1-1-1987

The NLRB in the Dog House--Can an Old Board Learn New Tricks

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Available at: https://digital.sandiego.edu/sdlr/vol24/iss1/3
In this Article, Professor Morris uses the fiftieth anniversary of the National Labor Relations Act as a backdrop for a reassessment of the NLRB's performance. He concludes that the Board has failed to carry out its statutory mandate, especially criticizing the Board's woeful record of enforcement of core employee protection provisions. Professor Morris demonstrates that the Act's unambiguous statement of policy, encouraging free collective bargaining and employee organizational rights, still governs. He then urges that the Board invoke its neglected statutory authority and makes specific recommendations for nonlegislative procedural reform of the NLRB. Such reform would revitalize the Board and vindicate the policies embodied in the Act.

INTRODUCTION

The NLRB is indeed in the dog house. The fiftieth anniversary of the National Labor Relations Act\(^1\) provides one more occasion to assess the Labor Board's performance. That performance has been assessed many times before, indeed with boring regularity.\(^2\) The re-
sulting cries of woe and despair have been heard so often that one can only wonder whether anyone is out there listening. Fifty years is surely time enough for the Board to have demonstrated whether it reasonably can fulfill the primary statutory objectives with which it was vested.

This Article focuses upon Board procedures, structural organization, and remedial processes. It does not directly examine substantive law. Of course changes in substantive law usually attract the most public attention. The pendulum-like swings of substantive law from administration to administration are indeed noteworthy; whenever a major substantive law decision is overturned we are reminded of the doctrinal instability that characterizes the interpretation of the NLRA. But such substantive law changes, whether effected by the Reagan Board, by a prior Board, or by a future Board, are of lesser importance than the slow and silent erosion of the Board’s enforcement authority which has been occurring for more than two decades.

Although the pace of this deterioration has been gradual, its consequences have been devastating. This erosion of the Board’s effectiveness has undermined its capacity to discharge its basic statutory duties — so much so that if the Board no longer can fulfill the essential objectives of the NLRA, then it should move over and allow some other entity to take its place. If the Board as an institution is either structurally unable or politically unwilling to enforce the NLRA, and enforce it with stability and reasonable regard for stare decisis, then perhaps we should explore some other means to accomplish that task. One such means would be an article III labor court.


3. For example, in Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962), the Board established a rule that elections would be set aside on the basis of pre-election statements deemed to be material where there was insufficient time for the other side to reply. That rule was abandoned in Shopping Kart Food Mkt., 228 N.L.R.B. 1311 (1977). But in General Knit, Inc., 239 N.L.R.B. 619 (1978), the Board returned to the Hollywood Ceramics rule. Then, in Midland National Life Insurance, 263 N.L.R.B. 127 (1982), Hollywood Ceramics was again overruled and the permissive Shopping Kart rule was reinstated.

which indeed would represent a drastic and unfamiliar direction for American labor law. That alternative, however, should be a last resort. On the other hand, if the Board does have the statutory capacity to function as Congress intended — and I firmly believe that it has — and if the real problem is essentially an institutional unwillingness to utilize available statutory procedures and remedies, then a reinvigorated Board determined to enforce the Act would be preferable to a labor court. Although a labor court theoretically should function soundly and efficiently, it would still be an untried entity; such an option, therefore, should be pursued only after it has been demonstrated that the Board either is inherently incapable of fulfilling its major statutory functions or is not likely to do so in the foreseeable future.

Although a strong case can be made for an article III labor court, which I have discussed elsewhere, this Article will focus primarily upon the desirability of attempting a nonlegislative restructuring and a corresponding revitalization of the Labor Board itself. I believe such an approach is possible, though perhaps not very probable in view of the formidable political and inertial forces that such a program would have to overcome. Nevertheless, it seems appropriate to explore what could be accomplished under the existing statute in the event an institutional desire to enforce the NLRA effectively should arise in the near future.

**STATUTORY OBJECTIVES**

This discussion begins with the assumption that the Board has not been fulfilling its basic statutory objectives. Although that conclusion has been amply documented, I shall review some of the pertinent

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5. See *Morris, Board Procedure*, supra note 4, at 353-60; *Morris, Article III Court*, supra note 4.

studies and statistical evidence and compare such data against an available objective standard which defines what the Board's enforcement record ought to be. What standard could be more objective than the one provided by the statement of congressional intent imprinted in the statute itself? Although there has been some inaccurate perception in much of the recent debate about the fundamental roles of the NLRB, the statutory language and legislative history are clear as to what those roles were intended to be.

Let me note the obvious at the outset. The original congressional intent contained in the Wagner Act was substantially expanded by later legislative amendments, particularly by the Taft-Hartley Act. Notwithstanding some revisionist views to the contrary, those amendments did not change the core objective of the statute. The evidence is written clearly in the amended statute and was authoritatively voiced in pertinent legislative reports and debates. Although it is true that the Taft-Hartley Act added two important new dimensions to the scope of the NLRA, the underlying statutory objective remained intact.

Two statutory statements of policy should be noted. Section 1 of the original Wagner Act set out the basic statutory objective. Although the Taft-Hartley Congress added language to that section, the expression of the core intent of the NLRA was deliberately left undisturbed. The Taft-Hartley Congress also added another declaration of intent to the overall Labor Management Relations Act; this was a separate section preceding title I, which became the amended version of the Act. Both declarations require our attention.

The Wagner Act declaration opened by stating that "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest . . . ." The Taft-Hartley Congress changed that statement by inserting the word "some" before "employers" in both phrases. It thus removed the blanket indictment of all employers but still pointedly accused "some employers" of both denying employees the right to organize and refusing to accept the process of collective bargaining. This was taken from the Senate version of the amended Act, but the House acceded to it following its adoption by Conference Committee. The original House version would have eliminated the Wagner Act decla-

ration of policy completely. The Congress thus deliberately retained the Wagner Act declaration of basic statutory policy, which included the following statements:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes . . . and by restoring equality of bargaining power between employers and employees.

Whereupon the "policy of the United States" was expressly declared as the

encouraging [of] the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Accordingly, the Taft-Hartley Act reaffirmed those statements as the central policy of the statute.

Nevertheless, there has been a widespread misapprehension of the congressional intent behind the Taft-Hartley Act. This stems from a popular failure to distinguish between the perception of certain anticollective bargaining decisions of the Board as well as the conspicuous failure of the Board to provide vigorous enforcement of section 7 rights, and the reality of the compromise reached in the Taft-Hartley Conference Committee to reconcile differences between the House and Senate bills. A distinction should be made between what the Board has done — or failed to do — since passage of the Taft-Hartley Act, and what the statute actually declares that it should do. Time may have changed the popular perception of the proper role of the NLRB, but it should not have affected the determination of what the actual congressional intent was in 1947. Accordingly, I cannot fully agree with James Gross' assessment that "the Taft-Hartley Act contains conflicting statements of purpose that open the national labor law to conflicting interpretations of congressional intent."

Regardless of his observation that "Smith, Hartley, and the majority of the House certainly did not intend to promote collective bargaining as the solution to labor problems," the fact remains that the Con-

15. Id.
17. Id. Professor Gross seems to ignore the Conference Committee's rejection of
ference Committee pointedly rejected the House bill's attempted repeal of the statutory statement that collective bargaining is the national labor policy. Moreover, nothing in the separate statement of "purpose and policy" in the new Taft-Hartley preamble diluted or was inconsistent with the retained core statement of policy.

It is true that most of the new Taft-Hartley provisions could be — and they certainly were — viewed as anti-union. But those provisions, as well as the corresponding provisions declaring the legislative purpose, were not intended to change the core objective of the statute. Rather, the Taft-Hartley amendments primarily added substantial provisions regarding union unfair labor practices, as well as a number of provisions that slowed down the procedures for establishing representation. These amendments indeed provided new statutory objectives for the Board, but they were in addition to, not a replacement for, the original objectives of the NLRA. The new provisions were reflected in a new paragraph inserted within the original Wagner Act statement of policy, recognizing "certain practices of some labor organizations . . . burdening or obstructing commerce . . . through strikes and other forms of industrial unrest . . . ."18 Additionally, as previously noted, there was a separate "Declaration of Policy" added to the all-inclusive Labor Management Relations Act stressing the need for "employers, employees, and labor organizations each [to] recognize under law one another's legitimate rights in relations with each other . . . ."19 That declaration further stated:

> It is the purpose and policy of this [Act] . . . to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations . . . . to define and prescribe practices on the part of labor and management which . . . are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes . . . ."20

It thus is clear that the totality of the policy language in the Taft-Hartley Act did two things. First, it reaffirmed the basic objectives of the Wagner Act, which were to protect the right of employees to organize and to encourage the "practice and procedure" of collective bargaining. Second, it declared certain activities of labor organizations to be improper; but in doing so it emphasized the use of "or-

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19. Id. § 1, 29 U.S.C. § 141.
20. Id.
orderly and peaceful procedures” for dispute settlement as provided under the statute. Indeed, the new statute not only continued to provide for the National Labor Relations Board, it also provided for, among other things, the establishment of the Federal Mediation and Conciliation Service, a procedure to handle national emergency disputes, and judicial enforcement of collective bargaining agreements. Nowhere did the Taft-Hartley Act provide for any dilution of section 7 rights; indeed, it reaffirmed and added to those rights because employees were given “the right to refrain” from organizational and concerted activities. Nowhere did it retreat from the guarantee of the right of employees to “form, join, or assist labor organizations” or deviate in any manner from the statutory commitment to the concept of collective bargaining as the cornerstone of national labor policy. On the contrary, in recommending the bill, Senator Taft reaffirmed the centrality of collective bargaining by stating: “Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based on that proposition.” And during Senate debate which preceded the vote to override President Truman’s veto, Senator Taft emphasized that the bill “is based on the theory of the Wagner Act . . . . It is based on the theory that the solution of the labor problem in the United States is free, collective bargaining . . . .”

