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Depoliticizing the National Labor Relations Board: Administrative Steps

Samuel Estreicher

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‘DEPOLITICIZING’ THE NATIONAL LABOR RELATIONS BOARD: ADMINISTRATIVE STEPS

*Samuel Estreicher**

ABSTRACT

Complaints about the political forces arrayed against the basic labor laws and about the increasing “politicization” of the National Labor Relations Board are hardy perennials. The charge remains a constant, only those who level it differ depending on which party is in the White House. On the assumption that legislative change is not in the offing, what can the Board on its own do to improve its reputation in Congress and in the courts and, at the same time, enhance its effectiveness as the essential government agency to protect workers in dealings with their employers?

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* Dwight D. Opperman Professor of Law & Director, Center for Labor and Employment Law, NYU School of Law. I appreciate the comments of several current members of the NLRB, as well of those of former chair Wilma Liebman and NLRB attorneys John Colwell and Joan Flynn. All persisting errors are my fault. Copyright© 2015 by Samuel Estreicher. All rights are reserved.

INTRODUCTION

I am using inverted commas in my title to assure the reader that I am not a naïve academic or, worse, a dithering idiot. The National Labor Relations Board (NLRB or Board) is the agency entrusted by Congress to enforce the National Labor Relations Act of 1935 (NLRA or Act). Politics have been an inescapable part of labor law. This has been the case from the day the NLRA was enacted, marking, as it did, the first significant government intrusion into private employer decisionmaking. It remains so to this day—reflecting ever-contested terrain between employees and their representatives and management. Although there are many areas for shared gains between labor and management, generally when the Board gets involved employees are seeking to organize a union or compel management to bargain with the union. At least in the short term, a win for employees or the union is a loss for management, and vice versa.

The Board, if it is doing its best to enforce its organic statute, will often be viewed by disappointed parties and their allies as “political” and by winning parties and their supporters as “effective” guardians of the law. Congress, on some level, intended a continuation of the political process within the NLRB¹ by establishing a multimember “independent” agency with the custom² of the President appointing three members from his political party and two from the opposition party, rather than relying on the courts for enforcement.

The charge of politicization contains a kernel of truth but is nearly always an overstatement. The members of the Board and the General Counsel, the other presidential appointee, are conscientious professionals aware of their distinct obligations in serving a public agency. Most cases involve relatively fact-specific applications of the Act by administrative law judges; these rulings stir little controversy and are summarily affirmed by three-member panels of the agency without dissent (and routinely enforced by the courts of appeals). It is with respect to a relatively small number of cases and certain agency initiatives, such as the promulgation of national rules, where the law is either unclear or reversal of the agency law is being sought, and where Board members are likely to be especially responsive to their pre-NLRB political or

¹ See Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53.

² See Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 709–11, 714–15 (2006).

ideological inclinations.³ It is this relatively narrow, yet important, sphere of the agency's work that triggers the politicization charge.

It is difficult to say whether the Board is more political now than it was during, say, the Reagan administration (when the agency triggered a great deal of such criticism).⁴ Today, the charge is leveled by Republicans and employer representatives; then, the charge was leveled by Democrats and union representatives. There is reason to believe, however, that whatever the underlying factual reality may be, the charge now poses a greater threat to the NLRB's future viability than it has in the past.

The perception of a "politicized" agency seems stronger than ever. This is due to many causes, several of which are beyond the Board's control or influence. One is the widening polarization of the political parties; there are very few, if any, Republican Senators or Representatives that, as a general matter, support the NLRA. NLRA adherents among their ranks have for some time been a dying species and are now, for all practical purposes, extinct. Alongside that development, and perhaps abetting it, is the almost complete alignment of organized labor with the fortunes of one political party, the Democrats.

A second factor is that most employers have no real stake in a vigorously enforced NLRA. Dealing with a union is a little bit like being struck by lightning. An increasingly small number of private employers have union-represented employees or realistically expect organizing drives in their future. Few such employers are clamoring for unionization to be extended to their competitors. Those affected by unionization efforts are intensely interested in stymieing the agency and are able, with the acquiescence of other companies, to urge the various trade associations to take a hard line in Congress and the courts against the Board.

As for labor unions, they, too, have a much weaker stake in the NLRA. Union unfair labor practices, introduced by the 1947 amendments to the Act,

³ Some members on occasion vote in politically unpredictable ways. See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1367–68 & 1408 tbl.2 (2000); Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 102–05 (2004).

