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REFLECTIONS ON THE PROBLEM OF LABOR BOARD INSTABILITY

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INTRODUCTION

The National Labor Relations Board (NLRB or Board), currently composed of a majority of members appointed by President Reagan,[1] has in recent months been reversing earlier Board decisions at a fast and furious pace. These reversals have involved a number of critical labor/management issues including: the right of employers to relocate work during the term of a union contract,[2] the deferral of unfair labor practice charges to labor arbitrators,[3] the legality of misrepresentations of fact during labor representation campaigns,[4] rules regarding solicitation and distribution,[5] and employer interrogation of employees regarding their union sympathies.[6]

Labor Board vacillation in decisionmaking has been a perennial problem,[7] and in many respects reflects the quasi-political nature of the agency.[8] The *intensity* of recent Board "flip-flopping," however, has prompted increased concern regarding the impact such shifts in policy have on the effective administration of the Labor Act.

Observers have contended that such rapid changes create considerable uncertainty and instability in the law,[9] and indeed tend to encourage parties to press cases they might otherwise have settled had the

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1. The three Reagan appointees are Donald Dotson (chair), Patricia Diaz Dennis, and Robert Hunter. For a biographical sketch of Board members and a review of recent Board squabbling, see Wall St. J., June 28, 1984, at 29, col. 3.

2. *See* Milwaukee Springs II, 268 N.L.R.B. No. 87, 1983-84 NLRB Dec. (CCH) ¶ 16,029 (1984), *rev'g* Milwaukee Springs I, 265 N.L.R.B. 206 (1982).

3. *See* United Technologies Corp., 268 N.L.R.B. No. 83, 1983-84 NLRB Dec. (CCH) ¶ 16,027 (1984), *rev'g* General Am. Transp., 228 N.L.R.B. 808 (1977).

4. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982), *rev'g* General Knit of Cal., 239 N.L.R.B. 619 (1978).

5. *See* Our Way, Inc., 268 N.L.R.B. No. 61, 1983-84 NLRB Dec. (CCH) ¶ 16,003 (1983), *rev'g* T.R.W. Bearings, 257 N.L.R.B. 442 (1981).

6. *See* Rossmore House, 269 N.L.R.B. No. 198, 1983-84 NLRB Dec. (CCH) ¶ 16,225 (1984), *rev'g* PPG Indus., 251 N.L.R.B. 1146 (1980).

7. *See* Dunau, *The Role of Criticism in the Work of the National Labor Relations Board*, 16 N.Y.U. CONF. ON LAB. 205 (1963); Hickey, *Stare Decisis and the NLRB*, 17 LAB. L.J. 451 (1966); Cooke & Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539 (1982).

8. *See generally* Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1955).

9. *See* Cooke & Gautsche, *supra* note 7, at 548-59; *NLRB Rulings That Are Inflaming Labor Relations*, BUS. W., June 11, 1984 at 122 (statements of William N. Cooke, a "prominent Washington management attorney").

"rules of the game" themselves been more settled.[10] One president of a major union recently put it as follows: "The pendulum in Labor Board decisions has swung so rapidly and erratically over the recent past that volumes of Board precedents no longer can be relied upon by unions or employers and their legal counsel."[11] Such concerns have also prompted a number of prominent observers of the labor scene to call for congressional action to deal with this "problem."[12]

This article will explore the NLRB's recent policy reversals in the context of these calls for congressional reform. Part II will examine three important areas where NLRB shifting decision-making has been of a particularly strident nature. Part III will then address the policy implications of these shifts in terms of some possible avenues for congressional reform. In this regard, particular attention will be given to the various proposals raised as part of the aborted Labor Law Reform Act of 1978,[13] and to broader administrative law implications which may be involved in any legislative reforms in this area. Part IV will conclude with a call for limited congressional action.

