The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath

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I. INTRODUCTION

At the advanced age of seventy, the National Labor Relations Act is in considerable trouble and is experiencing difficulty in retaining any semblance of viability. In a variety of fora and through different mechanisms, the pendulum has swung sharply against the policies contained in the Act’s preamble: the right of freedom of association and the promotion of the collective bargaining process.

In the late ’70s and again in the ’90s opportunities to reform the labor law and to address the basic problems of administrative delay and inadequate remedies were squandered and the proposals rejected.1 In the foreseeable future, absent a substantial shift in the political climate, Congress and the President will not only remain resistant to labor law reforms, but they will also facilitate discussions, proposals, and attempts to emasculate the Act even further.

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American Federation of Labor Organizations - Congress of Industrial Organizations (AFL-CIO) General Counsel Jonathan Hiatt and Craig Becker have illustrated in detail the doctrinal shifts undertaken by the National Labor Relations Board (NLRB) at the beginning of this new century; I shall not repeat them in any detail. In general, I subscribe to their views on this subject.

Hiatt and Becker's emphasis on the Board's Majestic Weaving decision is particularly important. This decision, as well as attempts to revive and amplify it, is particularly pernicious because it inhibits labor and management from voluntarily addressing a major hurdle to the spread of the collective bargaining process: the view that collective bargaining and flexibility in wages and working conditions are inherently incompatible.

One illustration of an approach which defied Majestic Weaving is the General Motors-Toyota joint venture and the agreement between that new entity created at Fremont, California—New United Motors Manufacturing (NUMMI)—and the United Auto Workers. There, the parties sounded out one another on the shape of the relationship before recognition so as to further the negotiation process. Once information was exchanged, positions were staked out and informal understanding could be reached prior to recognition itself. Circumventing Majestic Weaving was necessary to achieving this sensible result: good jobs and wages were promoted; employment security and competitive enterprise were obtained.

Inevitably, the pendulum shifts from one Board to another. The newest Board, composed exclusively of George W. Bush appointees ("Bush II Board"), has exhibited an unprecedented and indiscriminate one-sidedness in both its promotion of supposed employer interests and its subordination of the collective bargaining and freedom of association


policies at the heart of the Act. Three factors have been particularly important in furthering this trend: (1) the Board member appointment process; (2) the doctrinal shifts described by Hiatt and Becker; and, most importantly, (3) the breakdown in law enforcement due to the administrative backlog and quagmire in which the parties now find themselves—a phenomenon that is exceeded only by the work and record of the Reagan Board in the '80s. This third factor is the most significant of all, for it undercuts day-to-day regulatory administration which affects employees and employers far more profoundly than doctrinal shifts.

II.
THE NLRB IN THE 1990S

In the '90s, the Clinton Board acted as an impartial arbiter between labor and management. President Clinton appointed me as Chairman, with my thirty-year record as an impartial arbitrator of labor disputes, having decided in favor of management in nearly seventy percent of the cases that had come before me. While the politically-charged appointments process induced other members of the Board to function more like labor and management representatives—which is similar to the role given to Board members by statute in Japan, which has a similar system7—the Clinton Board’s approach was a balanced one, with different combinations of Board members moving back and forth across the statutory and ideological spectrum.8

As Professor G. Calvin Mackenzie has noted, the process of NLRB appointments—and, indeed, appointments of other administrative regulatory agencies as well—began to change in the '90s.9 Senator Nancy Kassebaum of Kansas had used the filibuster threat—a tactic now decried by Republican Senate Majority Leader William Frist—to further a process of “batching” of appointments.10 The '90s were not the first time that informal “packages” of nominees had been put forth. But as Professor Mathew Bodah noted, “for another example one has to go back more than fifty years to when Democrat Abe Murdock and Republican J. Copeland

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Gray were both appointed to the Board on August 1, 1947. That situation, however, was extraordinary: The Board had been expanded from three to five seats by the Taft-Hartley amendments.  

The changes in the '90s are well chronicled by Professor Mackenzie: [T]he tendency to select appointees to an agency as teams and to divide up control over the choices has become the norm in Washington. The Senate, in fact, often delays confirmation until several nominations to the same agency accumulate, thus allowing it to require that the president include some nominees who are effectively designated by powerful senators. This kind of batching of nominations rarely happened before the present decade. Even on the regulatory commissions, whose original statutes require that only a bare majority of appointees can be from any one party, a vacancy in an opposition party chair was usually filled by the president with an enrollee in the opposition party who supported the president. These appointments, common for most of this century, came to be known as "friendly Indians" and were routinely confirmed by the Senate even when it was controlled by the opposition party. But they allowed the incumbent president to control the appointment process and to shape the majorities on most regulatory commissions.

