Is There a New National Labor Policy? The NLRB and the Courts - Views of a Neutral

Edith Baum
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THE NLRB AND THE COURTS—
VIEWS OF A NEUTRAL

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It is still too early to tell whether there is a new national labor policy because there has been little change since the advent of the Reagan Administration. Although many individuals believed that the election of Ronald Reagan, Republican control of the Senate, and the prior defeat of the Labor Reform Act meant a change in national labor policy, there has not been any legislation involving national labor considerations. The only change has been an effort by organized labor and its supporters in Congress to prevent any attempt to weaken or eliminate important legislative protections. Consequently, it will be some time before we can foresee the possibility of a new national labor policy.

The development of labor policy involves the National Labor Relations Board, the Circuit Courts, and the Supreme Court. Disagreements between the Board and the Circuits, or among the

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1. The text of this paper was prepared in June 1982. At that time President Reagan had nominated John Van de Water as his choice for Chairman, and had also appointed Robert Hunter to fill an additional vacancy. It was expected that the Senate would confirm the Van de Water appointment as part of a compromise which would include the reappointment of Member Fanning, the most pro-labor member of the current Board.

However, the opposition that organized labor and its supporters in Congress mounted against Van de Water because of his prior experience as a management consultant was underestimated. This opposition forced the President to withdraw his nomination and replace him with Donald Dotson, currently Assistant Secretary of Labor for Labor-Management Relations. Dotson is a Republican who began his career with the NLRB and also served as labor counsel to a number of corporations. Dotson, if confirmed by the Senate, will be expected to join Member Hunter as the two strongest management votes on the current Board.

Further, Member Fanning was not appointed to another term. For this vacancy, the President has nominated Patricia Dennis, a Democrat, who is an attorney with the American Broadcasting Company. The appointment of Dennis and Dotson will provide the Republicans with three seats on the current Board—Dotson, Hunter and Jenkins. However, the philosophical composition of the Board may be similar to the one which included Chairman Van de Water and Member Fanning. Chairman Dotson, if confirmed, and Member Hunter can be expected to support the management views while Jenkins and Dennis can be expected to support the views of organized labor. Member Zimmerman, a former Democrat, will probably follow his previous views and vote with other Democratic and pro labor Board members.

Circuits, lead to situations where the Board follows a policy contrary to some of the Circuits. On occasion, the Supreme Court has adopted the Board’s position.3 In the last few years, there have been volumes of criticism of the Board from the viewpoint of management representatives.4 However, there has been little criticism of the NLRB and court decisions from supporters of organized labor. There may be some need to balance the recent past policies of the Board. Whether the present Board chooses to do so is speculative, but probable. It is probable because many of the criticisms lie in legal interpretations of the National Labor Relations Act5 or in interpretation of contract language.

The zenith of the present Board’s era was just recently reached. In a 3-2 decision, the Board issued a bargaining order where the union did not have, nor had it ever demonstrated, majority status.6 Conair and its background illustrate exactly why only strong, straightforward, knowledgeable and practical persons should be appointed as Members of the Board.

The principal purpose of the Act is to protect the employees’ freedom of choice to select or reject a union as their representative. It is the Board’s duty to carry out that purpose.7 Historically, the Board has carried out its duties by holding elections under “laboratory” conditions8 and the Board does an excellent job. The Board also may order an employer to bargain if a majority of the employees have designated a union as their representative, and the employer, by

3. See, e.g., NLRB v. Hendricks County Rural Electric Membership Corporation, 454 U.S. 170 (1981), where the Supreme Court adopted the Board’s ruling that confidential employees are those who have access to labor relations information; and Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404 (1981), where the Supreme Court agreed with the Board’s position that a bargaining impasse was not “an unusual circumstance” to justify an employer’s withdrawal from a multi-employer unit.


7. § 7, 29 U.S.C. § 157. “It is hereby declared to be the policy of the U.S. to [protect] the exercise by workers of . . . designation of representatives of their own choosing . . .”

8. In election proceedings it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish these conditions; it is also our duty to determine whether they have been fulfilled. When . . . the requisite laboratory conditions are not present . . . the experiment must be conducted over again.

committing serious unfair labor practices, has tried to dissipate the union's majority status.

Neither the policy of the Act nor the Board's duties changed when the Supreme Court issued its decision in NLRB v. Gissel Packing Co., Inc. The Court combined four cases in which the union demonstrated majority support and the employer committed unfair labor practices in an attempt to frustrate the employees' desires for representation. The Supreme Court held that the Board, in these circumstances, could order an employer to bargain although the union lost a subsequent election. The Court then discussed the speculation of the Fourth Circuit that "[W]hile refusing to validate the general use of a bargaining order in reliance on cards," it may be possible to impose a bargaining order "without need of inquiry into majority status on the basis of cards or otherwise" in exceptional cases marked by "outrageous" and "pervasive" unfair labor practices. Without directly addressing this issue, the Court noted that the Board issues bargaining orders "in the absence of a Section 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices."

The Supreme Court decided Gissel in 1969. Thereafter, the Board continued to issue bargaining order remedies where the union demonstrated that it had majority support and the employer had committed unfair labor practices which prevented the holding of a representation election. In 1979, the Board finally had to decide whether it would rely on the dicta in Gissel, where the Supreme Court indicated that the Board could issue a bargaining order without determining majority status, and issued this remedy where the union had never achieved an authorization card majority.