I. SOME REPRESENTATIVE AREAS OF NLRB POLICY REVERSAL

A. *Arbitration and the National Labor Relations Act*

Over ninety percent of extant labor-management collective bargaining agreements in the United States contain grievance arbitration clauses pursuant to which disputes arising between the parties, during the term of the agreement, are submitted for final and binding resolution to a neutral third party arbitrator.[14] Such grievance arbitration clauses grew in popularity after Congress, in the Taft-Hartley amendments of 1947, amended the Labor Act to specifically encourage parties to establish voluntary dispute settlement procedures,[15] and made contractual grievance arbitration clauses directly enforceable in federal district court.[16] The national policy favoring the peaceful resolution of labor disputes through grievance arbitration also received a sharp boost in 1960 from the Supreme Court in three decisions known as the "Steelworker's Trilogy."[17] There has been, however, an ongoing tension between the national policy favoring labor arbitration, and the role of the

10. *See* 14 LAB. REL. REP. (BNA) 194 (Nov. 7, 1983) (statement of NLRB Member Patricia Diaz Dennis); *see generally* Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

11. 116 LAB. REL. REP. (BNA) 190 (July 9, 1984) (statements of Thomas W. Gleason, President, International Long Shoremen's Association).

12. *See Cool Rhetoric; Bitter NLRB Debate*, 115 LAB. REL. REP. (BNA) 203 (March 12, 1984) (statement of then NLRB General Counsel William Lubbers); *see generally Regulatory Reform For NLRB Stability*, 116 LAB. REL. REP. (BNA) 68-69 (May 28, 1984).

13. This legislation was passed by the U.S. House of Representatives but filibustered in the U.S. Senate. For a complete listing of the relevant legislation, see Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Election*, 127 U. PA. L. REV. 755 & n. 1 (1979).

14. *See* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 7 (5th Ed. 1978).

15. *See* 29 U.S.C. § 173(d) (1982).

16. *See* 29 U.S.C. § 185(a) (1982).

17. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United

National Labor Relations Board in enforcing the National Labor Relations Act (NLRA or Act).[18] This tension has been reflected in a string of shifts in Labor Board policy in this area.

By way of background, take, for example, the case of a unionized employee who is covered by a collective bargaining agreement which provides, as nearly all of them do, that employees cannot be fired except for "just cause."[19] The employee is then fired for trying to get new employees to join the union.[20] This action would almost certainly not constitute "just cause" for dismissal, and would thus represent a contractual violation. It would also represent a violation of the NLRA, which in section 8(a)(3),[21] prohibits discrimination against employees on the basis of union activity. The issue then becomes: where does the employee go first to assert his rights, to a labor arbitrator with the power to enforce the collective bargaining contract, or to the Board with the power to enforce the NLRA?[22] The issue has been a highly controversial one.

In 1971 the NLRB addressed this issue in the leading case of *Collyer Insulated Wire*.[23] In *Collyer* an employer unilaterally changed his pay scale, an action which arguably violated both the parties' collective bargaining contract and section 8(a)(5) of the Act.[24] Section 8(a)(5) generally makes it an unfair labor practice for employers to fail to bargain with unions in "good faith" over issues like pay and other "mandatory" subjects of bargaining before they take action with respect to them.[25] The union wanted the NLRB, as opposed to an arbitrator, to address the alleged violation first. The Board demurred over the dissent of its two most pro-union members,[26] and held that the parties had agreed to submit contractual disputes to arbitration and that the Board would defer from intervention until the parties' own dispute-resolution machinery had been utilized. One year later, in the *National Radio*[27] case, the Board extended its *Collyer* pre-arbitration deferral policy to cases involving instances other than refusals to bargain, including alleged *individual rights* violations of sections 8(a)(1)[28] and 8(a)(3) such as the kind set forth in the example above involving an employee being discharged for union

Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

18. 29 U.S.C. §§ 151-69 (1982).

19. *See generally* Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 483-84 (1976).

20. In states which have passed "right-to-work" laws pursuant to NLRA § 14(b), it is unlawful for a union and employer to have an agreement requiring union membership as a condition of employment. *See* 29 U.S.C. § 164(b) (1982).

21. 29 U.S.C. § 158(a)(3) (1982).

22. *See generally* Vause, *The NLRB Policy on Deferral to Arbitration—Deference or Abdication?*, 58 FLA. B.J. 461 (1984).

23. 192 N.L.R.B. 837 (1971).

24. 29 U.S.C. § 158(a)(5) (1982).

25. *See generally* R. GORMAN, LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 498-523 (1976).

26. The dissenters were members John Fanning and Howard Jenkins.

27. 29 U.S.C. § 158(a)(1) (1982).

