to distinguish the case being reviewed from the cases already decided by the circuit court. Nonacquiescence also seems inappropriate where the initial precedent-setting case was heard by the Circuit sitting en banc. In these kinds of situations, it would be unfair to force parties to spend the time and incur the expense of litigation to obtain a result based on an interpretation of the law that the relevant circuit court already has made. Parties forced to litigate under these circumstances probably should be entitled to attorney's fees and costs.

If the Board does not approve of a circuit court decision, it theoretically can seek judicial review. As a practical matter, however, the Board may not be able to obtain review because the Solicitor General may decline a Board request to petition for certiorari in the absence of a conflict among the circuits. These practical limitations on the Board's ability to obtain judicial review of adverse circuit court decisions should be considered in formulating any proposal for modifying the Board's policy of intracircuit nonacquiescence. The Board also should have some flexibility in deciding which case, among several, ought to be the subject of Supreme Court review.

In any event, it may be time to abolish forum shopping. The Act could be amended to limit judicial review to the circuit in which the unfair labor practice occurs. This would eliminate the uncertainty about where judicial review will occur and make it easier for the Board to acquiesce in the law of the circuit, under appropriate circumstances, without prejudice to the Board's right to interpret the statute differently in other circuits where the law is not settled.

E. Whether to Create a Federal Labor Court

Some commentators have proposed the creation of a federal labor court or the transfer of jurisdiction over unfair labor practices directly to a special labor division of the federal district courts. Although we are not convinced that labor law cases warrant a special court devoted exclusively to labor disputes, these proposals are at least worthy of discussion and consideration.

162. See Note, Intracircuit Nonacquiescence, supra note 112, at 606; cf. Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983) (awarding attorney's fees against NLRB for having litigated an issue court had previously determined).
163. See Note, Intracircuit Nonacquiescence, supra note 112, at 608.
165. Bartosic, supra note 27; Morris, supra note 42; see also Shutkin, One Nation Indivisible—A Plea for a United States Court of Labor Relations, 20 Lab. L.J. 94, 97 (1969) (urging establishment of labor court for each circuit).
166. Farmer, supra note 39, at 11.
167. There plainly are enough labor cases litigated at the appellate level to justify consideration of a labor court. In fiscal year ("FY") 1986, 197 cases were decided by federal courts of appeals as compared to 188 cases so decided in FY 1985. In FY 1986, 1 criminal and 25 civil contempt proceedings were instituted as compared to 31 civil proceedings in FY 1985. Additionally, in FY 1986, the Board's Special Litigation Branch filed 73
Professor Florian Bartosic has called for the creation of a United States Labor Court that would replace the circuit courts of appeals in reviewing Board decisions. 168 This new federal court would be established under Article III of the Constitution, 169 and consequently judges would be appointed by the President, subject to approval by the Senate, and would have life tenure. 170 Ideally, the judges appointed to such a court would have practical expertise in labor law. Under Professor Bartosic's proposal, the Labor Court would have a trial division to hear section 301, 171 fair representation and section 303 172 cases, and Board applications for injunctions. The appellate division of the court would hear appeals from the trial division and the Board. 173 Eventually, under Professor Bartosic's plan, the Equal Employment Opportunity Commission ("EEOC") would be given enforcement powers like those of the NLRB, and the appellate part of the proposed labor court would review EEOC cases as well. 174

One advantage of such a court could be to end the Board's nonacquiescence policy, because the rationale for such a policy would no longer apply. A second advantage might be the efficiency of having labor-management issues decided by one intermediate appellate court with expertise in labor law. Members of one appellate court, however, probably would lack the diversity of views that necessarily exists today in the eleven circuit courts widely dispersed throughout the different regions of the United States. In addition, the perspective of persons who are not labor specialists sitting as circuit court judges may have a creative or ameliorating effect on labor decisions that would be lost if only labor lawyers were appointed to a single labor court.

Professor Charles Morris has proposed the creation of an Article III briefs: 43 district court briefs, 5 bankruptcy court briefs and 25 appellate court briefs. R. Collyer, Summary of Operations Fiscal Year 1986, Daily Lab. Rep. (BNA) No. 38, at D-1 (Feb. 27, 1987). Moreover, if cases arising under Title VII of the Civil Rights Act of 1964 were added, there would be many additional cases for a labor court to hear.