In United Dairy Farmers I, the Board considered a case in which the employer committed unfair labor practices against every employee in the unit. The Administrative Law Judge recommended a bargaining order after the Union lost the election, despite the Union's failure to demonstrate majority support. The Board, consisting of

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10. "We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show it has been able to maintain its majority status." Id. at 610.
11. Id. at 613.
12. Id. at 615.
Chairman Fanning, Members Jenkins, Penello, Murphy and Truesdale, was confronted with the momentous decision of whether the employer should be ordered to bargain. Thus, what should have been a definite articulation of the Board's views became a mass of indecision. Chairman Fanning and Member Jenkins, concurring in part and dissenting in part, were relatively decisive in reversing their previous positions. They concluded that a bargaining order should be issued since the "Board's conventional remedies were inadequate to dissipate the pernicious effects of Respondent's flagrant and pervasive unfair labor practices." Though a bargaining order is an "extraordinary remedy, it is justified in an effort to balance the various policies and purposes of the Act."  

While Chairman Fanning and Member Jenkins at least reached a decision, which was internally contradictory given their stated objective of maximizing employee choice in representational elections, Members Murphy and Truesdale could not even reach a decision on the Board's authority to issue a bargaining order in these circumstances. Members Murphy and Truesdale claimed that the scope of the Board's authority under Section 10(e) of the Act may include the power to issue a bargaining order without a prior showing of majority status." They wanted to be sympathetic to the union and tough on the employer, yet remain within statutory precedent. Their ultimate decision failed to accomplish any of these objectives. In an effort to punish the employer, these members attempted to balance the above competing interests without succeeding. Conair resulted from their failure to exhibit decisiveness and principle.  

The dissent by Member Penello in United Dairy Farmers I was decisive and analytical. After tracing the history of the Act and placing  

16. 242 NLRB at 1032, 101 L.R.R.M. at 1283. The opinion of Fanning and Jenkins is contradictory in that it states that "[T]he paramount purpose of the Act is to protect the employees' freedom of choice to select or reject a union as their collective bargaining representative" Id. at 1037, 101 L.R.R.M. at 1288, and then would deny the employees that choice by imposing a collective bargaining representative on them. Furthermore, it lacks precedential weight in that two authoritative statements are rendered without citation: "We share our colleagues' concern for the possibility that a majority of employees may not, in fact, desire the bargaining representative. But in balancing competing policy considerations under the Act, the Board, with approval of the courts, has frequently issued bargaining orders with no greater assurance of the sentiment of an uncoerced majority than in the present case (.)" Id at 1033, 101 L.R.R.M. at 1284-85; and [T]he lack of certainty as to the uncoerced wishes of the majority has not, as stated, precluded the issuance of a bargaining order in other situations where the remedial processes of the Board were otherwise appropriate to correct the effects of an employer's unlawful conduct." Id. at 1034, 101 L.R.R.M. at 1285.  
18. 242 NLRB at 1032, 101 L.R.R.M. at 1283.
The Supreme Court’s language in Gissel into context, Member Penello concluded that a non-majority bargaining order violated one of the fundamental purposes of the Act—majority rule. Member Penello noted that the Supreme Court has acknowledged that the Board’s remedial powers under Section 10(c) are broad. He referred to a case limiting those powers where the proposed remedy of imposing a contract term violated a fundamental policy. The principle of majority rule is as much a fundamental policy of the Act as is the policy of freedom of contract expressed in Porter, and should be granted similar protection.

The Third Circuit, in United Dairy Farmers I, agreed with the Board that the employer committed pervasive unfair labor practices, and concluded, based on its past analysis of Gissel, that the Board in exceptional cases “has the right to issue bargaining orders even where there is no showing that the union at one point had a card majority.” In remanding the case to the Board for a determination whether the facts of the case justified a Gissel bargaining order, the Court expressed its concern for the length of time the case had been before both the Board and the Court.

A three Member Board issued United Dairy Farmers II. Chairman Fanning and Member Jenkins adhered to their original position in United Dairy Farmers I and concluded that even after the passage of seven years, a bargaining order was warranted. Member Zimmerman temporized and decided only that the Third Circuit’s decision was binding as “the law of this case.” This wavering, unarticulated stand only added confusion to the chaos.

The same members who decided United Dairy Farmers I properly refused to issue a bargaining order where the union never obtained majority support, despite repeated and egregious violations of the Act by the employer. The Third Circuit enforced that part of the Board’s order which granted the union access to the employer’s

19. Id. at 1038, 101 L.R.R.M. at 1289.
20. H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970). In Porter the Board ordered the employer to agree to a dues checkoff clause after the employer refused to bargain in good faith over that particular provision of the contract. The Supreme Court held that the proposed remedy violated a fundamental policy of the Act; namely, freedom of contract, and, therefore, it exceeded the Board’s authority.
23. Id. slip op. at 3, n.5, 107 L.R.R.M. at 1577, n.5.
premises for the purpose of communicating with the employees. The Supreme Court refused to review this extraordinary remedy. At the same time, the Supreme Court denied review of a Ninth Circuit decision enforcing the Board’s bargaining order where the employer engaged in extensive unfair labor practices, and the union had obtained a card majority at one time.

With a history of procrastination and decisiveness without precedent, the Board, on June 3, 1982, issued Conair in a 3-2 decision. Astoundingly, the majority ordered the employer to bargain with the union while admitting that no one “can state with complete certainty whether a majority of Respondent’s employees actually desired representation by the Union prior to the onset of Respondent’s unfair labor practices.”