28. 198 N.L.R.B. 527 (1972).

organizing activity.[29]

Five years later, however, with new membership on the Board, the NLRB reversed its decision in *National Radio*. The Board held in the 1977 *General American Transportation Corp.*[30] case that it would no longer defer to arbitration cases involving the exercise of individual employee rights under the Act such as those involving alleged violations of sections 8(a)(1) and 8(a)(3). In a case decided the same day, however, the Board reaffirmed its original *Collyer* decision policy of initially deferring to arbitration charges involving alleged refusals to bargain.[31]

The Board's holding in *General American Transportation* was not, however, destined to be a long standing one. On January 19, 1984, the Board, again comprised of new members decided, in the case of *United Technologies Corp.*,[32] to reverse *General American* and reinstate the rule of *National Radio*. This constituted the third major shift on the issue of pre-arbitration deferral of unfair labor practice charges in approximately thirteen years.

The Board's record of policy reversals is perhaps even worse on the issue of *post-arbitration* deferral. Cases in this area arise after arbitration has been conducted, and there is a question as to how much weight the Board should give the arbitrator's award in a subsequent unfair labor practice case. The general standards were set forth by the Board in the 1955 case of *Spielberg Manufacturing*[33] where the Board said that, in general, it would broadly defer to an arbitrator's award in any subsequent proceeding so long as the arbitrator's decision was "not clearly repugnant to the purposes and policies of the Act."[34]

Eight years later, however, the "Kennedy Board" in its *Raytheon Co.*[35] decision said that it would not defer to an arbitrator's decision unless the arbitrator had carefully considered the unfair labor practice issue involved in the case. This decision was reversed in 1974 by the "Nixon Board" in *Electronic Reproduction Service Corp.*,[36] which essentially returned to the old *Spielberg* standard. *Electronic Reproduction Service* was overruled in 1980 by the "Carter Board" in *Suburban Motor Freight*[37] which essentially returned to the holding of the Raytheon case. In its 1982 *Propoco, Inc.*[38] decision, though, the Carter Board went even beyond the holding of the *Raytheon* case, and decided to limit deferral to an arbitrator's award in subsequent Board proceedings involving the same case only to instances where the arbitrator procedurally disposed of the issues in precisely the same manner the Board would have. The Board's post-arbitration deferral policy has culminated, for the present, in the

29. *See supra* notes 16-20 and accompanying text.
30. 228 N.L.R.B. 808 (1977).
31. *See* Roy Robinson Chevrolet, 228 N.L.R.B. 828 (1977).
32. 268 N.L.R.B. No. 83, 1983-84 NLRB Dec. (CCH) ¶ 16,027 (1984).
33. 112 N.L.R.B. 1080 (1955).
34. *Id.* at 1081.
35. 140 N.L.R.B. 883 (1963).
36. 213 N.L.R.B. 758 (1974).
37. 247 N.L.R.B. 146 (1980).
38. 236 N.L.R.B. 136 (1982).

"Reagan Board's" 1984 decision in *Olin Corp.*[39] overruling *Suburban Motor Freight* and *Propoco* and again essentially returning to the "Eisenhower Board's" *Spielberg* standard. To say the least, the Board's policy approach to this area has not been a static one!

B. *The Work Relocation Conundrum*

Perhaps the most controversial[40] recent decision of the Reagan Labor Board was its decision in *Milwaukee Spring Division of Illinois Coil Spring Co.*,[41] better known as *Milwaukee Spring II*. This decision involved the critical issue of union veto power over employer determinations to relocate a plant.

Legal analysis of this issue turns to a large degree on section 8(d)[42] of the Act which mandates that once a union and a company reach agreement over a collective bargaining contract, the company is required to obtain the union's *consent* before it can modify any term of the contract. If, for example, a union contract provides that for the contract's duration employees are to be paid ten dollars an hour, an employer seeking to reduce this rate of pay to nine dollars per hour must first obtain the union's consent. A change without such consent would constitute both a breach of contract and an unfair labor practice.[43]

The fact that the employer's desire to modify the above hourly rate was motivated by economic necessity does not privilege the modification. Nor does it matter that the employer was willing to bargain in good faith, or that the employer has bargained in good faith before taking action. The employer's modification of an extant collective bargaining contract without union consent, in and of itself, violates the Act.[44]

In a string of decisions[45] culminating in the first *Milwaukee Spring* case[46] (*Milwaukee Spring I*), the Carter Board held that a decision by an employer having a union contract to relocate work constituted a "modification," albeit an indirect one, of the given contract's wage, benefit and recognition provisions. Consequently, such relocations made without the given union's consent were deemed to violate section 8(d) and constitute unfair labor practices subject to Board remedial powers under section 10 of the NLRA.[47]

The Reagan NLRB, however, in its highly controversial decision in *Milwaukee Spring II* overruled these earlier decisions and held that absent

39. 268 N.L.R.B. No. 86, 1983-84 NLRB Dec. (CCH) ¶ 16,028 (1984).