⁴ The movement away from appointing career government types to the Board is said to have begun with the Eisenhower administration and accelerated during the Reagan years. See James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005); Flynn, *supra* note 3, at 1367–77.

are few in number because unions are less involved in traditional organizing campaigns involving labor picketing; preliminary injunctions against union violations these days are virtually unheard of. Instead, where organizing is occurring, unions tend to employ variants of the “corporate campaign” technique to wrest “neutrality and card check” agreements from target employers, thus bypassing NLRA processes altogether. If the unions have any interest in the Board, it is in enlisting the agency’s occasional assistance during bitterly fought collective bargaining disputes with employers or in advancing novel theories of employer responsibility to facilitate organizing.

One consequence of these factors is the impact on the pool of people that might be attracted to serve on the Board and how the Board’s work product is regarded by judges and other decisionmakers. Today, few in the labor and employee relations community, whether they are practitioners, academics, or even professional neutrals,⁵ likely to be considered for an appointment to the agency come without firmly established views on most of the issues in contention. These professionals take their job seriously and are open to the evidence and reasoned argument. But in the hard, politically tinged cases, they are not likely to depart from their prior conceptions. The decisions that issue in these hard cases are invariably seen, not entirely without cause, by the losing side as a product of political or ideological preferences.

Another consequence is that Board innovation increasingly incites enormous, cascading controversy. When the Board ventures into new areas where the NLRA has not previously been applied (not in itself problematic)—for example, considering “employee” status for college football players or adjunct faculty, or challenging “class action waiver” agreements in the nonunion sector as an interference with employee concerted activity—fuel is added to the fire. For the Board’s opponents in Congress and among allied trade associations, the choice is clear and unwavering: stop the agency in its tracks.

Does the Board’s reputation affect its record in the courts? There is no discernible effect with respect to the routine, fact-specific cases that are grist for the NLRA mill. If there is an effect, it is in hard-fought cases in the courts of appeals—especially, the District of Columbia Circuit, where the alternative

⁵ There are relatively few professional neutrals in the labor relations sphere who are “acceptable” to both unions and employers. Of these, it is doubtful any would leave a lucrative arbitration practice to serve on the Board, where one’s public voting record could complicate post-NLRB engagements.

venue provision steers many Board orders for review. And it is with regard to the agency's rulemaking efforts.

It may be that the time has come for a legislative fix, for a fundamental alteration of the statutory scheme. Republican Senators Lamar Alexander and Mitch McConnell have authored a bill that would expand the agency to six members, require that any decision receive the support of four members to be valid, and provide for immediate judicial review of NLRB General Counsel complaints.⁶ Professor Zev Eigen of Northwestern University School of Law and Sandro Garofalo of the Target Corporation have proposed transferring all adjudication of unfair labor practice complaints to the federal courts with the NLRB limited to holding elections and ruling on election objections.⁷ On February 23, 2015, fifty-two Republican senators approved a joint resolution, which soon thereafter passed the House in a largely partisan vote, disapproving of the NLRB regulation dealing with representation case procedure⁸ and declaring that “such rule shall have no force or effect.”⁹ Predictably, President Obama vetoed the measure; an override has not been attempted.

If past experience is any guide, these legislative seeds are not likely to bear fruit any time soon. It is very difficult to change laws under our federal system, and the NLRA, like Social Security, may be one of the “third rails” of U.S. politics.¹⁰

But these stirrings should help us bear in mind the political winds that could fundamentally change the NLRA. Should anyone care? In my view, the state of the agency should be a concern not just to its personnel but to those who support the essential guarantees of the Act—that employees should be free of employer retaliation to engage in concerted activity for their mutual aid or protection and to select collective bargaining agents. A vibrant Board is needed not so much for the high-visibility, controversial cases but for the

⁶ See Press Release, Lamar Alexander, Alexander Introduces “NLRB Reform Act” to Change the National Labor Relations Board from an Advocate to an Umpire (Sept. 16, 2014), available at <http://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=67fce1d6-ff3e-4d60-9d26-fe90444aba55>.

⁷ See Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879 (2014).

⁸ Representation—Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pt. 101-103).

⁹ See S.J. Res. 8, 114th Cong. (vetoed Mar. 31, 2015); 161 CONG. REC. H1782-88 (daily ed. Mar 19, 2015); see also Memorandum of Disapproval Regarding Legislation Concerning the National Labor Relations Board Rule on Representation Case Procedures, 2015 DAILY COMP. PRES. DOC. 216 (Mar. 31, 2015).