That is nearly impossible these days. The membership of the regulatory commissions has become little more than the sum of the set of disjointed political calculations. Concerns about fealty to leadership, effective teamwork, and intellectual or ideological coherence play almost no part in the selection of regulatory commissioners. The juggling of political interests dominates. That we as a nation often get inconsistent and incoherent regulatory policies should be no surprise to those who follow the shuffling and dealing that produces regulatory commissioners.

Nonetheless, subsequent to my confirmation in the teeth of hostile political winds, the Clinton Board undertook policies to expedite both representation and unfair labor practice proceedings, though Congress sought to obstruct the effective administration of the Act with all the resources available to both houses, particularly the House of Representatives. But even though an inordinate number of issues raised in some of the representation hearings appeared to contribute to the delay, it was a unanimous Board, for instance, which held that a hearing, in some form, is always required before an election takes place (unless the parties

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agree otherwise).15 A contrary ruling would have furthered the overriding policy of facilitating the prompt handling of cases. But the Board's view was that the statute required the above-noted holding. At the same time, the Clinton Board emphasized that a hearing officer's role in a representation proceeding is to ensure that a record is concise as well as complete.16 Strict adherence to the rule of law was followed whatever the political result of the decision.

In addition, the Clinton Board stressed new policies designed to save administrative costs and promote freedom of association by encouraging, for instance, postal ballot cases.17 Simplifying arcane doctrines was meant both to diminish litigation18 as well as to promote voluntary resolution procedures outside the Act itself.19 Monetary payments to voters in an NLRB election were prohibited.20

Of course, fundamental rights were enhanced during the Clinton years in cases other than those which have drawn the initial attention of the new Bush II Board. For instance, the Clinton Board protected unions' right to use the Fair Labor Standards Act of 1938, which provides for minimum wages and maximum hours,21 as well as other forms of protective labor legislation.22 Employee as well as employer free speech was promoted.23 E-mail messages concerning working conditions were declared to be protected and concerted activity.24 Collective bargaining obligations were fashioned subsequent to impasse in the bargaining relationship.25 And a

22. The court of appeals for the District of Columbia has refused to enforce Novotel, Freund Baking Co. v. NLRB, 165 F. 3d 928 (D.C. Cir. 1999), and, so far as I am aware, the Bush II Board has followed this decision. The reasoning of Novotel applies to employment legislation generally. See generally, Catherine L. Fisk, Union Lawyers and Employment Law, 23 BERKELEY J. EMP. & LAB. L 57 (2002).
trade union right to address unfair racial condition and racial harassment in the workplace was enhanced.26

But bargaining was a two-way street during the Clinton Board. Management was protected in its right to propose a seniority credit system which would cause “discomfort to the union and engender a sense of grievance and dissatisfaction amongst the incumbent employees . . .”27 A majority of the Clinton Board rejected the view that regressive bargaining constituted a violation of the Act.28 Rough-and-tumble tactics in the collective bargaining process by management were approved.29 The unanimous Clinton Board rejected the union argument that the employer had an obligation to provide a complaining customer’s name, address, and telephone number to the union as part of its grievance processing.30

The Clinton Board declared union disciplinary sanctions against dissident candidates unlawful.31 By 3-2, the Board enhanced secondary boycott prohibitions32 and yet immunized union conduct outside the statutes’ restrictions.33 Again, by a 3-to-2 vote, an employer was deemed to have lawfully withdrawn from a multi-employer association even though a list of employers presented to the union was lengthy and cumbersome.34 The parties’ own autonomous procedures were promoted in other contexts in multi-employer bargaining relationships.35 In a series of 3-2 cases decided coming in the wake of the Supreme Court’s 1992 opinion in Lechmere v. NLRB,36 the Clinton Board held that non-employee union organizers were properly denied access to private property where they were

26. Shepherd Tissue Inc., 326 N.L.R.B. 369 (1998) (Gould, Chairman, concurring at 369, approving a campaign handbill which included a statement by a discharged unit employee concerning a sexual harassment investigation that “black folk have been wrongly touched by whites for over 300 years” under the standards set forth by the Board in Sewell Mfg. Co., 138 N.L.R.B. 66 (1962)).
33. Manganaro Corp., 321 N.L.R.B. 158 (1996) (In which a Board Majority of Chairman Gould and Member Browning, over member Cohen’s dissent, held that an anti-dual-shop clause sought by the union had a primary objective and thus did not violate section 8(b)(4)(B) of the Act); see Indeck Energy Servs., 325 N.L.R.B. 1084 (1998).
trying to reach the public as well as employees. (In Lechmere organizers were trying to reach employees only.) At the same time, in a series of decisions involving whether employers had engaged in discrimination in the provision of access between different groups, the Board frequently found violations.