40. *See Statement of Peter G. Nash Before Joint Hearings before House Subcomm. on Labor-Management Relations and Subcomm. on Manpower and Housing* at 7 (June 26, 1984) (on file, Texas A&M Business School).

41. 268 N.L.R.B. No. 87, 1983-84 NLRB Dec. (CCH) ¶ 16,029 (1984).

42. 29 U.S.C. § 158(d) (1982).

43. *See* Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975).

44. *See* C&S Industries, 158 N.L.R.B. 454 (1966).

45. *See* Brown Co., 243 N.L.R.B. 769 (1979); Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978), *enforced*, 602 F.2d 1032 (9th Cir. 1979).

46. 265 N.L.R.B. 206 (1982).

47. 219 U.S.C. § 160 (1976).

specific language to the contrary, employer decisions to relocate work can, once "good faith" bargaining has been conducted, be made without the given union's consent.[48] The Board held that section 8(d) prohibits mid-term contractual modification without union consent only of terms "contained in" the parties' collective bargaining agreement. In the Board's opinion, unless the parties included a "work preservation" or similar clause clearly within the contract, the Board would not attempt to read such a provision into the parties' agreement.[49] In short, under the new Reagan NLRB interpretation, unlawful contract modifications will be found only where a term contained in the contract is clearly being modified. How a Democratic appointed Board might interpret section 8(d) at some point in the future is certainly open to speculation.

C. *Representation Election "Misrepresentations of Fact"*

A final notable area which is representative of Board policy reversals is the NLRB's regulation of labor representation election misrepresentations of fact. In 1947, as part of that year's Taft-Hartley amendments to the NLRA, Congress enacted section 8(c)[50] of the Labor Act. This section afforded both employers and unions rights of "free speech" under the Act, and stated that speech by either party would not constitute an unfair labor practice as long as it did not contain a "threat of reprisal or force or promise of benefit."[51]

The Truman Labor Board, however, declined to give free rein to labor speech despite seemingly clear congressional intent and action. Instead, in the landmark 1948 case of *General Shoe Corp.*[52] the Board differentiated between labor speech which constitutes an unfair labor practice, i.e., speech prohibited by section 8(c), and speech which is lawful under section 8(c), but which the NLRB nevertheless deems to interfere with holding fair labor representation elections. For example, an inflammatory appeal to racial prejudice may contain no "threat . . . or promise of benefit" and thus be lawful under section 8(c). But it may nevertheless be held by the NLRB to improperly interfere with the holding of a labor representation election and thus justify postponing or setting aside such an election.[53] Similarly, the NLRB has held that employer or union election misrepresentations of fact, e.g., misstatements regarding the amount of money earned by unionized employees at other plants, can also constitute improper election interferences.[54]

48. 268 N.L.R.B. No. 87, 1983-84 NLRB Dec. (CCH) ¶ 16,029 (1984) at 27,333-27,335.

49. *Id.*

50. 29 U.S.C. § 158(c) (1982).

51. *Id.* This provision was enacted in response to the Board's doctrine of "strict neutrality" prohibiting *any* anti-union speech by employers, and the Supreme Court's decision in the case of NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941), holding this practice to be unlawful. For an excellent discussion of the history behind this provision see Comment, *supra* note 13, at 756-62.

52. 77 N.L.R.B. 124 (1948).

53. *See e.g.*, Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).

54. For an outstanding, albeit now somewhat dated, study of the whole issue of NLRB

The Board's regulation of this latter area, however, has of late been something akin to a roller coaster ride.