¹⁰ The merits of these proposals is not the focus of this paper. The Eigen-Garofalo article does warrant further consideration.

everyday holding of prompt elections, investigation of retaliatory discharge charges, and repair to the district courts for a preliminary injunction to reinstate workers discharged in the course of an organizing drive. If the Board's overall reputation suffers, or if Congress deprives the Board of its adjudicatory function, the only resort for workers will be litigation in the courts where, unless they are supported by a union, they will have to fend for themselves without counsel; and, moreover, the law will confusingly, and perhaps incoherently, develop district-by-district and lawsuit-by-lawsuit.

But there is a problem, at least in perception, and the Board should be open to improvements in how it conducts its business. I have a few suggestions, none of which require a statutory amendment, that I hope the Board and its General Counsel will consider. The underlying objectives behind these suggestions are (1) furthering the relative stability of Board law, (2) improving the quality of Board decisions by expanding the sources of information available to the agency, and (3) husbanding the political capital of the agency through prudential rules of abstention for disputes between parties in established collective-bargaining relationships.

I. FURTHERING THE RELATIVE STABILITY OF BOARD LAW

A. *Rule of Four for All Policy Reversals*

By internal agreement, the members of Board would bind themselves, at least on an annual basis, to a Rule of Four: all cases coming to them contemplating or requiring a reversal of a prior NLRB decision would be heard by all five members and would require a vote of at least four members to take effect.¹¹ I have previously argued for rulemaking for policy reversals.¹² The proposal offered here does not require rulemaking. It would send a message to all affected by the Board's work that the agency's general policy is to preserve the stability of Board law, that policy reversals will be more exceptional than has been the case, and that some bipartisan support will be required to overturn a prior decision.¹³

¹¹ This is similar in form to the "Rule of Three" the Board now follows for policy reversals.

¹² See Estreicher, *supra* note 1.

¹³ An alternative to the Rule of Four would be for the Board to agree to publish annually an Agenda of Issues of Board Law for Reconsideration, inviting commentary focused on particular issues, and then limit all policy reversals to issues that appear on that list, with perhaps an exception for issues arising in the course of adjudication that require a policy reversal and which four members are willing to vote for reversal.

B. *Statement of Special Justification for Policy Reversals*

Again, by internal agreement, the Board would require that any decision to overrule a prior decision spell out what new evidence has come to light or what changed circumstances have occurred justifying such an overruling. A mere change in the composition of the Board or a judgment that the first decision was simply wrong would not be a sufficient justification.¹⁴ This is in line with the Supreme Court's recent teaching in *FCC v. Fox Television Stations, Inc.*¹⁵:

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.¹⁶

II. IMPROVING THE QUALITY OF BOARD DECISIONMAKING BY ENHANCING THE RANGE OF INFORMATION AVAILABLE TO THE AGENCY

Despite the initial success of healthcare-bargaining unit rulemaking in the 1980s,¹⁷ and the Supreme Court's unanimous endorsement of the agency's

¹⁴ This statement-of-justification requirement would generally be enforced by the Members themselves informing how they vote on the proposed policy reversal. There may be cases where failure to provide such a justification may affect judicial review of the Board's order.

¹⁵ 556 U.S. 502 (2009).

¹⁶ *Id.* at 515–16 (citations omitted).

¹⁷ For an extensive overview of the Board's first substantive rulemaking, see Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991).

authority to engage in legislative rulemaking,¹⁸ the Board is wary of further rulemaking initiatives. Three setbacks have led to this attitude: the legislative reaction to the single-location bargaining unit initiative during the Clinton administration,¹⁹ the rejection by two courts of appeals of the agency's notice-posting rule,²⁰ and the still uncertain future of its representation-case procedure rulemaking. This record may encourage the agency to re-embrace case-by-case adjudication as the less visible, less politically charged route for new policymaking.²¹

The Board, in my view, should not abandon rulemaking but learn from experience and craft rules that do a better job of accommodating conflicting interests. The substantive objections of the courts should be taken into account. For example, to deal with the District of Columbia Circuit's criticism that the Board's notice-posting rule²² impermissibly infringed on the right of employers to be free from "compelled speech," the Board could relaunch a notice-posting rule that leaves out the fact-pattern illustrations and newfound, debatable remedial provisions in the rejected rule. It would then make the case that the Board has the requisite statutory authority and that there are no serious Section 8(c) difficulties with such a stripped-down notice posting.