Throughout this debate, not one member has sought to fashion a new or different remedy from the extraordinary remedies proposed in these cases. The Board may address this issue, since it is likely that Conair will be before them again. In the course of this debate, no Board Member has cited the precedent of majority rule enunciated in Emporium Capwell Co. v. Western Addition Community Organization.

In Emporium Capwell, the question was whether, in light of the national policy against racial discrimination in employment, the National Labor Relations Act protects concerted activity by a group of minority employees to bargain with their employer over issues of employment discrimination. The employer was a party to a collective bargaining agreement with a union which was recognized as the bargaining representative of all covered employees. The contract prohibited employment discrimination and established a grievance and arbitration procedure for processing any claimed violation, as

25. 640 F.2d at 404. To remedy serious unfair labor practices the Board may require the employer to provide the union with access to his premises. See, e.g., OCAW v. NLRB, 547 F.2d 575 (D.C. Cir. 1976) cert. denied 431 U.S. 966 (1977) (bulletin boards); Montgomery Ward & Co. v. NLRB, 339 F.2d 889 (6th Cir. 1965) (right to reply to captive audience speech); NLRB v. Crown Laundry & Dry Cleaners, 437 F.2d 290 (5th Cir. 1971) (pre-election speech).


29. Id., 110 L.R.R.M. at 1166. Member Zimmerman joined Members Fanning and Jenkins without enunciating his reasons for issuing a bargaining order remedy under these circumstances. In United Dairy Farmers II, Member Zimmerman concluded that it was the law of the case. Is his rationale now the law of the circuit or another reason? It seems he could have footnoted his present concurrence.


well as a no-strike clause. A group of employees presented grievances, including a claim that the employer was engaging in racial discrimination in the matters of assignment and promotion. The union investigated those allegations and presented the charge of discrimination to the company, which agreed to “look into the matter.” The union announced its conclusion that the employer was engaging in discrimination and that it, therefore, would process every grievance to arbitration, if necessary.32

When the minority employees expressed a view that the union should picket, the union, the Fair Employment Practices Committee, and the local antipoverty agency advised the employees that they should follow the contract procedures, thereby helping themselves and others who might be victims of discrimination. Shortly thereafter, when the employer-union adjustment board met, the minority employees whom the union intended to call as witnesses refused to participate and, instead, demanded that the President of the Company meet separately with the minority employees as a group. The President refused to do so, but suggested that the minority employees talk to the personnel director. Rather than talk to the personnel director, the minority employees called a press conference, denounced the employer as a racist, and announced their intention to picket and boycott. The employees were warned that they would be terminated after their first day of picketing; and when they continued to picket the next week, they were discharged. The employees then filed unfair labor practice charges claiming that their discharges violated Section 8(a)(1) of the Act.33

After the hearing, the Board, in dismissing the complaint, found that the discharged employees’ course of conduct was not merely a presentation of a grievance, but a “demand that the (company) bargain with the picketing employees for the entire group of minority employees.”34 It is important to point out that the employer terminated the picketing employees for their attempt to bargain with the company directly, rather than through their chosen representative, and not for only attempting to bring a grievance to the attention of their employer.35

The scheme of the Act is to encourage bargaining so that all members of the unit can have the benefits of their collective strength.

32. 420 U.S. at 54.
33. Id. at 57
34. Id. quoting The Emporium and Western Community Organization, 192 NLRB 173, 185; 77 L.R.R.M. 1669, 1671 (1971).
35. Id. at 60-61.
as the most effective means of bargaining. The exclusive representative is, likewise, under a duty to fairly and in good faith represent the interests of minorities within the unit. The Act establishes orderly collective bargaining procedures to secure the employees' substantive rights to be free of racial discrimination. Indeed, the contract in *Emporium Capwell* was the result of the bargaining process and the procedures established under that contract provided adequate remedies for the situation. Further, the union was actively pursuing a course of action to remedy the allegations of racial discrimination.

In *Emporium Capwell*, the Board concluded that a minority group may not divide themselves, engage in separate bargaining, and by-pass their elected representative. The Court of Appeals for the District of Columbia found concerted activity directed against racial discrimination to be in a "unique status." The Supreme Court reversed, holding that the principle of majority rule was so strong that any form of employee protest which occurred outside the bounds of the grievance procedure, even an attempt by a racial minority to remedy the employer's alleged acts of discrimination, was unprotected (concerted) activity. Although *Emporium Capwell* arose in an entirely different factual context, its discussion of majority rule should have been considered and analyzed in *Conair*.

I believe *Conair* was the high-water mark of a "liberal" or "pro-union" Board from which it eventually must retreat. How soon that water recedes depends on the swiftness of the case through the courts or the ultimate majority of a "Reagan Board," not soon to be realized.

The Board recently decided three cases concerning the union's right to plant safety information. These decisions are not as broad as they would first appear. Clearly, health and safety is a mandatory subject of bargaining and something the employees' representatives should find of utmost importance. However, in these cases, the Board was concerned with employer claims of privilege and confidential-

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36. *Id.* at 63.
37. *Id.* at 64.
38. *Id.*
39. *Id.* at 53-54.
40. *The Emporium and Western Community Organization, 192 NLRB 173, 77 L.R.R.M. 1669 (1971).*
41. *Western Addition Community Organization v. NLRB, 485 F.2d 917, 927 (D.C. Cir. 1973).*
42. *See 420 U.S. at 61-70.*
The NLRB and the Courts

In *Colgate-Palmolive*, the Board stated “[W]hen claims of confidentiality, as here, are interposed as a defense to a union’s request for information, they raise questions concerning legitimate and substantial company interests possibly requiring a finding that an employer need not disclose information of a confidential nature or at least not unconditionally disclose it...”