Perhaps the leading case involving the NLRB's regulation of labor election campaign misrepresentations of facts is the Kennedy Board's 1962 decision in *Hollywood Ceramics Co.*[55] In this case the Board explicitly set forth the rule that a labor election will be set aside where there has been a misrepresentation (or other campaign trickery) which "involves a substantial departure from the truth . . . [and which] may reasonably be expected to have a significant impact on the election."[56]

Almost from the day *Hollywood Ceramics* was decided, however, labor analysts have questioned the Board's ability to determine what kinds of statements actually have a "significant impact" on an election, and have criticized the subjectivity involved in these determinations.[57] In 1976 these criticisms were buttressed by a major, and highly controversial,[58] empirical study by Professors Getman, Goldberg and Herman[59] which attacked the basic behavioral assumption behind the *Hollywood Ceramics* doctrine: that employee voters are generally influenced by campaign misrepresentations and other election propaganda. The Getman, Goldberg and Herman empirical study purported to show that employees are generally inattentive to information offered during representation election campaigns and uninfluenced by it in their voting.[60]

Relying on the Getman, Goldberg and Herman study and on a general perception of increased employee sophistication, the Nixon Board in 1977 overruled the *Hollywood Ceramics* decision in the case of *Shopping Kart Food Market, Inc.*[61] where it held that it would "no longer set elections aside on the basis of misleading campaign statements."[62] This decision represented the Nixon Board's "last hurrah," however, for less than two years later the Carter Board, in *General Knit of California*,[63] overruled *Shopping Kart* and reinstated the general rule of *Hollywood Ceramics*. But the issue was not yet to be put to rest. Soon there was another change of national administration, and the Reagan Board in the case of *Midland National Life Insurance Co.*[64] abruptly overruled *General Knit* and reinstated the precedent of *Shopping Kart*. In sum, over the past seven years the NLRB has reversed itself three times with respect to its role in

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regulation of campaign tactics, see Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

55. 140 N.L.R.B. 221 (1962).

56. *Id.* at 224.

57. *See e.g.*, R. WILLIAMS, P. JANUS & K. HOHN, NLRB REGULATION OF ELECTION CONDUCT 57 (1974).

58. *See e.g.*, Eames, *An Analysis of the Union Voting Study From a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976); Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781-87 (1983).

59. J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976).

60. *Id.* at 149.

61. 228 N.L.R.B. 1311 (1977).

62. *Id.* at 1313.

63. 239 N.L.R.B. 619 (1978).

64. 263 N.L.R.B. 127 (1982).

regulating misrepresentations of fact in labor representation elections.[65]

II. Options for Congressional Reform

A. *Maintaining the Status Quo*

From some perspectives, the best reform which could be made regarding the Board's shifting policies is no reform at all. Indeed, the whole controversy regarding NLRB policy reversals may be much ado about nothing.

Adopting this point of view, the *Collyer/General American Transportation/United Technologies, Spielberg/Suburban Motor Freight/Olin, Milwaukee Spring*, and *Shopping Kart/General Knit/Midland National Life* "flip-flops" can be regarded as anomalies. It is a fact that the overwhelming majority of the Board's decisions involve clear adherence to time-honored precedents.[66] Over ninety percent of all NLRB decisions are, regardless of political shifts in membership, made by a unanimous vote.[67] Consequently, we might accept occasional flip-flopping with respect to a few highly controversial issues. This may be the price we must pay for having an administrative agency, with considerable flexibility and discretion, regulate a highly contentious and ever-changing area of the law.[68]

With regard to the political nature of the Board's policy shifts, i.e., policies changing as a result of new political appointments to the Board, it can be argued that administrative agencies like the NLRB should be responsive to changes in national political administration.[69] First, as former SEC Chairman William Cary has insightfully pointed out, while the ordinary operations of an administrative agency generally have little political effect, there can be serious deleterious impact on the incumbent resident of the White House "if there is any trouble."[70] Thus if the President may ultimately be held politically responsible for an administrative agency's actions, it is reasonable for him to appoint agency members who will best promote his political ideologies and goals. Shifts in the substance of Board policy which follow shifts in the Board's political complexion may be necessary, as Professor David Shapiro has noted, "if the administration of federal labor law is to reflect in some degree the prevailing political climate."[71] Professor Clyde W. Summers has elaborated on this theme, stating:

Ought not government, in the making of policies, reflect major-

65. For a stinging criticism regarding the NLRB's "fickleness" in this area of the law, see *Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610, 612 (7th Cir. 1983) (Posner, J.).