The overriding themes of the Clinton Board were principled decision making and balance. Standing in sharp contrast is the record of the Bush II Board during the past four years. This Board, chaired by a career management labor lawyer, has not exhibited any form of balance in its doctrines, a point to which the Hiatt-Becker paper testifies.

Yet the main difficulty with this new era is found in matters beyond its frequent doctrinal shifts. The main difficulty lies in the area of law enforcement. There, the Bush II Board’s record signals an even more alarming development.

III. LAW ENFORCEMENT

The Clinton Board attempted to address remedies in a number of ways. It provided unions with access to private property to which they were not normally entitled. The Board also obliged employers to pay both Board and union attorneys fees and double costs, as well as nationwide orders and postings at all of an employer’s facilities throughout the United States.


38. Riesbeck Food Mkt., Inc., 315 N.L.R.B. 940 (1994); petition for review granted and cross-petitions for enforcement denied, unpublished memorandum decision, 91 F.3d 132 (4th Cir. 1996); Dow Jones and Co., Inc., 318 N.L.R.B. 574 (1995). See Cleveland Real Estate Partners, 316 N.L.R.B. 158 (1995), enforcement denied, 95 F.3d 457 (6th Cir. 1996), where a Board panel of Members Stephens, Browning and Cohen found that the employer, a privately owned shopping center, violated 8(a)(1) by preventing nonemployee union handbillers from distributing handbills on its property urging customers not to shop at nonunion stores, because the employer knew and permitted other political and charitable groups to solicit and distribute on its property. In Four B Corp. d/b/a Price Chopper, 325 N.L.R.B. 186 (1997), a majority of the Board, consisting of Chairman Gould and Member Fox, held that an employer violated Section 8(a)(1) of the Act by refusing to allow nonemployee union organizers to contact employees on the employer’s property when it had allowed numerous other nonemployee organizations to solicit on the property, even if the nonunion organizations had solicited the employer’s customers and not its employees.


40. NLRB v. Unbelievable, Inc., 71 F.3d 1434 (9th Cir. 1995).

However, these procedures were of limited effect (sometimes rejected by the courts, sometimes rejected by Congress) and have fallen into disuse with the Bush II Board of the twenty-first century.

What is even more alarming, however, is the sharp decline in the use of section 10(j) of the Act, a critical element of the Clinton Board's labor policy. Section 10(j) allows the Board, in its discretion, to obtain injunctive relief against a wide variety of unfair labor practices committed by both employers and labor organizations, though the mandate given to the Board to seek injunctions in union unfair labor practice cases—at the regional level and without consultation with Washington—makes section 10(j) disproportionately applicable to employers. This is so because, while 10(l) is focused exclusively on unions, section 10(j) is the only provision aimed at employer unfair labor practices and most injunctions and injunction requests are aimed at employers. This provision is particularly valuable when the Board attempts to address statutory violations in the form of dismissals, discipline, and refusals to bargain where the passage of time will erode an effective remedy.

In the early 1990s, section 10(j) fell into disuse. In 1992, under the Bush I Board the number of section 10(j) authorizations had declined to twenty-six, the lowest since the Ford Administration in 1976.

In 1994, this trend reversed course when the Clinton Board authorized section 10(j) injunctions in eighty-three cases. In 1995, section 10(j) injunctions were utilized in 104 cases. This constituted the high water mark and the most frequent use of section 10(j) in the seventy-year history of the Act and the Board! Given the substantial delays involved in the numerous administrative layers of the American process, section 10(j) provides the Board with the ability to jump over the hurdles and issue an injunction, making this provision of the statute peculiarly vital. One of the most publicized and successful uses of section 10(j) took place in connection

order at all of a respondent employer's facilities. In Torrington Extend-A-Care Employee Association. v. NLRB, 17 F.3d 580 (2nd Cir. 1994), the United States Court of Appeals for the Second Circuit denied enforcement of the corporate-wide order in Beverly I. More recently, the Seventh Circuit held that the NLRB did not abuse its discretion in principle in imposing a corporate-wide remedy, but remanded to the Board to refine the corporate-wide aspects of the remedial order. Beverly Cal. Corp. v. NLRB, 227 F.3d 817 (7th Cir. 2000).


43. Gould, Labored Relations, supra note 6, at 133-34.

44. See generally Steven Greenhouse, Labor Board's Detractors See a Bias Against Workers, N.Y. TIMES, Jan. 2, 2005, at 12.