Thus, notwithstanding some popular misconceptions, it is evident from the language of the statute and its legislative history that the Taft-Hartley Act did not change the basic national commitment to the encouragement of collective bargaining and the protection of the rights of employees under section 7 to organize and engage in concerted activity for “the purpose of collective bargaining or other mutual aid or protection.” The only addition to section 7 was that employees also had the right to refrain from such activity.

27. Id. at 1653 (emphasis added).
29. Professor Gross accurately observes: “The 1947 Declaration of Policy, coupled with a passage added in 1947 to Section 7 that affirms workers' right to refrain from engaging in collective bargaining, has been interpreted to mean that free choice and indi-
The Eightieth Congress was concerned with the power of "big labor." The hearings and debates and the resulting legislation focused on curbing much of that power, specifically secondary boycotts, closed and union shop agreements, certain strikes and picketing which on occasion had turned into violent confrontations, jurisdictional disputes, and some features of internal union affairs. Important structural and procedural modifications, particularly the separation of the office of General Counsel from the Board proper, were also enacted. In addition, the Supreme Court's pronouncement regarding the constitutional right of free speech was codified into section 8(c) of the statute. But no substantive changes were made in the text of the provisions defining employer unfair labor practices. Nor were any such changes made by the 1959 Landrum-Griffin amendments. Accordingly, the employer unfair labor practices contained in the statute today are basically the same as they were fifty years ago; the accompanying declarations of congressional intent were reconfirmed by the Taft-Hartley Congress and were not disturbed by the Landrum-Griffin Congress.

Consequently, the objective standard by which to measure the Board's record remains the declaration of policy in section 1 of the NLRA. To assess how well the Board has fulfilled that statutory mandate, we must look primarily to sections 7 and 8(a), which continue to contain the core rights and duties guaranteed by the Act. The union unfair labor practices of section 8(b) were designed to curb union power; and those provisions, especially those limiting the use of economic coercion against employers, have consistently been enforced with remarkable success. The latter provisions, however, are ancillary to the core provisions of section 7 and 8(a) — because in the main, union unfair labor practices depend upon the existence of established unions. In particular, the secondary boycott and jurisdictional dispute provisions in section 8(b)(4) generally assume the existence of unions that have bargaining rights with primary employers. The recognitional and organizational picketing provisions of sec-

6. See Flanagan, supra note 6, at 979-80.
tion 8(b)(7), added by the Landrum-Griffin Act in 1959, merely emphasize the primacy of section 9 procedures and requirements for the establishment of union recognition.

THE ENFORCEMENT RECORD

Whereas the Board’s record of enforcement of sections 8(b)(4) and 8(b)(7) indicates that it has been reasonably efficient as to those unfair labor practices directed against unions, its record of enforcement of the core employee protection sections, that is, cases which involve employer interference with organizational activity under section 8(a)(1), discriminatory discharge cases under section 8(a)(3), and refusal-to-bargain cases under section 8(a)(5), has been woefully inadequate. In addition, the delay factor in both representation ("R") cases and unfair labor practice ("C") cases has severely hampered the implementation of those basic statutory rights. This record of inadequate performance is not a recent phenomenon; several important studies covering periods of many years have documented the Board’s impotence in providing effective enforcement of these provisions of the statute.

Harvard economists Richard Freeman and James Medoff summarized and evaluated many of those studies and also certain statistical data contained in the Board’s annual reports. Among their conclusions, several should be noted. First, union success in achieving bargaining rights is significantly lower when there is a long delay between the filing of the petition and the holding of the election. That conclusion is also supported by the independent findings of Myron Roomkin and Richard Block. Their study, based on magnetic tape data supplied by the Board for fiscal years 1973-1978, found that delay was indeed linked to election outcome, the implication being “that delay affects elections the most when the outcome is in doubt and this class of contests generally result [sic] in a vote against unionization.” They noted that “[i]f delay results in creating an employer win from what would otherwise be a union win, then the delay has resulted in a change in the substantive outcome of the process.”

35. R. FREEMAN & J. MEDOFF, supra note 6, at 236.
36. Roomkin & Block, supra note 6.
37. Id. at 90.
38. Id. at 97.
Second, Freeman and Medoff conclude that illegal employer discrimination against union activists, particularly firing, has a substantial impact upon union success in winning elections; "[o]nly in the rare case where a fired worker is ordered reinstated by the NLRB and actually returns to his job before the election does breaking the law backfire." 39

Third, by analyzing Board statistics from 1960 through 1980, they observed that although the number of union elections scarcely changed during that period, the number of illegal activities committed by employers increased by 400%; the number of charges of discharges for union activity increased by 300%; and the number of employees awarded back pay increased by 500%. Such impersonal statistics demonstrate the reality of what happens in an election campaign and indicate how irrelevant the Board's enforcement processes have become. As Freeman and Medoff observed:

Despite increasingly sophisticated methods for disguising the cause of such firings, more employers were judged guilty of firing workers for union activity in 1980 than ever before. To obtain an indication of the risk faced by workers desiring a union, one may divide the number of persons fired for union activity in 1980 by the number of persons who voted for a union in elections. The result is remarkable: one in twenty workers who favored the union got fired. Assuming that the vast bulk of union supporters are relatively inactive, the likelihood that an outspoken worker, exercising his or her legal rights under the Taft-Hartley Act, gets fired for union activity is, by these data, extraordinarily high. Put differently, there is roughly one case of illegal discharge deemed meritorious by the NLRB for every NLRB representation election. 40

Obviously, the Board has not succeeded in providing effective enforcement. Nor has it created a legal atmosphere conducive to the achievement of widespread voluntary compliance. In this regard, the NLRA may be compared to title VII of the 1964 Civil Rights Act, 41 which was no more popular when enacted than the Wagner or Taft-Hartley Acts. But the remedial sections of the NLRA and title VII have much in common. Both provide for "affirmative action" orders; in fact, the NLRA was the source of the "affirmative action" language in title VII. 42 Both statutes are designed to be remedial rather than punitive in their application. However, the compliance history of the two statutes presents a study in contrasts. Title VII generally has been firmly enforced with meaningful remedies; 43 it is less costly

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39. R. FREEMAN & J. MEDOFF, supra note 6, at 236 (citations omitted).
40. Id. at 232-33.
43. See generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983).
to comply with that statute than to violate it.\textsuperscript{44} The opposite has been true of the NLRA; as to the core portions of that statute, the Board clearly has failed to fulfill its mandate "to prevent" persons from engaging in unfair labor practices — language which implicitly endorses the concept of voluntary compliance. Ironically, section 10, which covers enforcement, is entitled "\textit{Prevention} of Unfair Labor Practices,"\textsuperscript{45} but in the aggregate, the Board has been singularly unsuccessful in preventing the commission of unfair labor practices under the core provisions of the NLRA.

Not only has the Board failed to prevent such practices, it actually has \textit{encouraged} their commission by its ineffective processes. A recently published study by Morris Kleiner noted that employers found guilty of unfair labor practices are more likely, rather than less likely, to commit further unfair labor practices.\textsuperscript{46} The study, which was based upon a regression analysis of NLRB case data from 1970 through 1980, determined the following:

Firms that have previously violated Section 8(a)(3) may have found that the marginal benefits outweigh the marginal costs. Firms that violate this section of the Act may find significant benefits in the chilling effect on union organization efforts and on union aggressiveness once they are organized. If this occurs, then using the same [illegal] tactic again may be cost-effective strategy, even if the firm loses the case before an administrative judge.\textsuperscript{47}

Observing that empirical results were consistent with that theory, Kleiner noted:

The past violations variable [was] statistically significant and suggest[ed] that firms that have committed unfair labor practices in previous years are more likely to commit them in the current period . . . . [F]irms that committed past violations were over twice as likely to commit current violations. These results support the hypothesis that the law's penalties do not serve as a major barrier to employer discrimination.\textsuperscript{48}

Thus, not only is it cost effective for an employer to discharge union activists in breach of section 8(a)(3), a violation which most often occurs before an election, it apparently is also cost effective for an employer to violate the Act after the election. Further, evidence

\textsuperscript{45} NLRA § 10(a), 29 U.S.C. § 160(a) (1982)(emphasis added).
\textsuperscript{47} \textit{Id.} at 237.
\textsuperscript{48} \textit{Id.} at 240.
indicates that it is advantageous to an employer's prospects for not reaching agreement on a collective bargaining contract if a delay in Board procedures arises, such as in the processing of objections to an election. According to a recent investigation of first-contract negotiation outcomes conducted by William Cooke, “[e]mpirical support . . . for the hypothesis that . . . NLRB delays in the resolution of employer objections and challenges to election results, the refusal to bargain in good faith and discrimination subsequent to election victories have profound effect upon reducing the probability of agreement.”

Quantifying the effects of post-election unfair labor practices and delay factors, Cooke concluded that “employers who refused to bargain in good faith and/or illegally discharged union activists . . . reduced the probability of unions successfully negotiating contracts by 32-36 percentage points.” The estimated magnitude of negative relationship between NLRB procedural delay and the securing of a contract indicated that “on average, every one month delay between election date and NLRB close of objections and challenges to election outcomes reduces the probability of obtaining an agreement by as much as 4 percentage points.” Thus, even when unions win elections they often fail to achieve the statutory objective of a contractual collective bargaining relationship, for during the period of 1979-1980, in one of every four union certification victories, the union subsequently failed to obtain a collective bargaining agreement.