66. *See generally* Dunau, *supra* note 7, at 211-12. *But see id.* at 212 (pointing out that sometimes the issue of quality is far more important than quantity).

67. *See Statement of Edward B. Miller Before House Oversight Hearings On NLRB*, DAILY LAB. REP. (BNA) at E-7 (June 27, 1984).

68. The Supreme Court has clearly held that the Board possesses a wide degree of discretion and flexibility in applying the NLRA. *See generally* Radio Officers v. NLRB, 347 U.S. 17, 48-52 (1954); NLRB v. A.J. Tower Co., 329 U.S. 324 (1946); Republic of Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

69. *See generally* Hickey, *supra* note 7, at 460-61.

70. *See* W. CARY, POLITICS AND THE REGULATORY AGENCIES 7-9 (1967).

71. *See* Shapiro, *Why Do Voters Vote?*, 86 YALE L.J. 1532, 1545 (1977).

> ity will? Should not administrative agencies, within the area of discretion granted them, choose the policy which most accurately expresses the desires of the majority? To do so is to make democracy more responsive, an especially significant contribution when government tends to become remote. It is true that our principal instrument for expressing majority will is Congress speaking through legislation. However, there is serious doubt whether Congress is capable of expressing small shifts or gradual changes. Amendments to the National Labor Relations Act make long jumps, tending to go beyond the existing balance of public opinion. The Board, by bending to the wind can enable the same statutory words to serve a range of shifts, thus avoiding the necessity of frequent changes. When the amendments come, it can soften the shock and ease the adjustment, thereby preserving a measure of continuity and stability.[72]

Professor Summers thus offers a more subtle, positive view of policy shifts that follow changes in the political complexion of the Board. Such shifts help keep the NLRA a malleable and responsive document, rather than one set in stone. Shifts in Board policy serve as precursors for future legislative reform, softening the blow when such reforms come. In this respect, such shifts enable far greater stability and continuity.

Congress, though, has put some clear checks on the political nature of the Board. Appointments to the Board are for staggered terms of five years, which is, of course, one year longer than that of the President.[73] Board members cannot be removed from office by the President absent "neglect of duty or malfeasance in office" and even under such circumstances cannot be forced out without "notice and hearing."[74] Further, appointments to the Board are subject to Senate advice and consent.[75] The Senate on occasion has exercised its prerogative to reject a President's nominee, most notably in the recent case of President Reagan's nomination of John Van de Water to the post of Board Chairman.[76]

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72. *See* Summers, *supra* note 8, at 100.

73. *See* 29 U.S.C. § 153(a) (1982). For a general discussion of the importance of staggered terms which are longer than those of the President, from the perspective of regulatory independence, see MacIntyre, *The Status of Regulatory Independence*, 29 FED. BAR J. 1, 4 (1969). The importance of such staggered terms diminishes, of course, if a President serves for more than one term. *Id.* at 4.

74. 29 U.S.C. § 153(a) (1982). Judicial guidelines regarding the removal of administrative agency members by the President were established in the case of Humphrey's Executor v. United States, 295 U.S. 602 (1935). That case was an outgrowth of an attempt by President Franklin Roosevelt to remove, for political reasons, a commissioner of the Federal Trade Commission. The Supreme Court held that administrative agencies had quasi-judicial and quasi-legislative powers which were different from those of the executive departments. Consequently, while the President had absolute removal power over executive officers, he did not have such power over quasi-judicial or quasi-legislative officers. *See generally* Dixon, *The Independent Commissions and Political Responsibility*, 27 AD. L. REV. 1, 3 (1975).

75. 29 U.S.C. § 153(a) (1982).

76. For a criticism of the Senate's failure to confirm Van de Water by a former Board member, see Walther, *Suggestions and Comments on the Future Directions of the NLRB*, 34 LAB. L. J. 215, 228 (1983).