The Board did not order disclosure of employee medical records but, instead, sought a balance and required disclosure of statistical or aggregate medical data.

The Board went on to require the revelation of asserted trade secret information. This was not as bad for employers as it would seem at first blush for the Board first afforded the parties the opportunity to reconcile their differences.

The health and safety disclosure cases are practicable and supportable, despite the composition of the Board. Where it would appear that judgments of precedential value were initiated, the true value of these cases may add little to the Board’s history—other than to require bargaining where bargaining is required. The disclosure cases show that a strong “liberal” Board can, at times, be reasonable, and not as “liberal” as the present “moderate to conservative” Supreme Court. The Supreme Court has denied review of a Sixth Circuit case where the National Institute of Occupational Safety and Health was authorized access to individual medical records, despite a plea by the employer that release of the information would violate the employees’ privacy rights.

Let us turn our attention now to the Supreme Court, the Courts of Appeal and the Board, in that order.

It appears that recent Supreme Court cases will not have a significant impact in the future on the national labor policy, or a

44. In *Colgate-Palmolive* the employer did not want to disclose the following information: information concerning clinical and laboratory studies of any employee undertaken by the employer; certain health information derived from insurance programs covering employees; information concerning occupational illnesses; accident data related to workers’ compensation claims; radiation sources in the plant; listing of contaminants monitored by the employer; mortality rates on past and present employees, and generic names of all substances used at the plant. 261 NLRB No. 7 slip op. at 5, 109 L.R.R.M. at 1355-56.

45. 261 NLRB No. 7 slip op. at 12, 109 L.R.R.M. at 1356 citing Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (union was entitled to information pertaining to the results of employee psychological test program).

46. Though statistical or aggregate data may result in the unavoidable identification of some individual employee information, the Board reasoned that the “Union’s need for medical data potentially revealing past effects of the workplace environment upon those whom it represents outweighs any minimal intrusion upon employee privacy implicit in supplying this data.” 261 NLRB No. 7 slip op. at 15, 109 L.R.R.M. at 1357.

new" national labor policy. I am in agreement with Professor R. Wayne Estes, who termed the Court as one "in transition."48

The most far-reaching case and the one which will have the most impact on the negotiations of new collective bargaining agreements is *Woelke and Romero Framing, Inc. v. NLRB.*49 *Woelke* is an extension and clarification of *Connell Construction Co. v. Plumbers Local 100*50 regarding Section 8(e)51 and allows for top-down organizing. Although limited to the construction industry, these cases give credibility to contract clauses which would be secondary activity elsewhere (except in the garment industry), when sought or negotiated in the context of a collective bargaining relationship. In *Woelke*, the union sought a clause prohibiting subcontracting at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this agreement."52 The Court held that the clause was enforceable; however, picketing to enforce such a clause would still be prohibited. The Court left unresolved whether picketing to obtain this type of contract clause is lawful.

The Court reached a different conclusion in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Insurance).*53 This decision demonstrates the accuracy of Professor Estes' characterization of the present Supreme Court. The *Woelke* decision endorses the position advocated by organized labor, while the *Safeco* decision does not. The Court again examined the issue of secondary boycotts in *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*54 This case did not involve the NLRB, but was a damage action under Section 30355 and Section 8(b)(4)(B)56 allowing damages for secondary boycotts. The Court held that the Longshoremen's activity was "in commerce" within the scope of the

48. R. Wayne Estes, *Labor Law Decisions of the Supreme Court, 1979-80 Term,* 1980 LAB. REL. YEARBOOK 37. It is difficult, if not impossible, to formulate an accurate characterization of the Court's decisions as to its labor or management posture.

49. 50 U.S.L.W. 4538 (U.S. May 24, 1982).


52. 50 U.S.L.W. at 4539.

53. 447 U.S. 607 (1980). In *Safeco* the union was involved in a dispute with a title insurance company (*Safeco*), and conducted picketing at all title companies that did business with *Safeco*. The picketing reasonably could be expected to result in a complete boycott of the secondary employers because the primary product of the title company was the sale of title insurance.


 Moreover, the Court concluded that the prohibition against secondary boycotts contained in Section 8(b)(4)(B) was not limited to labor related objectives; the ban against secondary boycotts included disputes motivated by political objectives. The Court rejected the union’s first amendment argument and found that the conduct was not designed to communicate the union’s political message but to coerce employers who had a business relationship with Russian shipping concerns. The Court’s ruling is consistent with the Board’s findings that boycotts motivated for political reasons are prohibited secondary boycotts.

It appears the Court is engaging in a delicate balancing act in these secondary situations and, in doing so, is reading the Act literally. If this trend continues, and I expect it will, the intricate interpretations of Section 8(b)(4) and 8(e) may become more clear. Although some may see it as a turn-around from Tree-fruits, it all seems quite consistent.

In three other cases, the Supreme Court issued very narrow rulings and clarified issues that had created a growing caseload for the Circuit Courts. The Supreme Court, in Charles D. Bonanno Linen Service, Inc. v. NLRB, ruled that an impasse in collective bargaining did not justify an employer’s withdrawal from a multi-employer bargaining unit, although a number of the Circuits had previously held that a bargaining impasse justified withdrawal from a multi-employer unit.