These findings offer a disheartening view of the Board's efforts to enforce the basic provisions of the Act. It is not necessary, however, to resort to controlled investigations or even to the abundant anecdotal evidence which every union representative readily can supply in order to learn of the Board's failures. An available source of data, which the foregoing studies also have used, is the compilation of statistical tables in various volumes of the Board's annual reports. Comparing the early years with recent years reveals a general trend towards nonenforcement. Reviewing a twenty-year span from 1962 through 1981, the data show a two-fold increase in charges of discriminatory discharges under section 8(a)(3), a seven-fold increase in the number of employees receiving back pay for unlawful discharges, and a three-fold increase in section 8(a)(5) refusal-to-bargain charges. Such drastic increases cannot be explained by in-

49. W. Cooke, Union Organizing and Public Policy: Failure to Secure First Contracts 94 (1985). The study was conducted pursuant to a grant from the W. E. Upjohn Institute for Employment Research.
50. Id. at 90.
51. Id.
52. Id. at 94.
creases in organizational activity, for union organizing declined during that same period. Using the number of employees eligible to vote in representation elections as a barometer of organizational activity discloses that in 1962 there were 536,047 eligible voter employees, but by 1981 that number declined to 449,243. Thus, in relation to the volume of union activity, the increase in employer unfair labor practices is even greater than that revealed by the raw figures. Furthermore, a contrast between section 8(a)(3) activity in 1970 and such activity in 1980-1981 (the most recent years for complete available figures) demonstrates dramatically how steep the increase has been. In 1970 there were 608,558 employees eligible to vote in representation elections. The following year 6738 employees received back pay in employment discrimination cases. In other words, taking into consideration lag time for processing such cases, approximately one percent of all employees who were involved in election campaigns in 1970 had meritorious cases involving employment discrimination under the Act. Although such a rate of discriminatory employment activity, including discharges, may seem high — indeed it is — it seems almost acceptable compared to the upward trend for such violations that peaked during the 1980-1981 period. In 1980, 521,602 employees were involved in election campaigns, and in the following year, 25,929 employees received back pay because of employment discrimination. Thus, approximately five percent of all employees in organizationally active bargaining units were terminated or otherwise denied compensation because of their union involvement. These figures are not unlike the findings of Freeman and Medoff, which were arrived at using a different method of computation.

55. R. FREEMAN & J. MEDOFF, supra note 6, at 233, 283 n.12. The exact percentage of employees among eligible voters who were discharged for union activity in any given year cannot be determined with precision from the Board's statistics, but there can be no doubt that the percentage is too high for a showing of either effective enforcement

(1965); 31 NLRB ANN. REP. app. table 2 (1966); 32 NLRB ANN. REP. app. table 2
(1967); 33 NLRB ANN. REP. app. table 2 (1968); 34 NLRB ANN. REP. app. table 2
(1969); 35 NLRB ANN. REP. app. table 2 (1970); 36 NLRB ANN. REP. app. table 2
(1971); 37 NLRB ANN. REP. app. table 2 (1972); 38 NLRB ANN. REP. app. table 2
(1973); 39 NLRB ANN. REP. app. table 2 (1974); 40 NLRB ANN. REP. app. table 2
(1975); 41 NLRB ANN. REP. app. table 2 (1976); 42 NLRB ANN. REP. app. table 2
(1977); 43 NLRB ANN. REP. app. table 2 (1978); 44 NLRB ANN. REP. app. table 2
(1979); 45 NLRB ANN. REP. app. table 2 (1980); 46 NLRB ANN. REP. app. table 2
(1981). At the time when this was written, the 1981 Annual Report was the latest available. For more recent data, see 47 NLRB ANN. REP. app. table 2 (1982), and 48 NLRB ANN. REP. app. table 2 (1983).
The statistical tables in the Board's annual reports also reveal that union unfair labor practices directed at employers have not been increasing. Since the early 1970's the level of charges for secondary boycotts and jurisdictional disputes under section 8(b)(4) and organizational and recognitional picketing under section 8(b)(7) has remained relatively constant.\(^5\) Thus, the Board has been reasonably successful in both enforcing those provisions and deterring the wholesale commission of union violations, albeit with the aid of section 10(l) injunctions\(^6\) and the presence of private damage suits under section 303 of the Taft-Hartley Act\(^7\) for conduct which also violates section 8(b)(4). But such enforcement success is not sufficient to justify the Board's continuing to operate in the same old way. As I noted earlier,\(^8\) sections 8(b)(4) and 8(b)(7) are ancillary to the Act's fundamental purpose of protecting employees in organizational and collective bargaining activity. The Board's record of success in discouraging the commission of union unfair labor practices directed against individual employees (specifically sections 8(b)(1)(A) and 8(b)(2)) is hardly better than its record against employers, although the number of such charges is relatively small in relation to the number of charges filed against employers.\(^9\)

This appraisal of the Board's enforcement record reveals that notwithstanding the substantial number of employers against whom meritorious unfair labor practice charges have been filed in recent years, the Board has not protected employees by enforcing the core provisions of the NLRA effectively. Although the statistical data do not indicate that all employers who are involved in organizational campaigns violate the NLRA, such evidence does suggest and tends to confirm the popular belief\(^10\) that nonunion employers are more concerned with avoidance of the Act's requirements than with compliance with its objectives. The spirit of the NLRA is regularly disregarded in situations in which no violations of specific provisions are found or even charged. The prevalence of such efforts at union avoidance, coupled with the Board's dismal record in failing to provide meaningful remedies when violations are found, support the conclusion that the Board has failed in its primary mission.

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56. See generally 38-46 NLRB ANN. REP., supra note 53.
59. See supra notes 32-34 and accompanying text.
60. See Morris, supra note 32, at 20.
61. See, e.g., F. FOULKES, PERSONNEL POLICIES IN LARGE NONUNION COMPANIES (1980).
NATIONAL LABOR POLICY: AN ASSUMPTION

A question essential to this inquiry is whether the policy of the Act still represents the nation's true industrial relations policy. If so, then the core provisions of the statute should be enforced and further debate should center on the most suitable means of enforcement. On the other hand, if it is no longer the national policy to encourage free collective bargaining and affirm the rights of employees to organize, then we should quit pretending that such is the policy. Moreover, Congress should quit pretending, and it should reject the Wagner Act's policy in unambiguous statutory language and repeal or legislatively emasculate its core provisions. But if that were to occur, with collective bargaining on the wane a marked diminution of employer incentive to avoid unionization by duplicating or competing with union conditions would surely follow. The need for representation or at least protection of employee interests would remain, but other legal remedies or structures would probably evolve to fill the resulting vacuums: there might be a significant expansion of common-law wrongful discharge actions with accompanying development of employment at will case law; a series of pervasive statutory regulations of additional aspects of the employment relationship, at both the state and federal level, possibly would be enacted; and a new wave of unionism without the blessing of supporting legislation might even emerge.

It is not the purpose of this Article to engage in a weighing of substantive industrial relations policies; I have assumed that the policy contained in the present NLRA is both valid and desirable. Although this assumption is a prerequisite to justifying a search for a more effective means to enforce the present policy, I have not made that assumption lightly. Over the years, there have been sufficient examples of healthy collective bargaining to indicate that the NLRA system fits comfortably within the general democratic framework of American political and economic life. Notwithstanding the Board's bleak record of protecting employee rights, the NLRA, with its emphasis on employee self-determination, offers a suitable framework for channeling workers' participation into new decisionmaking processes in matters affecting their legitimate employment-related interests.

62. Id. at 154, 341.
63. That framework would be even more suitable were it not for certain Supreme Court decisions which unnecessarily have restricted the scope and subject matter of collective bargaining. In particular, see NLRB v. Wooster Div. of Borg-Warner Corp., 356
Because of the far-reaching changes which have occurred in American economic life during the last decade, there is a felt need to find appropriate means to organize industrial relations in a manner which will maximize productivity. The NLRA is not inappropriate for that task. The basic structure of the Act was devised with remarkable foresight. Given the proper institutional will, that statute could furnish the Board with a flexible means to provide positive responses to the demands of the industrial relations community for innovative and improved organizational techniques — some of which might emphasize cooperative rather than adversarial arrangements — in order to better cope with the nation’s ongoing process of either deindustrialization or reindustrialization.

Another observation of Freeman and Medoff is pertinent. After viewing the economic evidence and noting the decline of organized labor in the United States, a phenomenon which they found unique among modern democratic industrial societies, they expressed the following opinion:

We favor legal changes that will make it easier to unionize because we believe continued decline in unionization is bad not only for unions and their members but for the entire society. Because our research shows that unions do much social good, we believe the “union free” economy desired by some business groups would be a disaster for the country. . . . In a well-functioning labor market, there should be a sufficient number of union and non-union firms to offer alternative work environments to workers, innovation in workplace rules and conditions, and competition in the market . . . .

Such legal changes need not be substantive changes; they need only be changes that will make the present law work the way in which it was intended.

**ENFORCEMENT ALTERNATIVES**

If one accepts the premise that the existing primary statutory mandate is healthy for the country, then one must squarely confront the harsh evidence of the Board’s poor enforcement record. I have done that, and I have concluded that the Board as presently structured and motivated cannot fulfill its mandate. Therefore the time has come — indeed it is long overdue — for a drastic overhaul of the NLRA’s enforcement system. Several approaches to accomplishing this task are worth exploring.

One approach, perhaps the most popular of all, is the one that is typified by the Labor Law Reform Bill which failed to pass the

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64. R. Freeman & J. Medoff, supra note 6, at 250.
Congress in 1978. That approach would amend the NLRA by conferring new powers on the Board and increasing the number of Board members. But such a palliative simply would pass the buck to Congress. Such an approach seeks a quick-fix by beefing up the Board’s remedial powers in order to achieve essentially the same ultimate goals which the Board already has the power to accomplish. It is true that some of the proposed new remedies, for example, self-enforcing Board orders, would be useful additions to the Board’s arsenal of weapons; yet, a package of new legislative remedies would make little difference unless the Board’s enforcement philosophy undergoes a marked change. Furthermore, because of the Pandora’s Box syndrome which usually accompanies major efforts to amend this Act, any proposed congressional amendments should be looked upon with a mixture of skepticism and hesitation. I therefore will not discuss the various tack-on amendments which have been proposed to give the Board more clout. The Board first should use the clout which it already has.