168. Bartosic, supra note 27, at 666

169. Although some might prefer an Article I court with prescribed terms for judges, the creation of such a court could create a serious constitutional question if review from the new court were directly to the Supreme Court. As Professor Bartosic writes, "[t]his proposal could violate the proscription against congressional enlargement of the Supreme Court's original jurisdiction since that Court would be the first article III court that could hear the case." Id. at 666 n.127. See generally C. Wright, Law of Federal Courts §§ 10, 11 (4th ed. 1983) (discussing congressional control of jurisdiction and the creation of legislative courts).


174. Id. at 670.
labor court to achieve a "unitary system" for the administration and enforcement of federal private sector labor law. Professor Morris' system "would consist of a constitutional court with jurisdiction over the enforcement of the substantive rights and duties contained in the Labor-Management Relations Act, the Railway Labor Act, Title VII of the 1964 Civil Rights Act, and perhaps other federal labor laws [including the Employment Retirement Income Security Act (ERISA)]."

Professor Morris would complement this judicial structure with a revised administrative structure combining the personnel and functions of the NLRB, the EEOC and the National Mediation Board. The powers of the General Counsel of the NLRB would be expanded to include authority to investigate complaints and prosecute actions under the Railway Labor Act and Title VII as well as the NLRA. The General Counsel would either dismiss the charge or file a complaint in the labor court. In the event of dismissal, an individual could file and process his or her own action. Appeals from decisions of Professor Morris' labor court would be to the eleven circuit courts of appeals.

In 1985, Guy Farmer, former NLRB Chairman, proposed transferring jurisdiction over unfair labor practices from the NLRB to a labor division of each district court. He would give authority to a special division of the United States Attorney's Office to issue or refuse to issue complaints. He also would eliminate jury trials and discovery. The Board would be retained only to handle and supervise election cases. Board decisions on election cases also would be subject to review by the Labor Division of the United States District Courts. The ALJs would be eliminated and the Office of the General Counsel would be abolished.

In Guy Farmer's judgment, there is a great need to depoliticize the Board, hence his proposal to shift decision-making power away from the Board and into the courts. He feels strongly that "[a]ll 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

---

175. Morris, supra note 42, at 497-99.
176. Id. at 498.
177. Id. at 498-99.
178. Id. at 503.
180. Morris, supra note 174, at 505.
181. Farmer, supra note 39.
182. Id. at 11.
183. Id.
184. Id. at 10.
185. Id. at 11.
186. Id.
purposes be fulfilled."187

Opponents of his proposal, including Arnold Ordman, former General Counsel to the Board, argue that (1) the delay problem "would be severely aggravated if the Board's substantial case load were superimposed on the heavy dockets which the courts already carry"188 and (2) "a district attorney possesses no special attributes to assure superior performance in this area."189 We would hope that there is a better way to remedy existing problems than by stripping the Board of its power over unfair labor practices.

CONCLUSION

Given the dissatisfaction of unions and other critics with the present Board and Act and the number of ideas for change that have been offered by various commentators, it is time for a tripartite conference to examine the Act and its future. As a matter of sound public policy, it makes sense for the labor-management community to meet and confer on the Act as a whole, outside of the political arena.

Structural changes in the Act, as well as changes in how it is enforced, should be instituted to make the Act more effective. Some of the suggestions discussed in this Article could be implemented within the framework of existing law. Legislation, however, may be needed to foster changes on case backlog, rulemaking, and intracircuit nonacquiescence, given the longstanding record of the Board on these issues. Serious thought also should be given to whether it is desirable for new Boards to be as responsive as past Boards have been to political change in the executive branch.

More than fifty years have passed, and the Act remains on the books. Though some have called for its repeal, there can be no serious question about its survival. The Act, however, can be adjusted to better achieve its potential. If at all possible, the changes should derive from a consensus of labor and management after a dialogue held on neutral and respectable grounds made available under the auspices of the American Bar Association.

187. Id. at 14.
189. Id.