Although both the Woelke and Bonanno decisions may have been very appetizing to the Board and the AFL-CIO, the Court in First National Maintenance Corporation v. NLRB set a table of desserts for employer groups. There, the Court held that an employer does not have to bargain over an economic decision to partially close a plant. This decision is consistent with the rule first enunciated in Textile Workers Union of America v. Darlington Manufacturing Co. Although John Irving, former NLRB General Counsel, thinks the decision in First National Maintenance is very “important” and is “not a narrow holding,” he fails to consider that the decision to close is...

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57. ___ U.S. at __, 102 S. Ct. at 1662.
58. ___ U.S. at __, 102 S. Ct. at 1664.
61. 452 U.S. 666 (1981)
62. Id. at 686.
63. 380 U.S. 263 (1965). In Darlington, the Supreme Court held that an employer is free to go out of business for any reason as long as the closing does not chill unionism at other employer locations.
not a mandatory subject of bargaining, but effects of closing remain bargainable.64

In NLRB v. Hendricks County Rural Electric Membership Corp.,65 the Supreme Court reversed the Court of Appeals and held that "confidential" employees are within the jurisdiction of the Act if they do not have access to confidential information relating to labor relations.66 The dissent maintained that employees "allied" with management would not be protected by the Act. Excluding only those employees who have access to labor relations material will not create many problems.67 If an employee is "allied" with management, he/she will not want to be represented by the union and, likewise, the union will not want to represent the employee. Regardless of the effects, we will still have some factual disputes concerning what is or is not labor relations material.

A quick look at the Courts of Appeal will show that throughout history they have acted "to balance" the Board. This traditional role will continue. We must take a "quick" look because the Courts of Appeal are not "policymakers." For the most part, they have taken their admonition from the Supreme Court to consider the Board as the body expertise in the field of labor matters. The Courts are not willing to allow an administrative-adjudicative body to preempt their expertise in interpreting the law and the facts relating to that law.

While an array of cases flow from the circuits, an analysis of a selected few will lend credence to this "balancing" theory. The Courts have traditionally upheld the Board despite the Board's skittering on or near Circuit Court precedent. The Seventh Circuit, in NLRB v. The Coca-Cola Company Foods Division,68 upheld the Board's determination that a supervisor's remarks, which forbade an employee from discussing his grievance with fellow employees and threatened retaliation if the employee did so, was an unfair labor practice,69 despite the Court's prior ruling in Pelton Casteel, Inc. v. NLRB70 that no Section 771 "right to gripe" existed.

Even when the Board's decisions concern de minimus violations, the Courts have upheld the Board. The Seventh Circuit, in NLRB v.

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64. Mr. Irving has given an excellent analysis of First National Maintenance in his remarks before a personnel policy conference on January 22, 1982, in Arlington, Virginia, but his analysis does not justify a conclusion that the effects of the decision are broader than they actually are. 17 DAILY LAB. REP. (BNA) at D (Jan. 26, 1982).
66. Id. at 191.
67. Id. at 199-200 (Powell, J., dissenting).
68. 254 NLRB 823, 106 L.R.R.M. 1206 (1981) enforced 670 F.2d 84 (7th Cir. 1982).
69. Id. at 85.
70. 627 F.2d 23 (7th Cir. 1980).
General Thermodynamics, Inc.,\textsuperscript{72} upheld the Board's determination that an employer violated the Act by posting overly-broad no-solicitation and no-distribution rules. Though the employer removed those rules prior to their effective date when their illegality was called to the employer's attention, the Court enforced the Board's remedial order to cease-and-desist and to post the customary notices. Despite the Court's belief that it had a duty to enforce the Board's order, General Thermodynamics should never have been adjudicated before the Board or the Court. The case represented a gross waste of taxpayers' monies and could have been settled elsewhere.

Similar cases should encourage the Board and the General Counsel to seek to initiate new and novel \textit{de minimus} remedies. Perhaps the Respondent in General Thermodynamics could have posted a notice simply stating that the rules were withdrawn because the employer had been advised they were illegal under the Act. In addition, had the Respondent been offered a lesser alternative than a Board Order, much time and money could have been saved. As the Board seeks new and extraordinary remedies for "pervasive" violations, it also should seek to lower both its own caseload and that of the courts. This could be accomplished by developing special remedies in \textit{de minimus} situations.

While the Seventh Circuit enforced close cases, the Third Circuit balanced the equities by refusing to enforce Board orders in procedural cases that it considered were too literally interpreted by the Board. In \textit{Livingston Powdered Metal v. NLRB},\textsuperscript{73} the Court recognized that the Respondent had filed an untimely answer to the complaint, yet the Court still refused to enforce a summary judgment case against the Respondent where the employer did not willfully or intentionally cause default. Such delay would not have postponed the ultimate resolution. The Court declared that the Board's rules of "extraordinary circumstances" relating to the late filing of exceptions should be replaced by a less stringent standard of "good cause" in the late filing of answers.\textsuperscript{74}

In \textit{Kessler Institute v. NLRB},\textsuperscript{75} decided the same day, the Third Circuit examined the Board's regulations regarding service by mail. Although both were reasonable, the Court gave the employer the full


\textsuperscript{73} 253 NLRB 577, 105 L.R.R.M. 1681 (1980) \textit{enforcement denied} 669 F.2d 133 (3rd Cir. 1982).

\textsuperscript{74} 669 F.2d at 136.