A second approach stems from the recognition that if the Board inherently cannot, or simply will not, make a genuine effort to use its present authority effectively, then it should be dismantled — at least as to its unfair labor practice jurisdiction, in which event a judicial solution should be given serious consideration. However, transfer of unfair labor practice jurisdiction to existing federal district courts would bog down NLRA cases in clogged dockets, and uneven construction of statutory provisions and needless unwieldiness in the enforcement process would surely result. But what could be usefully considered is the establishment of a specialized federal labor court capable of functioning with full judicial authority under article III of the Constitution. Such a court offers numerous advantages. It would provide instant process and meaningful judicial process, capacity to require effective compliance with its orders, and an ability to function as a court of equity with orders tailored to meet specific needs. This solution could be a positive alternative for enforcement of the unfair labor practice provisions of the National Labor Relations Act. The jurisdiction of such a court, however, should not be confined to that Act alone. Ideally, such a court should also have gen-


67. The labor court alternative, however, is beyond the scope of this Article. See supra notes 4-5 and accompanying text.
eral jurisdiction over all or substantially all other federal labor and employment laws, including the other provisions of the Taft-Hartley Act, which would mean coverage, *inter alia*, of the duty of fair representation,\(^{68}\) arbitration under section 301,\(^{69}\) and secondary boycott damage suits under section 303.\(^{70}\) It is also important that the court's jurisdiction include the Railway Labor Act,\(^{71}\) which presently suffers from the absence of a centralized decisionmaking authority.\(^{72}\) And the court's jurisdiction should also cover, but not be limited to, the Labor-Management Reporting and Disclosure Act,\(^{73}\) title VII of the Civil Rights Act,\(^{74}\) the Age Discrimination in Employment Act,\(^{75}\) the Occupational Safety and Health Act,\(^{76}\) and the Fair Labor Standards Act.\(^{77}\) Because I have discussed the details of such an article III court elsewhere,\(^{78}\) I shall not repeat them here. Instead, this Article will focus on a third approach which relies wholly upon the NLRB and its present statutory authority.

If the latter approach can be viable, it will also be preferable, for it requires no legislation and no experimentation with the relatively unknown entity of a new specialized article III court. Utilization of existing administrative process only requires that the NLRB make a determined effort to use its existing authority more efficiently. However, this will necessitate some important preconditions, which I shall discuss in due course. The Board's unused and underused existing authority, to which I refer and about which I shall make some

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\(^{78}\) *See* Morris, *Board Procedure, supra* note 4; Morris, *Article III, supra* note 4.
specific recommendations, includes the following: substantive rulemaking; streamlining of “R” case procedures; making discovery available; increasing the use of section 10(j) injunctions, especially in discharge cases; reorganization of Administrative Law Judge operations; ordering damage-specific final remedies; and increasing the use of section 10(e) and 10(f) injunctions. These are the new “tricks” which the old Board needs to learn.

LABOR BOARD REFORM WITHOUT LEGISLATION

The most plausible antidote for the Board’s malaise is to be found in the potential of the statute itself. Achieving that potential, however, may never be possible. Because of the political nature of Board appointments, their short five-year terms of office, and the absence of a strong institutional commitment to vigorous enforcement of the NLRA, I have little expectation that the Board will ever reform itself. Notwithstanding that slim possibility, this Article will document certain means by which, in my opinion, the Board’s existing authority could be utilized to achieve its major statutory objectives. This fifty year old Board needs to learn new “tricks.” The following discussion will examine those means, which essentially consist of the activation of several unused or underused procedural devices, a reorganization of certain agency functions, and the employment of more effective and more injury-specific remedies.

Substantive Rulemaking

Substantive rulemaking pursuant to the Administrative Procedure Act79 (APA) and section 6 of the NLRA is probably the most important thing the Board can do to effectuate its process, economize its time, and advise the people who need to know — most of whom are not lawyers — what the law requires. It is this last feature, the information factor, which should be highlighted. Rulemaking has major advantages, some of which have been admirably treated by other commentators.80 Various improvements in agency action which

can result from regular promulgation of substantive rules through APA notice-and-comment procedures are enumerated below. These should be measured against the Board's exclusive practice (save for minor exceptions) of using adjudicated cases for such purposes. I do not mean to suggest that APA rulemaking should be the Board's only means to effect changes and clarifications in the law. The Supreme Court in *NLRB v. Bell Aerospace Co.* confirmed that the "choice between rulemaking and adjudication lies within the Board's jurisdiction," but it added that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." It is not the purpose of this Article to define when the Board is legally required to use rulemaking, although some of the illustrations may suggest situations in which the nature or consequence of a particular rule change may mandate use of APA procedures. Instead, I propose that because there are inherent advantages in using rulemaking, the Board should choose rulemaking as its primary discretion device for announcing existing legal doctrine and promulgating new doctrine. Nonetheless, the Board should not suddenly attempt to convert to an exclusive rulemaking system; to be administratively realistic, the conversion would have to be gradual. But a beginning should be made and future major doctrinal changes, in particular, should receive priority treatment for promulgation in accordance with APA rulemaking procedures.

Eleven reasons for the Board to convert to use of substantive rulemaking are here presented:

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81. In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Supreme Court reviewed the Board’s application of the rule adopted in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), and concluded that the Board had engaged in rulemaking without complying with the requirements of the APA. However, the Court later held that the NLRB is not precluded from announcing new principles in an adjudicative proceeding and that the choice is within the Board’s discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In the years between *Wyman-Gordon* and *Bell Aerospace*, the Board conducted three unprecedented rulemaking proceedings. These instances included promulgation of standards for the exercise of jurisdiction over private colleges and universities and over symphony orchestras with gross annual revenues from all sources of not less than one million dollars. The Board ruled in another proceeding that it would not assert jurisdiction over the horse-racing and dog-racing industries. *See 2 C. Morris, The Developing Labor Law* 1631 nn. 214-16 (2d ed. 1983).


83. *Id. at 293.*

84. *Id. at 294.*
1. **General language in the statute.** The Act is written in broad and general language. Congress left to the Board the responsibility of defining legal detail in accordance with legislative policy. As the Supreme Court noted in *Beth Israel Hospital v. NLRB*, 85 "to accomplish the task which Congress set for it, [the Board] necessarily must have authority to fill the interstices of the broad statutory provisions" 86 of the NLRA. Rulemaking is ideally suited for that purpose. The Board therefore should make use of the express authority contained in section 6 "to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of [the National Labor Relations Act]." 87

2. **Rulemaking is a source of necessary data.** Case-by-case adjudication does not provide the Board with the necessary factual data or the best available analyses of such data on which to premise rules of broad application. In adjudicated cases, even those in which the Board announces major policy changes, oral argument rarely is permitted and amici briefs rarely are invited. By contrast, the rulemaking process invites a dialogue between the labor relations community and the Board, for the notice-and-comment procedure contemplated by the APA encourages the parties who are likely to be affected by a proposed rule to submit relevant data and argument which the Board must consider. 88 To merit the "expert" label that Congress intended and which the courts are expected to acknowledge, 89 the Board needs an adequate research source; presently such is not available either through the adjudicative process or through the Board's limited statutory appointment authority. 90 Under rulemaking procedures, data

86. *Id.* at 501; *see also* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

Rulemaking ensures a level of public participation in the policymaking process not currently available. The opportunity for public participation is automatic with each notice of rulemaking, and open to all concerned. Hopefully, the various organizations representing employees, unions and management will in time develop rulemaking staff . . . who will vigilantly monitor and contribute to the rulemaking process.

Estreicher, *supra* note 2, at 177.
89. *See, e.g.*, Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
which are submitted by the public will tend to reflect diverse points of view, and the accuracy and objectivity of raw data can be tested and debated in the submission and consideration process. Lacking such a process, the Board often displays an "ivory tower" syndrome, which Samuel Estreicher perceptively characterized as "typically intuitionistic and excessively doctrinal." 91

3. Adjudicative rulemaking emphasizes specific facts rather than broad legislative policy. Rules promulgated in litigated cases usually are contained in decisions which are long on the facts of the particular case but short on the facts and reasons which would justify adoption of the broad rule being promulgated. For example, in its 1958 Mountain Pacific decision, the Board merely asserted that it was reasonable to infer that exclusive hiring hall authority to refer employees "enhances the union's power and control over the employment status" 93 and that this results in "the inherent and unlawful encouragement of union membership;" 94 whereupon the Board promulgated a rule requiring the insertion of specific protective language intended to be applicable to all exclusive hiring halls. But in Teamsters Local 357 v. NLRB, 95 the Supreme Court reversed the Board, noting that the rule implied the existence of discrimination under sections 8(a)(3) and 8(b)(2) without any showing of discrimination. But, had the Board designed a more carefully crafted hiring hall rule, perhaps under section 8(b)(1)(A) alone, and had the Board based it at least in part on empirical data obtained in an APA rulemaking proceeding, and had it provided an articulated rationale derived from such data, would the Court have invalidated it? Perhaps not.

An example in which the Board emphasized the facts of the particular case while virtually ignoring facts and accompanying rationale pertinent to the broad rule being promulgated was the decision in Rossmore House. 96 That case concerned interrogation of a known

91. Estreicher, supra note 2, at 172. Professor Estreicher colorfully describes the process:
Rather than providing a basis for decisions that only a supposedly expert agency could make — by evaluating the available empirical, economic literature and systematically distilling the accumulated experience of Board personnel and of the labor relations community generally — the Board acts as a kind of Article I "Talmudist" court, parcelling precedent, divining the true meaning of some Supreme Court ruling, balancing in some mysterious fashion competing, yet absolute-sounding values.

Id.