Thus, as the late labor practitioner and scholar Bernard Dunau[77] noted, Congress has established a delicate balance with respect to the appropriate level of NLRB political responsiveness. In Dunau's opinion, if in nothing more than setting the term of Board tenure at five years, Congress has consciously assured "the infusion of new faces at fairly frequent intervals," and that these new faces will invariably hold differing political views.[78] Dunau further points out that "[i]f in one sense this hinders stability, in another sense it impedes stagnation, and it is not unfair to conclude that Congress prefers the former risk to the latter."[79] For example, by mandating five year terms for members of the NLRB, in contrast to the fourteen year terms provided for members of the Federal Reserve Board,[80] Congress has deliberately chosen the Board to be an agency which is relatively sensitive to shifts in the political winds. In Dunau's opinion, if Congress is unhappy about this situation it should do something about it; in the meantime, blame for shifting Board policy should be placed on Congress and not on Board appointees.[81]

B. *Altering Board Tenure and Composition*

Given the discussion above, one obvious option for reform in depoliticizing the NLRB would be for Congress to lengthen the tenure in office of Board members or alter the Board's structure and composition. Indeed, one such reform was considered by Congress as part of the ill-fated Labor Law Reform Act of 1978.[82] Under both the House and Senate versions of the proposed Labor Reform Act, section 3(a) of the NLRA was to be amended to provide staggered seven year terms for Board members.[83] In addition, these proposed statutory amendments provided that no more than a simple majority of the members of the Board were to be members of the same political party.[84]

Both of these amendments were part of a broader proposal to expand the size of the NLRB from five to seven members, and unfortunately were greatly overshadowed in the ensuing debate.[85] Nevertheless, both Congress and those testifying before it were aware of the potential benefits of extending members' terms to seven years. The

77. For a memorial tribute to Dunau's legal skills both as a scholar and practitioner see the articles set forth in 62 VA. L. REV. 469-662 (1976).

78. *See* Dunau, *supra* note 7, at 225.

79. *Id.*

80. 12 U.S.C. § 241 (1982).

81. *See* Dunau, *supra* note 7, at 225-29.

82. This Act was introduced in the House of Representatives as H.R. 8310, 95th Cong., 1st Sess. § 6 (1977) and in the Senate as S. 2467, 95th Cong., 2d Sess. § 6 (1978).

83. *See* H.R. REP. No. 637, 95th Cong., 1st Sess. (1977) at 52; S. REP. No. 628, 95th Cong., 2d Sess. (1978) at 45.

84. *Id.*

85. *See, e.g., Labor Reform Act of 1977: Hearings on S. 1883 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1031-35 (1977) (analysis of provision by former Board General Counsel Peter Nash on behalf of management clients). *See generally* Nolan & Lehr, *Improving NLRB Unfair Labor Practice Procedures*, 57 TEX. L. REV. 47, 52-56 (1978).

Senate Human Resources Committee, for example, noted in its legislative report that longer terms might create "greater stability" and result in Board decisions in precedent setting cases being accorded "a greater degree of respect by the affected parties."[86] Former United Auto Workers President Douglas Fraser elaborated on this theme in his congressional testimony, stating that: "the use of a seven-year term should moderate the political see-sawing the Board has seen throughout its history. It will take nearly two full presidential terms to appoint a completely new Board, rather than the approximately one term now required."[87]

Further, Congress also clearly wanted to codify the existing "de facto" practice of having no more than a simple majority of Board members from the same political party. As the House Committee on Education and Labor noted: "[a]t the present the practice is that no more than three members of the Board shall be members of the same political party. To assure continued balance on the Board, [this bill] expressly provides that no more than a simple majority of the Board's membership shall be drawn from one party."[88]

One obvious question which must be asked, however, is how much impact amendments providing longer terms for members, and mandating political party "balance," would really have on depoliticizing the Board? One need only look to the Federal Trade Commission (FTC)—which has had from its inception, both seven-year terms for commissioners and provisions statutorily mandating political party balance[89]—for evidence that the impact of such legislative amendments on depoliticization may not be great. The FTC has regularly experienced sharp shifts in policy resulting from political shifts in membership.[90] In 1980, Congress, reacting in part to the "politically charged" nature of the Commission's activities, enacted special legislation sharply limiting the Commission's authority.[91]

Important in all of this is the fact that requiring that no more than a simple majority of an administrative agency's members be from the same political party may not necessarily provide an adequate check on

86. S. REP. No. 628, *supra* note 83, at 8.

87. Hearings, *supra* note 85, at 1618.

88. H.R. REP. No. 637, *supra* note 83, at 31.

89. *See* 15 U.S.C. § 41 (1982).