\textsuperscript{75} 253 NLRB 990, 107 L.R.R.M. 1040 (1981) \textit{enforcement denied} 669 F.2d 138 (3rd Cir. 1982).
benefit of the most liberal interpretation, adding, in dicta, that it was as expert in interpreting the regulations, which were similar to the Federal Rules, as the Board. The issue was purely one of law.

Occasionally, the Board has shown a tendency to overlook some of its own precedent and the Courts again serve as a "balancing agent." In Wallace-Murray Corp., the Board established a policy that no unit clarification petition would be entertained during the term of a collective bargaining agreement which "clearly confines" the unit. The Board failed to observe this policy in Consolidated Papers. Consequently, the Seventh Circuit denied enforcement of the Board's order. While expressing no opinion on the wisdom of the Board's policy, the Seventh Circuit nevertheless found that the Board unfairly failed to apply that policy to the instant case. In recent years, the Courts have been more concerned with the Board's enunciated policies, and have required the Board to be more consistent.

One of the debates between the Board and the Courts is whether or not the Board should hold hearings on employer or union objections to an election. To require hearings on all cases would mire the Board in a morass of spurious litigation. However, ignoring requests, or failing to hold hearings in legitimate cases, would deny a party its due process rights. In recent years, both the Board and the Courts have attempted to balance the rights of the litigants; however, the burden of the ultimate balancing falls upon the Courts because of the Board's continuing reluctance to hold these hearings. The Board's failure to hold the hearing would inordinately delay its decision and require the Respondent to refuse to bargain and litigate its objective by means of an unfair labor practice decision before the Court can correct the failure or inadvertence of the Board.

Two recent cases illustrate the Courts' continuing attempts to balance the equities arising in hearing matters. In ATR Wire and Cable Company v. NLRB and NLRB v. ARA Services, Inc., the employer objected to pre-election conduct by pro-union employees which amounted to threats and vandalism. Had these actions been committed by union agents, the elections would have been set aside.

76. 192 NLRB 1090, 78 L.R.R.M. 1046 (1971).
77. 253 NLRB 283, 105 L.R.R.M. 1537 (1980) enforcement denied 670 F.2d 754 (7th Cir. 1982).
78. 670 F.2d 754 (7th Cir. 1982).
With persuasive dissents present in both cases, the Courts remanded to the Board for hearings; in ART Wire to determine whether on the full record, including excluded affidavits, the employees were agents of the union, and in ARA Services to determine whether the threats and coercion tainted the representative elections. The Courts remain skeptical and find "substantial and material factual issues" that the Board and dissenting Judges often fail to recognize. While both the Board and Courts attempt to provide due process, the Courts take a more cautious approach since their resources are not involved in the hearing process. While the "balancing" in favor of due process represents the more cautious approach, it is preferred.

PPG Industries, Inc. v. NLRB\textsuperscript{81} illustrates both the agency problem in pre-election cases and the constantly arising "law of the Circuit" issue. The Fourth Circuit had a prior ruling that in-plant organizing committee persons were akin to agents of the union.\textsuperscript{82} In PPG, neither the hearing officer nor the Board could deter the Circuit from relying upon its own precedent. Consequently, the Court ruled that "the findings that there was a fair election cannot stand."\textsuperscript{83}

The Fourth Circuit later demonstrated its disagreement with the Board on the issue of "laboratory conditions" in union representation elections. In Hanes Corporation v. NLRB,\textsuperscript{84} the Court denied enforcement of a Board order to bargain where the union's campaign maligned the legal profession, constantly referring to the employer's attorneys as "shysters."\textsuperscript{85} It is incomprehensible how the Board could have enforced an order to bargain based upon this particular campaign effort. The Court's "balancing act" is seen best in this instance—where the Board is leaning too far in its attempt to reach its desired and possibly politically motivated position.

Circuit Courts have reversed or remanded cases to the Board in the following circumstances: where the employer engaged in "hard bargaining," not a refusal to bargain;\textsuperscript{86} where an employee's serious wrongdoing was not "automatically immunized because the company

\textsuperscript{81} 255 NLRB 765, 106 L.R.R.M. 1403 (1981) enforcement denied 671 F.2d 817 (4th Cir. 1982).
\textsuperscript{82} NLRB v. Georgetown Dress Corp., 537 F.2d 1239 (4th Cir. 1976).
\textsuperscript{83} 671 F.2d at 823.
\textsuperscript{84} 254 NLRB 532, 106 L.R.R.M. 1207 (1981) enforcement denied 677 F.2d 1008 (4th Cir. 1982).
\textsuperscript{85} 677 F.2d at 1014.
\textsuperscript{86} NLRB v. American National Insurance Co., 343 U.S. 395 (1952). The Court stated "... the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." Id. at 404. See also Pease Co. v. NLRB, 666 F.2d 1044 (6th Cir. 1981) and Pittsburgh-Des Moines Corp. v. NLRB, 663 F.2d 956 (9th Cir. 1981).
gave him a polygraph test for an impermissible reason"; where striker misconduct which was physical, prolonged, away from the picket line, and which may result in serious injury, will not be forgiven and the Board should employ an objective standard based upon the nature of the strikers' misconduct rather than a subjective perception on the part of the harassed employee; where an arbitrator has interpreted a contract, the Board should not substitute its reading for the arbitrators.