93. Id. at 896.
94. Id. at 897.
96. 269 N.L.R.B. 1176 (1984), aff'd, 760 F.2d 1006 (1985). The "emphasis on what may well be idiosyncratic specific facts diverts the agency's attention from the broad policy implications of the rule under consideration." R. Pierce, S. Shapiro & P.
union adherent. The Board used the occasion to reverse a rule which a prior Board had announced in *P.P.G. Industries.* Not surprisingly, the *P.P.G.* Board had been equally guilty of failing to spell out its findings and rationale. The Board in *P.P.G.*, relying on various prior decisions, concluded that an employer's inquiries about an employee's union sentiments, regardless of the fact that the employee had been open and active in his support of the union, reasonably tends to coerce employees in the exercise of their section 7 rights because it "conveys an employer's displeasure with an employee's union activity. . . ." The Board in *Rossmore House* adopted an entirely new rule to the effect that interrogation about union sentiments, whether of a known union adherent or any other employee, would be unlawful only if "under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with" section 7 rights. It also suggested in a footnote some of the factors which may be considered in analyzing alleged interrogations; but nowhere did the Board provide an explanation of why employer interrogation about union activity would not presumptively coerce, or at the very least interfere with, the employee's organizational rights, or why the employer would have any legitimate need or reason under ordinary circumstances to make the inquiry. Whether it was a Carter Board contemplating the *P.P.G.* rule or a Reagan Board contemplating the *Rossmore House* rule, APA rulemaking would have required the Board to receive and consider proffered empirical data and other input from the industrial relations community on the effects of employer interrogation during a union organizing campaign.

Another prime example of the need to articulate the reasoning behind a substantive rule and the inadequacy of the adjudicative process for that purpose may be found in the Board's recent quandary over the *Meyers* rule. The employee in the case had been dis-
charged from his employment as a truck driver because of his safety complaints and his refusal to drive an unsafe truck after reporting its unsafe condition to a state public safety agency. Inasmuch as no union was involved, the case raised the issue of the rule enunciated in *Alleluia Cushion Co.*, which would have treated such conduct as protected constructive concerted activity under section 7. The Reagan Board chose *Meyers* as its adjudicative vehicle to overturn the *Alleluia* rule; indeed, it went even further and announced a broad rule defining situations which were not covered by the *Meyers* facts. Oral argument and amici briefs were not invited, nor was the public informed of any proposed new rule, as would have been required under APA procedures.

On review of the Board's decision, the Court of Appeals for the District of Columbia Circuit remanded the case for further consideration. Judge Harry Edwards' majority opinion explained that the Board had erred in holding (1) that its construction of the rule was "mandated by the statute," (2) that the new rule imposed requirements in addition to that required for reversal of *Alleluia*, which was the only rationale the Board provided for its action, and (3) that the decision "contains not a word of justification for its new standard in terms of the policies of the statute." Following remand, the Board requested the parties to provide statements of position, but it did not appeal generally for public input, nor did it permit oral argument. The Board thus issued a new rule by the adjudicative process without benefit of any empirical data and with virtually no input from the persons and parties likely to be affected by the rule. The per-

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104. 221 N.L.R.B. 999 (1975).
105. *Meyers*, 268 N.L.R.B. at 496-97. The new rule announced in the case was as follows:

In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

*Id.* at 497. See *infra* note 108.


107. 281 N.L.R.B. No. 118, slip op. at 2 n.8. Even the discharged employee's counsel, that is, the NLRB General Counsel, had now abandoned his case, for the present General Counsel took the position that *Prill*'s protest was not protected concerted activity, therefore his discharge did not violate the statute. *General Counsel's Statement of Position on Remand* filed by General Counsel Rosemary Collyer in Case No. 7-CA-17207 (268 N.L.R.B. No. 73), Sept. 27, 1985; see also Lab. L. Rep. (CCH) No. 730, at 4 (Feb. 14, 1986). However, the Board did accept an amicus brief supporting the charging party's position. 281 N.L.R.B. No. 118, slip op. at 3 n.9.

108. In its decision following remand, 281 N.L.R.B. No. 118 (1986) (*Meyers II*), the Board succeeded both in expanding the original *Meyers* (*Meyers I*) concept of con-
sons who will be most affected will be nonunion employees who may engage in conduct, knowingly or unknowingly, that may get them discharged. Those are the persons for whom the core provisions of the statute were intended.

Employees, as well as their employers, need to know the rules which govern protected concerted activity by nonrepresented employees; for without that knowledge, such rules only invite entrapment for not only the outspoken but also for the unwary employee, who might get himself discharged, and for the employer, who might unknowingly commit an unfair labor practice by threatening or ordering an employee's discharge.

APA rulemaking would provide the Board with a means to ascertain what really happens in the workplace—not just what happened at the one establishment involved in the case. Rulemaking would also provide a means for the Board to receive informed and diverse opinion on the subject, after which it would have an opportunity to consider relevant data and various points of view. The end product should be a rule for which the Board is able to provide an adequate rationale, as the District of Columbia Circuit Court of Appeals required in its Meyers remand.

certed activity for mutual aid or protection and in compounding the confusion surrounding the meaning of that rule; for it stated that it was adhering to the definition of concerted activity set forth in Meyers I, but it also redefined the meaning and intent of the Meyers I rule. See supra note 105. The Meyers decisions are thus classic examples of the inadequacy of the adjudicative rulemaking process.

In Meyers II, by way of “clarification,” the Board, in effect, rewrote the Meyers I rule by adding the following glosses: “There is nothing in the Meyers I definition which states that conduct engaged in by a single employee at one point in time can never constitute concerted activity within the meaning of Section 7.” Meyers II, 281 N.L.R.B. No. 118, slip op. at 11. “When the record evidence demonstrates group activities, whether ‘specifically authorized’ in a formal agency sense, or otherwise, we shall find the conduct to be concerted.” Id. at 13. “[O]ur definition of concerted activity in Meyers I encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” Id. at 15. “[I]ndividual activity ‘looking toward group action’ is deemed concerted.” Id. at 16 (quoting Ontario Knife Co. v. NLRB, 637 F.2d 840, 844-45 (2d Cir. 1980)).

The foregoing changes in the Meyers rule (coupled with changes in Board membership) were so significant that the Board's subsequent decision in Every Woman's Place, Inc., 282 N.L.R.B. No. 48 (1986), Chairman Dotson, dissenting, suggests that if Prill's case were now being decided under the Meyers II construction of Meyers I, Prill would be reinstated to employment because he had discussed safety problems with other employees, see Prill, 755 F.2d at 943, and because another employee who drove Prill's truck told the supervisor in Prill's presence that he would not drive it again until it was repaired. Id. Thus, Prill's report of safety problems to state authorities would seem to have been "sufficiently linked to group activity to constitute concerted activity," as was the case in Every Woman's Place, 282 N.L.R.B. No. 48, slip op. at 2.
4. Rulemaking reduces litigation. Development of doctrine through the adjudicative process emphasizes fact-oriented decision-making and encourages parties to take risks and test the outer limits of the law. It thus provides minimal incentive for voluntary compliance and settlement. Looking back on half a century of the adjudicative process in action, it truly can be said that adjudication begets adjudication. On the other hand, rulemaking can provide a greater measure of stability and uniformity. Yet, rulemaking need not be synonymous with rigidity. As Merton Bernstein noted seventeen years ago in his seminal article on NLRB rulemaking, "the rigors of rule making uniformity can be ameliorated by interpretation in adjudication, while the mere existence of a rule will forestall many potential cases or provide the basis for summary disposition of many others."\textsuperscript{110}

5. Rulemaking uses agency resources more efficiently. With the Board’s overcrowded docket and the lengthy delays which characterize most “C” cases and many “R” cases, the Board should welcome rulemaking as a means to expedite the case-handling process. The wheel need not be reinvented in every case, yet the Board stands helpless while the same types of unfair labor practice situations move repetitively and slowly through the decisional process.\textsuperscript{110} Clear substantive rules would allow many of those cases to be handled summarily. And for “R” cases, one cannot seriously dispute the fact that almost all bargaining unit determinations could be reduced to specific rules.\textsuperscript{111} If that were to happen, the need for contested on-the-record hearings would vanish in most “R” cases. Again, it should be noted that in exceptional cases the Board would not be bound by the straight-jacket of inflexible rules, for the agency is empowered both to interpret rules and to make exceptions to rules whenever warranted by significant factual differences.

6. Effect on appellate review. Rulemaking should improve the Board’s appellate image. Doctrinal changes backed by adequate data

\textsuperscript{109} Bernstein, \textit{supra} note 80, at 592.

\textsuperscript{110} See 27-48 NLRB ANN. REP., \textit{supra} note 53, app. table 2. Professors Pierce, Shapiro and Verkuil conclude that determining broad rules through adjudication is grossly inefficient:

First, when formal adjudication is used as a means of exploring the many effects of a proposed rule, a single proceeding can be very expensive and time-consuming. . . . Second, the expensive process of formal adjudication may have to be repeated in subsequent cases. . . . Third, rules of conduct extracted from an adjudication tend to be considerably less clear in scope and content than rules that result from rulemaking.

R. Pierce, S. Shapiro & P. Verkuil, \textit{supra} note 80, at 283-84.

derived from broad public input, accompanied by a well reasoned statement of the basis for the rule, would provide the courts with evidence of genuine agency expertise to which they should be more likely to defer. Furthermore, the existence of an APA-promulgated rule would tend to focus the reviewing process upon policy and statutory interpretation rather than upon the facts peculiar to the individual cases. If the Board commands greater respect in the courts, then it also may command greater respect in the industrial relations community which it was created to serve.