There can be other situations where the Board might use a notice-and-comment procedure where the end result is not a rule but information that helps the Board consider important regulatory questions. I have suggested in previous writings²³ that the Board has authority, under an extension of the reasoning in *Excelsior Underwear Inc.*,²⁴ after a representation election has been scheduled to afford the petitioning labor organization access, with appropriate security measures, to certain nonworking areas of the

¹⁸ *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991).

¹⁹ Notice of Proposed Rulemaking, Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 60 Fed. Reg. 50,146 (Sept. 28, 1995), *withdrawn*, 63 Fed. Reg. 8890 (Feb. 23, 1998).

²⁰ See Chamber of Commerce of U.S. v. NLRB, 721 F.3d 152 (4th Cir. 2013); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013), *overruled in part on other grounds by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (overruling discussion of scope of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)).

²¹ See Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995).

²² Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011).

²³ See Samuel Estreicher, "Easy In, East Out": *A Future for U.S. Workplace Representation*, 98 MINN. L. REV. 1615, 1632–33 (2014); Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1 (2009).

²⁴ 156 N.L.R.B. 1236, 1239–40 (1966).

employer's facility, such as the break room and cafeteria, to discuss with employees the merits of voting for the union in the upcoming election. The statutory goal of an informed employee electorate would be advanced by such limited mandatory access. A notice-and-comment proceeding could be used to test reactions among practitioners and to learn in-depth the practical, logistical issues that bear on the question before the Board. Equipped with such information, whether the Board addresses the issue in adjudication or rulemaking, its decision is likely to be a better decision on the merits and is more likely to receive a favorable review in the courts.

Thought also should be given to revisiting the Gould Board's use of advisory committees of labor and management representatives. Such committees need not represent merely one side but could instead be "mixed" committees of labor, management, and academics.²⁵

III. HUSBANDING THE POLITICAL CAPITAL OF THE AGENCY THROUGH PRUDENTIAL RULES OF DEFERRAL/ABSTENTION FOR DISPUTES INVOLVING ESTABLISHED COLLECTIVE BARGAINING RELATIONSHIP

This is a proposal for a broadening of *Collyer*-type²⁶ deferral to arbitration: If the parties are in an established collective bargaining relationship and there is a good reason to believe that the parties' dispute, even if nominally over a statutory question, is capable of being resolved in the parties' agreed-upon arbitration process, the Board should stay its hand, reserving its jurisdiction for possible review of any award at the conclusion of the arbitration process. Thus, for example, a union's unfair labor practice charge against a company considering the transfer of unit work to another location should be deferred to arbitration to determine whether the company has contractual authority to transfer the work. Theoretically, resolution of the contractual issue via arbitration may not fully resolve the statutory question, whether it is a claimed failure to bargain in good faith or a claimed discriminatory work relocation,

²⁵ The Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. §§ 1-16 (2012)), sets up hurdles to creating such advisory committees, but they are not insurmountable. The Board should also consider using the procedures of the Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570a (2012), for certain recurring issues.

²⁶ See *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

but arbitration is likely to resolve many of the underlying factual issues and, as a practical matter, encourage the parties to resolve the underlying dispute.²⁷

This proposal would only apply to disputes where resolution of the contractual issue would be helpful. It would not apply to questions of individual employee rights independent of the duty-to-bargain rights/prerogatives of the bargaining representative.

Perhaps the Board could convene an advisory committee or negotiated rulemaking committee to consider possible extension of this *Collyer* approach to other disputes involving established bargaining relationships.

The basic idea here is that disputes in an established relationship are best left for the parties to resolve on their own and, at the end of the day, the Board will not and should not change the outcome of the bargaining. Additionally, the theoretical existence of a statutory question is not a good enough reason for the Board to get involved when there is reason to believe that the parties' agreed-upon arbitration process can resolve the dispute or is otherwise worth pursuing.

CONCLUSION

These are a few ideas to provoke discussion of ways the Board can improve its general reputation in Congress and the courts without compromising its core statutory responsibilities.

²⁷ This proposal is in some tension with the Board's recent 3–2 ruling in *Babcock & Wilcox Constr. Co.*, 361 N.L.R.B. No. 132, 2014 WL 7149039 (Dec. 15, 2014), which tightens up post-arbitral review by the agency but does not appear to change pre-arbitral deferral under *Collyer* and its progeny.