Similarly, the Ninth Circuit ruled that the Board is precluded from continuing a make-whole remedy beyond the term of a contract, since this type of remedy is punitive. Additionally, the Courts will not permit the Board to direct an employer to make a retroactive wage increase. In administering and interpreting contracts, the Courts feel as qualified as the Board. In Pacemaker the Court read two separate no-strike clauses as signifying the parties intent "to bar strikes over both arbitrable and nonarbitrable disputes" even when the nonarbitrable dispute was unforeseeable at the time the contract was negotiated. A simple reading of the contract clauses makes one wonder how the Board could have reached a different conclusion.

In a case of first impression, the Seventh Circuit decided that replacement of economic strikers could be permanent and, after a layoff, those replacements were entitled to reinstatement prior to unreinstated strikers with more seniority, despite a contrary conclusion by the Board.

Finally, a union Respondent is entitled to present evidence in its defense of an 8(b)(7)(C) charge, despite an assertion that such

87. NLRB v. Fixtures Mfg. Corp., 669 F.2d 547 (8th Cir. 1982).
88. Chevron U.S.A., Inc. v. NLRB, 672 F.2d 359 (3rd Cir. 1982).
89. John H. Fournelle v. NLRB, 670 F.2d 331, 345 (D.C. Cir. 1982) quoting the Supreme Court in NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967): "To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step." The Ninth Circuit is in general agreement with the ability of arbitrators in an 8(a)(3) case where a divided Court found, contrary to the Board, that the unfair labor practice issue "was first presented to and considered by the arbitrator" and concluded that the Board abused its discretion when it failed to defer to the arbitrator's decision upholding the discharge. Albertson's Inc. v. NLRB, 108 L.R.R.M. 3152 (1981).
90. Rayner v. NLRB, 665 F.2d 970 (9th Cir. 1982).
93. Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926 (7th Cir. 1982).
The NLRB and the Courts

Evidence would violate the General Counsel's "final authority" under Section 3(d) of the Act.95

The many cases covering such an array of adverse issues indicates the imbalance in recent Board decisions. But, as United Food and Commercial Workers, Local 576 v. NLRB96 indicates, the Courts will look at the entire Act and will not get bogged down in technicalities in order to protect the rights of the parties. It well may be that the Board engages in too many institutional niceties.

These cases show that a new national labor policy does not exist. The cases prove that there will be "business as usual" between the Board and the Courts. The Board and the Courts each will rely on their own precedents. Then the Board will rely on the Court's "law of the case" until the Supreme Court ultimately decides who is correct.

As discussed previously, the Board reached its "high-water" mark of liberal policy in Conair.97 As the tide ebbs, the Board will need to face other "policy issues" as well as certain "legal issues." If these issues are not addressed and corrected, they will likely sink the boat (or Board), even at the low-water mark where labor practitioners are capable of piloting.

An important area of Board decision-making prior to Conair involves the expansion of jurisdiction, as all bureaucracies are wont to do.98 Despite budgetary limitations, the Board has expanded its jurisdiction by increasing its caseload in formerly settled policy areas.99 Prime examples include the Board's withdrawal from the Collyer100 doctrine and its failure to heed the Senate and House Reports of 1974, which cautioned against "proliferation of bargaining units in the health care industry."101

Expansion may be curtailed in some areas by Member Zimmerman's swing vote. For example, he joined Chairman Van de Water and Member Hunter in declining jurisdiction "over 'purely' religious noncommercial activities of noncommercial, not for profit

95. § 3(d), 29 U.S.C. § 153(d) (1976).
96. 675 F.2d 346 (D.C. Cir. 1982).
97. 261 NLRB No. 178, 110 L.R.R.M. 1161.
98. See Member Truesdale on Significant NLRB Decisions, 1980 LAB. REL. YEARBOOK 66.
99. See TRW, Inc., 257 NLRB No. 47, 107 L.R.R.M. 1481 (1981). TRW changed the Board's rules concerning solicitation and distribution of literature. Prohibited solicitation and distribution were formerly "presumptively valid" if applied to "working time" as opposed to "working hours." Now both times are "presumptively invalid," causing employers to change well-settled rules. See also John Irving's remarks in 212 DAILY LAB. REP. (BNA) at E (Nov. 2, 1981).
religious organizations." The question remains, however, whether that majority will hold. If it does, I predict it will not hold too firmly. In general, examining the Board's history of asserting jurisdiction in areas or industries previously uncovered by the Act demonstrates that it has always acted with the best of motives and after reasoned deliberation. The Act offers protections particularly to employees, but also to employers and unions. A failure to offer those protections goes against the conscience of Board Members. Those who, because of budgetary concerns, fault the Board for constantly expanding its jurisdiction still have great admiration for the Board's motives. Any attempt to limit legislatively the Board's jurisdiction may cause conflicts in the consciences of Members of Congress.

It seems that the Board could reduce its caseload without limiting jurisdiction if it set precedent regarding policy issues. One of the areas in which the Board has wavered and has created problems for the parties, as well as its own Regional Offices, is in the area of permissible conduct during an organizational campaign. For years, Hollywood Ceramics Company, Inc. enunciated the rule which defined the extent of "misrepresentation" that would be permitted before the Board set aside an election. Then, the Board took another look at the misrepresentation issue and decided that these cases were causing a backlog which was difficult to administer and, in a fit of austerity, overruled Hollywood Ceramics and issued Shopping Kart Food Market, Inc. In a 3-2 decision, with members Fanning and Jenkins dissenting, the Board ruled that it would no longer set aside elections on the basis of misrepresentation. The Board finally assumed employees have some knowledge or understanding of the work environment. However, this assumption was short-lived because another Board issued General Knit of California, Inc. overruling Shopping Kart. General Knit returned election statements back to the Hollywood Ceramics standard. This constantly changing decision-making confuses the parties before the Board as to their rights and the proper exercise thereof. While it would appear that the Board should come down from its "Ivory tower" and attempt to