7. The prevention factor. Rulemaking would allow the Board to emphasize the prevention of unfair labor practices rather than merely the remedying of violations. For one to comply with the law voluntarily, one first needs to know what the law requires. Rulemaking permits the Board to react swiftly to a perceived need without having to rely on delay and haphazard chance to produce the rulemaking opportunity. As Professor Bernstein observed, "[r]ule making provides the agency with the opportunity to initiate changes in its own doctrine, whereas adjudication leaves the initiative to the few private parties who have the resources, the hardheadedness, or the innocence to persevere in the litigation process."118

8. Rulemaking provides a more suitable medium for articulation of reasoning behind rules. Reliance on rulemaking as the vehicle of major shifts in policy provides a more appropriate medium for the agency to justify its action. The APA specifies that the agency shall incorporate in the rule "a concise general statement of [its] basis and purpose."114 Aside from the obvious utility of this requirement from the standpoint of the users of the rule, this "basis and purpose" statement also may be essential to the process of judicial review. The District of Columbia Circuit Court of Appeals noted in Portland Cement Ass'n v. Ruckelshaus: "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inad-
quate data, or on data that . . . is known only to the agency." It is obviously much easier to change a rule by adjudication than by notice-and-comment rulemaking. But rulemaking would at least encourage and possibly require the Board to explain, with reference to the intent of the law but without reference to the facts of a specific case, why a particular policy shift is needed.

9. **Rulemaking assists the Congress in its oversight responsibilities.** If Congress should disagree with a substantive action of the Board, the offensive rule can be identified with precision and changed by specific legislative amendment if it is deemed contrary to contemporary congressional intent. This "watchdog potential" in rulemaking may serve to keep an agency aware that Congress is watching; the existence of specific APA rules also may make it easier to change the law without butchering the entire statute.

10. **The General Counsel factor.** Two features relating to the peculiar role of the General Counsel under the NLRA tend to inhibit the Board's capacity for fully effective rulemaking when it exclusively utilizes the adjudicative process. Unlike other federal agencies, the Labor Board and its General Counsel are separate entities, and the General Counsel's discretion to refuse to issue a complaint is unreviewable. These factors make it virtually impossible, or at least awkward, for the Board to initiate doctrinal changes that are likely to result in the imposition of substantial monetary liability. A good example of this is the Mackay "rule" increasingly used by many companies to replace union employees with nonunion personnel, thereby divesting the incumbent union of its bargaining rights. This well-known rule recognizes the right of an employer to make permanent replacements of striking employees during an economic strike. This rule was never actually "promulgated" by the Board.


either in an adjudicated case or through APA rulemaking; it was derived from language in dictum\textsuperscript{120} contained in the Supreme Court's 1938 decision in the \textit{Mackay} case. The Board never enunciated a formal reason for the rule, nor did it ever explain why permanent replacements, as distinguished from temporary replacements, are always essential to the employer's operation of its business during a strike.\textsuperscript{121} Even if the Board wanted to change the \textit{Mackay} rule, under an adjudicative rulemaking system it would be difficult if not impossible to do so. If a charge were filed alleging that an employer had violated section 8(a)(3) by permanently replacing strikers, thereby causing permanent economic damage to the union members and destruction of the bargaining relation, the General Counsel would be expected to dismiss such a charge and the Board would not have the opportunity to rethink the rule. Indeed, even if the General Counsel should choose to initiate a change in the rule by issuing a complaint, the potential backpay liability which the employer would face would be so great that the Board's retroactive imposition of the rule change would probably represent an abuse of administrative discretion and a violation of due process, such as the Supreme Court had in mind in its \textit{Bell Aerospace} caveat.\textsuperscript{122} But if the rule change were not made retroactively applicable in the subject case, what happens to the rights of the displaced employees and the union that has lost its majority? The only reasonable answer to this quandary — and the quandary also could apply to any other contemplated rule change which would impose more restrictive penalties than presently

\textsuperscript{120.} \textit{Id.} at 614.

\textsuperscript{121.} In 1967 the Supreme Court issued its decision in \textit{NLRB v. Great Dane Trailers, Inc.}, 388 U.S. 26 (1967), which stated that "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights," despite evidence of legitimate business motivation and the absence of proof of anti-union motivation, the employer could be found in violation of sections 8(a)(1) and 8(a)(3). \textit{Id.} at 34. In view of the "inherently destructive" impact of permanent replacements on unionized employees and the collective bargaining process, a strong case can be made that an employer should be required to prove that it cannot operate its struck business with temporary replacements before it could legally justify the hiring of permanent replacements during a strike. The Board in fact does require that only temporary replacements be used during offensive lockouts. \textit{See Inland Trucking Co. v. NLRB}, 440 F.2d 562 (7th Cir.), \textit{cert. denied}, 404 U.S. 858 (1971); Intercollegiate Press v. NLRB, 486 F.2d 837 (8th Cir. 1973), \textit{cert. denied sub nom}. Bookbinders Local 60 v. NLRB, 416 U.S. 938 (1974); \textit{cf.} Johns-Manville Prods. Corp., 223 N.L.R.B. 1317 (1976), \textit{enforcement denied}, 557 F.2d 1126, (5th Cir. 1977), \textit{cert. denied sub nom}. Oil Workers v. NLRB, 436 U.S. 956 (1978). During a period of high unemployment it is especially likely that ample numbers of job applicants would accept temporary employment. \textit{Cf.} Hansen Bros. Enters., 279 N.L.R.B. No. 98 (1986).

\textsuperscript{122.} \textit{See supra} text accompanying notes 82-84.
exist — is rulemaking in accordance with APA procedures. The proper way would be for the Board to announce in advance its proposed rule change, and thereafter it would receive, through notice-and-comment procedures, empirical data and opinion from the various constituencies who would be affected by the proposed rule.128

11. Information factor. The information factor in rulemaking is of special importance to an agency whose primary coverage extends to millions of individual employees with levels of education and sophistication that range from illiterate, unskilled, and naive at one end of the spectrum, to highly educated, professional, and astute at the other. Adequate dissemination of substantive rules to persons whose employment can be affected by those rules is a critical but missing element in the task of the NLRB. The following sampling of suggested rules contains many illustrations of the function and importance of rules as conveyors of essential legal information.

a. Posting a general notice of the Act's basic requirements (in English and other appropriate languages). Such a rule should be posted on employee and union members’ bulletin boards by all employers and unions subject to the Board’s jurisdiction. Why has the Board avoided taking this simple but important step toward informing employees of their rights under the Act? Most employees do not know what the NLRB does or what the law requires. I suspect that, except for those persons who have had personal experience with collective bargaining or have been involved in a union election campaign, the overwhelming majority of adults in the United States — and an even greater number of employees affected by the NLRA — do not know what the NLRB does or that union organizational rights realistically can be protected. I also suspect that a surprisingly large number have never even heard of the NLRB. One incisive study of personnel policies in large nonunion companies124 revealed that a number of those companies maintain employee committees, plans, or grievance procedures which appear to qualify as labor organizations within the meaning of the NLRA.125 Many of those companies may be in violation of the section 8(a)(2) prohibition against employer support or domination of such entities. And most of the employees involved in those plans do not know what their legal rights

123. See supra notes 88-91 and accompanying text. For another example of the pernicious effect of the “General Counsel factor,” see Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1973), in which the Supreme Court, in the context of an antitrust action, promulgated a new rule under section 8(e) of the NLRA — the “hot cargo” provision — despite the fact that the Board had not previously passed on the rule, for the General Counsel had refused to issue a complaint when the charge was filed. Only thereafter did the charging party file his antitrust action in federal court. See 2 C. Morris, The Developing Labor Law 1231-34 (2d ed. 1983).
124. F. Foulkes, supra note 61.
are, and if they did, they probably would not know how to enforce them.

The same lack of information, with the same corresponding need, is characteristic of employees and prospective employees at almost every company where employees are not represented by a union. To put it bluntly, most employees do not believe that they cannot be fired or adversely affected if they engage in even the mildest and most "protected" forms of union activity. But not only do working employees need to know their rights and how to inquire about possible statutory violations or representation procedures, prospective employees — that is, job applicants — also need to know about their rights.

As Justice Frankfurter reminded us long ago in *Phelps Dodge Corp. v. NLRB*, 126 “discrimination in hiring is twin to discrimination in firing.” 127 A general posting of NLRA rights and procedures would help provide the needed information, for it is just as unlawful for a new automotive employer in Tennessee to deny employment to an experienced laid-off auto worker from Detroit on account of his union membership as it would be to fire an existing employee for the same reason. But without the benefit of a clearly posted rule to that effect to remind the job interviewer and the applicant, the *Phelps Dodge* rule will rarely be enforced.

Notices can be found on employee bulletin boards advising of rights under other federal laws, such as title VII, 128 the Fair Labor Standards Act, 129 and the Occupational Safety and Health Act. 130 A general NLRB notice should also contain an “800” telephone number for hot-line information, a service which some other federal agencies presently make available to the public. 131 It should not be difficult to reach the NLRB, but it is. 132 The Board certainly could do more to advertise its services — that is, if it really wanted to.