45. I have discussed the contrasting approaches in the mandated area from those which involve an exercise of discretionary authority in Teamsters Local No. 372 (Detroit Newspapers), 323 N.L.R.B. 278 (1997) (Gould, Chairman, concurring at 280).

with the 1994-95 baseball strike, which brought the strike to conclusion and resulted in the negotiation of the 1996 collective bargaining agreement.\textsuperscript{47}

Because Congressional pressure diminished the number of NLRB general counsel requests to authorize injunctions—and perhaps encouraged more law-abiding conduct from employers who feared NLRB litigation authorized by the Board—the numbers declined somewhat after 1995. In 1996 only fifty-three authorizations were provided;\textsuperscript{48} and General Counsel requests to authorize declined to fifty-nine.\textsuperscript{49} In 1997 and 1998 the number was fifty-three and forty-five respectively, while the number remained fairly constant after my departure from the Board in late 1998.

But in 2002, the first full year of the Bush II Board, the number was fourteen and it has been seventeen and fourteen in 2003 and 2004 respectively. The Bush II Board has made the Bush I era look like one of aggressive law enforcement.\textsuperscript{50}

Meanwhile, the number of cases coming before the Board has declined from 34,792 when the Clinton Board first came to the office in 1994 to 28,124 at the beginning of the Bush II Administration. This phenomenon may be due to union lethargy, an unwillingness, as well as inability, to recruit new members,\textsuperscript{51} the inherent difficulties in organizing under the statute, and a disillusionment with and boycott of the Bush II Board.

But while the number of cases is declining, the backlog is increasing. In 1995, the Clinton Board achieved the lowest backlog ever recorded in the more than three decades since the NLRB has been keeping records: 330! Nine hundred and thirty-five decisions were issued. Because of administrative lethargy, turnover at the Board, and reluctance of NLRB members to make decisions because of the fear of political consequences,\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{48} \textit{See} NLRB fiscal year summary provided to the author in 2004 (on file with author).
\item \textsuperscript{49} All data in this section is based on the \textit{Historical Fiscal Year Summary} prepared by NLRB Division of Information (on file with author).
\item \textsuperscript{50} For a comparison between the British and American statutory schemes \textit{see} Bogg, \textit{supra} note 4.
\item \textsuperscript{52} The political problems have been chronicled in LABORED \textit{RELATIONS}, \textit{supra} note 6, at 287-305. Again, Professor Mackenzie’s scholarship is important in revealing the difficulties posed for effective case handling in Democratic administrations by Congress. \textit{See} MACKENZIE, \textit{STARTING Over}, \textit{supra} note 10; MACKENZIE \\& SHOGAN, \textit{supra} note 10. This led me to advocate that NLRB members be limited to one term in office consisting of seven or eight years so that decisions and opinions could be issued promptly with less fear of political retaliation. With the changes which prompted this proposal came internal institutional tensions inside the NLRB which were a mirror image of the external political attacks upon the Board. The recent controversy relating to the Chairman of the Security and Exchange Commission seems to me to be similar to the controversy surrounding my attempt to obtain case
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that number more than doubled when I left office in 1998. But even in 1998 the number of cases produced was at 708. Now, with a declining caseload the backlog has stayed steady at nearly 600 cases and the number of decisions produced has been between 499 in 2002 and 576 in 2004. And though my Board held elections in more than 3,000 cases in 1994, that number has declined to 2,302 in 2004.

Thus the Bush II Board is doing considerably less in terms of case production, even with a substantially smaller number of cases, than was true of the Clinton Board in the mid-'90's. And, as noted, the use of section 10(j) has declined appreciably, even below the level of the Bush I Board which itself had set new records for inactivity. As the strain on Board resources has eased, the agency’s energy level has dissipated. The major victims in this process are both unions and employees who use the statute disproportionately for the purpose of obtaining protection in the employment relationship, recognition, and bargaining.

IV.
CONCLUSION

Persistent one-sidedness, lack of impartiality, and administrative lethargy has reached new levels. The prospects for law reform as well as adherence to the principal policies of the Act by the Bush II Board are nonexistent. Congress and the President have no interest in law reform, having fostered a Board which has produced the current labor law mess in Washington. Effective law enforcement as well as a balanced interpretation of the Act is a hope for the distant future. At best, it is a possibility in more than four years’ time and, in probability, at some point beyond 2009.

This is the reality of labor law in the United States today. It is not an encouraging one.

53. I have described some of these problems in William B. Gould IV, The Labor Board’s Ever-Deepening Somnolence: Some Reflections of a Former Chairman, 32 CREIGHTON L. REV. 1505 (1999). As Judge Noonan recently said: “No decisionmaking body is totally immune from the dilatory virus, and delay is sometimes the too human way of grappling with a thorny issue of policy. Nonetheless, the Board stands out as a federal administrative agency which has been rebuked before for what must strike anyone as a cavalier disdain for the hardships it is causing. We have on other occasions indicated that extraordinary delay of this kind will itself be reason to refuse to enforce an order of the Board.” Id. at 1519.