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103. 140 NLRB 221, 51 L.R.R.M. 1600 (1962).
104. 228 NLRB 1311, 94 L.R.R.M. 1705 (1977).
106. Much has been said about Wright Line, Inc., 251 NLRB 1083, 105 L.R.R.M. 1169 (1980), where the Board established a "but for" test in 8(a)(3) cases, but other than generating litigation over the "new" standard, it does not appear much different from the old "in part" standard. However, the Board was attempting to follow the Supreme Court's action in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). The questions arise, did the Board have to "shift" policy and/or did the Board shift policy?
discover what really occurs in election campaigns, it seems the Board also has a continuing reluctance to recognize the difference between union puffery and employer misrepresentation. In both instances, the Board should give some credit to the intelligence of the workers and to the realities of industrial life. Rather than continuing to criticize the Board, it should be complimented for becoming eminently practicable and increasingly reasonable; the only notable exception being the aberrant Conair decision. In the area of contract administration, Members Fanning, Jenkins, and Zimmerman, the three most "liberal" members of the Board, have gone so far as to read a contract clause and to interpret it in terms favorable to employers. In United Brotherhood of Carpenters and Joiners of America, Local Union No. 743, the employers asserted that both parties intended an annual option to terminate the collective bargaining agreements, rather than implementing an option only after the expiration of the first three years. This panel read the terms of the contract, viewed the union's own past practices, and concluded that the union refused to bargain relative to the employer's notice to re-open. In another case, involving the full five member Board, the Board sought remand of its order to bargain "to reconsider the issue of whether a wrap-up (or zipper) clause, by itself, constitutes a waiver of the union's right to bargain during the term of the contract concerning matters not specifically covered by the contract." The Board, with Member Jenkins dissenting, found that it should give "literal effect to the parties' waiver of their bargaining rights" as promoting industrial peace and collective bargaining stability.

Former Chairman Miller has consistently lamented the demise of the Collyer deferral and the faltering of the Spielberg doctrine. However, it appears that the Spielberg doctrine is now revived. In G&H Products, Inc., a three member Board deferred to an arbitrator's award, when the issue of anti-union discrimination had been presented to and rejected by the arbitrator. The Board stated that "the test to be applied is not whether the Board would have reached the same result, but whether the award is palpably wrong as

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107. After this paper was prepared, the Board once again changed direction and returned to its Shopping Kart standard, overruling General Knit and Hollywood Ceramics. Midland National Life Insurance Co., 263 NLRB No. 24, 110 L.R.R.M. 1499 (1982).
109. Id. at slip op. 12, 110 L.R.R.M. at 1088.
111. Id. at slip op. 2, 110 L.R.R.M. at 1193.
112. Id. at slip op. 4, 110 L.R.R.M. at 1193.
a matter of law.” Member Jenkins again dissented, but Member Zimmerman joined Chairman Van de Water in deferring. Does this case again indicate Member Zimmerman may be a “swing” vote in some instances, or does it merely indicate that the award was palpably correct as a matter of law?

In a case which may offer precedent to enable one employer to refute a de minimus violation, the Board, in a 3-2 decision, found that a remedial order was not necessary where the Respondent made every effort to disavow the unlawful conduct by a supervisor. In Broyhill, the Respondent posted a notice, which was similar to Board notices, and effectively disavowed its supervisor’s unfair labor practices; therefore, the employer “obviated the need for additional remedial action.” Members Fanning and Jenkins dissented, but Member Zimmerman joined the majority.

It also appears the Board may be looking beyond inferring unfair labor practices to making the General Counsel prove that the unfair labor practice occurred with an intent to violate the Statute. In St. Francis Hotel, a memo was circulated to division heads by the Respondent and marked “confidential.” Members Fanning and Zimmerman found that there was no clear intent to violate the Act because the memo was ambiguous; since the General Counsel failed to show that the employees were aware of the memo, there was no basis on which “to construe the ambiguity against the Respondent.” Member Jenkins again dissented, arguing that the General Counsel’s reading of the memo was correct and that a prima facie case was established which the Respondent had not rebutted. The interesting division among the Board in St. Francis Hotel implies that it may be seeking to do its own “balancing” rather than give the Courts a chance.

Finally, in Sterling Sugars, Inc., a discharge case, the full Board agreed upon an “expungement remedy,” and made that remedy consistent with expunction in similar discipline warning cases. This decision may indicate that, in the future, this Board will seek consistent remedies and that there are some areas in which the views of all Members will coincide.

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115. Id. at slip op. 3, 110 L.R.R.M. at 1036.
117. Id. at slip op. 3, 109 L.R.R.M. at 1315.
119. Id. at slip op. 7, 109 L.R.R.M. at 1319.
120. 261 NLRB No. 71, 110 L.R.R.M. 1114 (1982).
CONCLUSION

My remarks about the Board are both critical and complimentary. It should be noted, however, that the National Labor Relations Board is one of the most effective agencies of the Federal government. Sometimes the policies of the Board swing the pendulum too far to the right, sometimes too far to the left, and having reached its "high-water" mark, it is now ebbing. These swings cause the criticism leveled at the Board, but as long as there is a two-party political system and an NLRB, we will have these fluctuations. The Board will survive, but it will be a long time before there is a "new national labor policy."