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126. 313 U.S. 177 (1940).
127. *Id.* at 187.
131. As an example, the Environmental Protection Agency maintains a “hot-line” number, 1-(800)-424-9346, for the reporting of hazardous waste occurrences.
132. For instance, in Dallas if an employee wanted to call the nearest NLRB regional office, a long distance call would be required. But even that would not be easy, for the telephone number would not be found in the local directory. In fact, the employee would have no convenient way of knowing that the regional office was in Fort Worth.
b. Organizational campaign rules. Organizational rules should be spelled out clearly, and then made available to employees, unions, and employer representatives, including supervisors. These rules presently exist in a plethora of decisions. Attorneys usually can find them, but not always quickly. Affected employees, however, may never learn about them until it is too late. Many of the present adjudicated rules are fact-oriented, such as the one discussed in Rossmore House, so that they do not really prevent unlawful conduct. Accordingly, the Board should promulgate clearly understandable rules relating to such subjects as campaign misrepresentation; access to the employer's premises by union organizers and employees (both on-duty and off-duty); solicitation and distribution of union authorizations and literature; interrogation and polling as to employees' union sentiments or activity; permissible activity by employers, including supervisors; and, prohibitions relating to union promises and grants of benefits.

c. Engaging in concerted activity for "mutual aid or protection." These rules are particularly important for employees in nonunion establishments, for such persons ordinarily will not have access to a union as a source of information. And Weingarten rules also should be made available to employees directly because they must be invoked by the employee involved, not by the employee's union.

d. Defining labor organizations under section 2(5) of the NLRA and rules relating to employer domination, support, and assistance to labor organizations under section 8(a)(2). As previously noted,

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141. Id.; see also 1 C. Morris, THE DEVELOPING LABOR LAW 149-56 (2d ed. 1983).
these rules are especially important in nonunion establishments.\textsuperscript{142} And rules relating to lawful recognition of labor organizations, derived from the Supreme Court’s decision in \textit{International Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altmann)},\textsuperscript{143} also should be promulgated and made widely available, thereby advising employees and employers how they can lawfully achieve recognition of an employee plan, committee, or other labor organization.

e. Employees’ Rights. Rules should be posted regarding union representation, including the union’s duty of fair representation,\textsuperscript{144} rights regarding union security,\textsuperscript{145} check-off of union dues,\textsuperscript{146} hiring halls,\textsuperscript{147} and rights concerning resignations from union membership in relation to strikes.\textsuperscript{148} All of these rules relate to day-to-day conduct at unionized establishments and at union halls and offices. Clear notice of such rules would facilitate compliance with their requirements and thereby reduce the level of contested litigation.

f. Defining appropriate bargaining units. A comprehensive set of rules to define appropriate bargaining units should be established. The existence of such rules would greatly assist in speeding up the representation and election process.\textsuperscript{149}

The foregoing list is not intended to be complete, but it is especially illustrative of those rules for which the information factor is important. For the most part, these are rules which employees and employers need to know regardless of the availability of lawyers. The NLRA has become too much the exclusive domain of lawyers. Lawyers always should have and always will have an important role to play in the administration and enforcement of this Act, but they should not dominate the stage. The promulgation and dissemination

\textsuperscript{142} See supra notes 124-32 and accompanying text.
\textsuperscript{143} 366 U.S. 731 (1961).
\textsuperscript{144} See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Truck Drivers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967); Local Union No. 12 Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1967).
\textsuperscript{145} See, e.g., Teamsters Local 46 (Port Distributing Corp.), 236 N.L.R.B. 1175 (1978); Plasterers Local 32, 223 N.L.R.B. 486 (1976).
\textsuperscript{147} International Bhd. of Teamsters, Local 357 v. NLRB, 365 U.S. 667 (1961); Asbestos Workers, Local 80, 270 N.L.R.B. No. 171 (1984).
\textsuperscript{148} Pattern Makers’ League v. NLRB, 105 S. Ct. 3064 (1985).
\textsuperscript{149} See S. REP. No. 628, 95th Cong., 2d Sess. 18-20 (1978) (reference to rulemaking for unit determination in legislative history of the Labor Reform Bill of 1978); St. Francis Hospital, 271 N.L.R.B. 948, 954-55, 958 (1984) (favorable discussion in the concurring opinion of Member Dennis and the dissenting opinion of Member Zimmerman); see also NLRB v. Hillview Health Care Center, 705 F.2d 1461, 1466 (7th Cir. 1983). See supra note 110.
of clear substantive rules would help to return the Act to the primary players, that is, employees, employers, and union representatives.

**Streamlining of “R” case procedures**

The representation and election process can be expedited by the use of two interrelated devices: (1) rulemaking, particularly rules defining appropriate bargaining units, as noted above; and (2) show cause or summary judgment hearings. The NLRA does not specify the nature of the hearing required by section 9(c)(1)(B) except that it must be “appropriate.” There is no requirement that a full hearing be held regardless of the existence of bona fide contested issues.150 “Show cause” and “summary judgment” procedures, especially when coupled with rules relating to bargaining units, could reduce substantially the incidence of “live” on-the-record hearings.151 Other agencies have enjoyed outstanding success in using written submissions in routine cases;152 the Board could use similar procedures in most “R” cases.

**Making Discovery Available**

Interrogatories, depositions, prehearing subpoenas, and other discovery devices, when used under proper supervision, could facilitate the enforcement process. The unreviewable discretion of the General Counsel to issue complaints and dismiss unfair labor practice charges can be justified under strict due process standards153 only if all reasonable efforts are made, or made available, for gathering evidence relating to a charge filed in good faith. It is indeed strange for a law enforcement agency to operate with a self-imposed handicap such as the Board’s limitation on compulsory discovery process. The greater the likelihood of law violators being prosecuted (which in NLRB parlance of course means having a complaint issued), the less the incentive for violations to occur. Discovery can be a means to ferret out evidence that the charging party or regional attorney has reason to believe is there but is unobtainable without compulsory

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150. *Cf.* United States Lines, Inc. v. Federal Maritime Comm’n, 584 F.2d 519 (D.C. Cir. 1978). Judge Skelly Wright opined that “[t]he requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama.” *Id.* at 537 (quoting Marine Space Enclosures, Inc. v. FMC, 420 F.2d 577, 589 (1969)).


process.

Discovery will also facilitate the settlement of cases. A high settlement rate is consistent with vigorous enforcement of the Act, but only if the achieved settlements produce remedies and compliance consistent with the Act’s objectives. This requires a realistic appraisal of available evidence by both sides. Discovery can lead not only to settlement but also to shorter hearings. Both results are desirable.

The often expressed fear that employees will be intimidated through depositions is groundless. Discovery can be controlled and protected, and witnesses who testify in depositions are more visible and thus less likely to be targets of discrimination because of their visibility. Discovery should not be granted without restrictions, however, for discovery indeed can be abused. The process can be regulated and protected by requiring a showing of reasonable need for the discovery device sought. Administrative Law Judges are the logical persons to provide such oversight and protection.

Increasing the Use of Section 10(j) Injunctions, Especially in Discharge Cases

The Taft-Hartley Congress was mindful of the Board’s need for speedy injunctive relief for “all types of unfair labor practices,” not just for secondary activity for which section 10(l) mandatory injunctions were provided. Section 10(j) therefore was written into the Act to provide interim relief pending final Board action. It was contained in the original Senate Committee bill for which the Committee Report noted that “the Board need not wait, if the circumstances call for [injunctive] relief, until it has held a hearing [and] issued its order. . . .” Nevertheless, 10(j) injunctions were

155. See infra text accompanying note 170.
little used during the early Taft-Hartley years, but their use gradually increased, and their record of success has been outstanding.\textsuperscript{160} The 10(j) device received its strongest boost from General Counsel John Irving in his 1979 memorandum report\textsuperscript{161} on section 10(j) utilization, which still provides the basic guidelines for these actions. Irving appraised the device as follows:

I strongly believe that Section 10(j) is an important tool for accomplishing the remedial purposes of the Act. The timely use of such injunction proceedings in appropriate circumstances permits maintenance of the status quo ante to assure that the Board's final order, when entered, will not be a nullity. It provides a means for assuring that the remedial purposes of the Act will not be frustrated by the delays inherent in the statutory framework for litigation.\textsuperscript{162}

That report provided a statistical analysis which demonstrated how useful and successful the device could be. It examined 175 cases in which petitions for injunctions had been filed. Of the 175 cases, the objectives of the 10(j) proceedings were accomplished in whole or in substantial part in 142 cases, or eighty-one percent. Of these 142 cases, eighty-two were concluded with a settlement of the 10(j) aspects of the case (and in the great majority of these, the underlying Board case was also settled).\textsuperscript{168} In the other sixty cases, an injunction was obtained, albeit in some instances the court did not grant the full extent of affirmative relief sought by the Board.\textsuperscript{164} General Counsel Irving noted that what was most striking about those statistics was "the high settlement rate,"\textsuperscript{168} for in all of those cases the respondent previously had shunned the Region's efforts to obtain a settlement.

Although the Board filed seventy-three section 10(j) actions in the district courts in 1979, many more, even hundreds more, could have been filed. This is not a criticism of Irving's 10(j) stewardship; on the contrary, he deserves commendation because he demonstrated what could be done with this versatile remedial device. But even more can be done.

10(j) injunctions should be used almost routinely in discharge cases, particularly when the discharge occurs in the context of an organizational campaign. This would not flood the courts. Instead, once it has been demonstrated that the remedy is available and likely to be used, an employer will perceive no advantage in discharging


\textsuperscript{161} See Irving, supra note 160.

\textsuperscript{162} Id. at 1.

\textsuperscript{163} Id. at 4 n.3.

\textsuperscript{164} Id. at 4.

\textsuperscript{165} Id. at 5.
union activists. In fact, the judicially enforced return of such an employee prior to an election would be counterproductive to the employer's campaign. The 10(j) injunction is thus an important preventive measure. But even after the injunction complaint is filed in court, experience demonstrates that the case is as likely to settle as it is to go to trial. And experience under the Railway Labor Act, where injunctions against section 8(a)(3) type conduct presently are available, suggests that such availability of quick judicial process tends to discourage illegal discharges.

The potential of section 10(j) has hardly been touched. It can be used against any kind of unfair labor practice, both against unions and against employers, as well as whenever the Board's ordinary remedy is too late or otherwise inadequate. The Third Circuit Court of Appeals in Eisenberg ex rel. NLRB v. Wellington Hall Nursing Home recognized the importance of this temporary injunctive remedy: "When the Board files an application for [10(j)] relief it is not acting on behalf of individual employees but in the public interest . . . . That interest is the integrity of the collective bargaining process."

The statute requires that 10(j) injunctions be authorized by the Board. Thus, the General Counsel first must request the authorization, and if and when it is granted (and it almost always is granted), the General Counsel proceeds to file the action in court. The present loosely-structured procedure is awkward, but such awkwardness is only the product of the long-time failure of the Board and General Counsel to make a combined effort to streamline the process. 10(j) cases could move almost as fast as 10(l) cases, provided the Board and the General Counsel want to achieve that result.

The streamlined 10(j) process should begin with the filing of the charge. The printed charge form itself should make preliminary inquiry as to the need for rapid and temporary relief. And with a

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168. Id. at 907 n.4. It is true that some courts have strictly required the Board to show "with reasonable probability from circumstances of the case that the remedial purpose of the Act would be frustrated unless immediate action is taken." Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265 (8th Cir. 1968). However, such a showing can easily be made in most discharge cases in view of the well documented history of what typically happens to discharged employees when they are reinstated many months, or even years, after the unlawful termination. Timing is a crucial variable in reinstatement cases.
quick screening process at the regional level, the General Counsel's recommendation to the Board could move rapidly. The case should also receive expedited treatment on the Board side. A rotating three-Member panel could be maintained on a stand-by basis at all times and thus be available to authorize filing the action without delay; and one Member, also designated on a rotating basis, could be primarily responsible for the 10(j) docket. The process could become routine and simple if the General Counsel's recommendations are prompt and adequate. These procedures would not be difficult and could be activated with amazing speed if the Board and General Counsel should decide to use this remedy to compensate for the sluggishness of the Board's ordinarily slow hearing and remedial processes.

Reorganization of Administrative Law Judge Operations

The Board is a court in its adjudication of unfair labor practices. It is as much a court as the United States Tax Court.170 Both are article I legislative courts, but the Tax Court is perceived as a court, whereas the Board is not. The long tenure of tax judges — fifteen years — certainly makes a difference; given the desire, however, the Board could act more like a court in many of its functions. It was not enough to change the title of "Trial Examiners" to "Administrative Law Judges." They also should function more like judges, at least to the extent allowed by the statute. Their judicial function could be improved if they were permitted to act more like court judges. Within the limits allowed by the statute, the following recommendations are designed to assist in their achieving that status.

(1) The Administrative Law Judges (ALJs) should be geographically decentralized. This decentralization should be part of an integrated scheme of enforcement. Although individual ALJs should be subject to both temporary and permanent geographical transfer to meet the needs of the agency's docket, for the most part they should be conveniently located in major metropolitan cities where the parties, that is, their attorneys, will have access to them, to their chambers, and to their courtrooms.

(2) As soon as a complaint issues, the case should be assigned to a designated ALJ. That assignment might be changed later if necessary, but to the extent possible the same ALJ should handle every motion and ruling that has to be made on the assigned case until that case reaches the Board.

(3) Pre-trial conferences, discovery motions, summary judgment motions (including partial summary judgments) should be entertained and encouraged. The parties should know they are in a

“court” in which a real, live judge is available to hear their claims.

(4) The ALJ should also be an additional conduit for section 10(j) injunctive relief. Should it become apparent to the assigned ALJ, by appropriate motion, that facts exist which require temporary judicial restraint, the judge should make such recommendation to the Board, either in an interim order or as part of the ALJ decision. The Board should give such a recommendation considerable deference, for it comes from the very person who, at that stage of the proceeding, is in the best position to make an objective assessment of the need for extraordinary remedial action.

**Ordering Damage-Specific Final Remedies**

Ironically, the familiar “affirmative action” concept originated with the NLRA, which was subsequently the source of similar language in title VII of the Civil Rights Act of 1964.171 But in the hands of federal district judges, the affirmative action concept was used imaginatively and effectively to make title VII the law of the land for which there developed substantial voluntary compliance — something which has never been true of the NLRA. It is indeed late, but it will never get any earlier, so the Board should now go forward and order more effective “make whole” remedies. As long as such remedies reasonably restore the status quo ante and are accompanied by sufficient rationale, they should be able to pass judicial muster and not be reversed for being either punitive or in violation of section 8(d).172 Here are some suggested examples of damage-specific remedies:

(1) Section 8(a)(5) orders that relate to every item of unilateral activity affecting mandatory subjects of bargaining. This remedy, to


be fully effective, should be coupled with a rule which clearly puts bargaining parties on notice that once a labor organization has been established as bargaining agent, every action of the employer relating to mandatory subjects, including discipline, discharges, layoffs, promotions, and of course merit wage increases, must be negotiated to impasse with the bargaining agent. Although a union could conditionally waive its negotiation rights as to individual and ad hoc situations pending agreement on an entire collective bargaining contract, it also could withdraw that waiver whenever it felt that bargaining on the contract was not progressing satisfactorily. In the event of a section 8(a)(5) violation, the Board, similar to its approach in Trading Port,173 should seek to remedy each situation in which the employer has acted unilaterally, even if that requires nullifying some promotions, demotions, wage changes, or other actions involving conditions of employment, including layoffs and discharges, at least when the Board can determine that they were not made for “cause.” The Board’s process should not be looked upon as a game with certifications and cease-and-desist orders being viewed merely as separate rounds in the sport of “industrial-relations combat.” The duty to bargain should be made to be what it was intended to be — a duty.

(2) Interest on back pay awards should be based on what it would have cost the dischargee to borrow the money lost as a result of the unlawful termination. Consumer-loan rates have been rarely lower than sixteen percent and often as high as twenty-one percent. For some employers, it might no longer be cost effective to discharge employees to discourage pro-union sentiment.

(3) “Frivolous defense” reimbursement for attorneys fees, organizational expenses, and dues174 should be ordered more often. This remedy should be based upon an examination of all of the respondent’s defenses, and if one or only a few of a larger number of mostly frivolous defenses is debatable, the stronger reimbursement remedy should apply.175

(4) Other examples. What is required is a matching of the offense with the harm which it has caused: the remedy selected should be a solution consistent with the objectives of the NLRA. One example of a missed opportunity was the Board majority’s failure to adopt Member Walther’s remedy in Atlas Tack Corp.,176 where the em-

175. See Teamsters Local 705 (Gasoline Retailers Ass’n of Metropolitan Chicago), 210 N.L.R.B. 210 (1974).
176. See Morris, supra note 171, at 667-80.
177. 226 N.L.R.B. 222 (1976); see also Morris, supra note 171, at 683-84.
ployer had reduced compensated time by unilaterally changing break and lunch periods and the length of the work day. Member Walther dissented from imposition of the traditional remedy of distributing the sum among past and present employees, proposing instead to treat the total amount of back pay as a fund over which the parties could negotiate at the bargaining table. He reasoned that “the highest possible priority must be given to restoring the union to its pre-unlawful conduct strength . . . [E]very effort must be made to create an environment in which it is economically advantageous for the employer to engage in meaningful collective bargaining.”

That type of analysis could be used effectively in many situations, so that “make whole” would become an attainable goal.

Section 10(e) and 10(f) Injunctions

The provisions in section 10 relating to enforcement and review of the Board’s final orders in a United States Court of Appeals contain authority for the court to issue “such injunctive relief or temporary restraining order as it deems just and proper.” Many courts of appeals are reluctant to grant such relief, primarily due to the Board’s own delayed process. Nevertheless, a strong and persistent effort should be made to use this injunctive power with some frequency; this may require the Board not only to speed up its own decisional process in general, but also to establish a specific hearing record in the subject cases showing the need for such relief. Partial remand to the ALJ who originally heard the case to make specific fact-findings regarding the need for special remedies may be appropriate. Also, separate hearings on the issue of appropriate remedy, conducted by the ALJ prior to the time the case goes to the Board, may sometimes be justified. The latter device would be another advantage of having the same ALJ in charge of the case from the day the complaint issues to the day the case is transferred to the Board on exceptions.

180. See, e.g., NLRB v. Aerovox Corp., 389 F.2d 475 (4th Cir. 1967). See Attachment C to NLRB Task Force Committee III from John S. Irving, General Counsel, regarding section 10(e) relief, in 1976 LAB. REL. Y.B. 378-81, in which the General Counsel stated: “Overcoming the reluctance of the courts to grant 10(e) relief would be a highly significant step in achieving the remedial purposes of the Act.” Id. at 381. That memorandum also noted, “if there is to be court acceptance of the 10(e) remedy, the problem of administrative delay must be alleviated.” Id. Unfortunately, the problem still exists.
WHERE DO WE GO FROM HERE?

The foregoing recommendations, which have focused upon procedures and remedies already in the statute, were based upon the premise that Congress intended the NLRA to be enforceable as to all its provisions and that the Act contains adequate means to achieve such enforcement. But how can the Board and the General Counsel be convinced to utilize those means? And how can a President in the appointment process be convinced to consistently appoint only highly qualified persons of judicial temperament, preferably nonpolitical appointees, so that there will be a mutual understanding and expectation that their mandate includes an intent to exercise the full statutory powers of the position? Let me hasten to add that over the years almost all of the appointees to the Board and to the office of General Counsel have been well qualified, but there was never any special expectation or implied mandate that they would enforce the Act with full vigor and imagination.

I am pessimistic about the Board's future. Indeed, the NLRB may never leave the dog house. But the Board is too important to the American political and economic system to be jettisoned without every reasonable effort being made to save it and use it. Given presidential desire and political courage, as well as either strong popular support or substantial consensus among leading figures in the industrial relations community, or if the majority of the Board and the General Counsel, acting with the independence which is supposed to characterize an independent federal agency, were similarly motivated to chart a new direction, then perhaps — just perhaps — the old Board might be able to learn to use some new tricks. It might become sufficiently depoliticized to achieve most of its true potential, or at least to make a beginning move in that direction. If this does not occur, then we should explore other alternatives.

Regardless of the direction taken, the National Labor Relations Act itself can be of inestimable value to the American industrial relations system and the economy it was intended to serve. Long-range economic objectives, particularly those relating to more equitable income distribution domestically and more successful industrial competition internationally, can benefit from a smoothly functioning industrial relations system, especially a system such as the one created by the NLRA, which is based upon principles of democracy and freedom of choice. The normative patterns which the NLRA was intended to foster can and should serve a vital role in moving this nation's economy toward attaining those long-range objectives.