90. Most recently, for example, "activist" Democratic Chairman Michael Pertschuk's strong push for the stricter regulation of children's television advertising fell into oblivion when Republican James C. Miller, an advocate of less government intervention in private enterprise, became the new FTC Chairman. *See generally* Washington Post, Oct. 1, 1981, at D11, col. 1. For a more general discussion of this issue in the context of the FTC, see Stewart & Cromartie, *Partisan Presidential Change and Regulatory Policy: The Case of the FTC and Deceptive Practices Enforcement, 1938-1974*, 12 PRES. STUD. Q., (Fall 1982).

91. *See* Federal Trade Commission Improvements Act of 1980, Public L. No. 96-252, 94 Stat. 374 (1980) (codified in various sections of the FTC Act, 15 U.S.C. §§ 41-51 (1982). This legislation was enacted despite the fact that Congress was dominated in both houses by the same political party as dominated the FTC. Indeed, the legislation was signed into law by a President who was also a member of the same party and who had also appointed the new "politically charged" FTC members.

undue agency politicization. Certainly, the current de facto practice of the NLRB has had relatively little such effect.[92] One former NLRB member has observed that political labels are of no meaning whatsoever.[93] The simple truth of the matter is that categorization of an individual as "Republican" or "Democrat" can be very misleading. A President can appoint a conservative Democrat or a liberal Republican and meet the "no more than a simple majority from one political party" litmus test, while creating a clear *ideological* imbalance within a given agency. Nevertheless, there are indications that Congress will go only so far in allowing "wolves to parade in sheep's clothing." Recently, for example, the Senate rejected the nomination of a purported "Democrat" to a "democratic" seat on the FTC, at least in part because of a feeling that President Reagan, in appointing the former director of "Democrats for Reagan," had pushed things beyond acceptable limits.[94]

Consequently, even if only at the outer extremes, it seems that political party limitations on agency appointments do put a political check on administrative agency makeup. Coupled with longer tenure for agency members and other possible reforms,[95] such limitations may help to stabilize and depoliticize administrative agencies. Those pondering future reforms with respect to the NLRB might do well to keep this in mind.

C. *Greater Board Use of Rulemaking*

Section 6 of the NLRA gives the NLRB the power to make, rescind, and amend in the manner prescribed by the Administrative Procedure Act (APA) "such rules and regulations as may be necessary to carry out the provisions of this [act]."[96] Despite its section 6 rulemaking authority, however, the Board has almost completely refused to engage in rulemaking, instead preferring to reach policy decisions on an ad hoc, case-by-case basis.[97] This refusal by the Board to engage in rulemaking

92. Former NLRB Member Peter Walther, a relatively pro-management Republican appointee, points out that over sixty percent of his Board dissents were from majority opinions written by the three "Republican" members of the Board. Walther, *supra* note 73, at 228.

93. *Id. See generally* Irving, *Recent NLRB Developments: The Survival of the Misguided Majority*, THE SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF TWENTY-NINTH ANNUAL INSTITUTE OF LABOR LAW, 78 (1982).

94. *See* Wall St. J., March 31, 1982, at 22, col. 3; N.Y. Times, Oct. 18, 1982, at D2, col. 1.

95. One possibility in this regard might be congressional legislation mandating a *tripartite* NLRB; made up of designated number of members representing labor, management and the general public. A number of the boards administering state public sector labor relations acts have been constituted in this manner. *See, e.g.*, N.J. Stat. Ann. § 34:13A-5.2 (West Supp. 1984). A tri-partite approach to the administration of labor laws is also quite common on Western Europe. *See* Aaron, *Labor Courts: Western European Models and Their Significance for the United States*, 16 U.C.L.A. L. REV. 847, 854-55 (1969).

96. *See* 29 U.S.C. § 156 (1982). Since the NLRA does not specifically mandate formal "on the record" rulemaking, the type of rulemaking proceeding required under NLRA section six is the "informal" "notice and comment" kind. *See* 5 U.S.C. § 553(c) (1982).

97. *See generally* Parker & Gilmore, *The Unfair Labor Practice Caseload: An Analysis of Selected Remedies*, 34 LAB. L. J. 172, 173 (1983). The Supreme Court in NLRB v. Bell Aero-

has been strongly and perenially criticized by a multitude of observers.[98] As Professor Clyde W. Summers has stated:

> The National Labor Relations Board, in administering the Act, has followed almost exclusively the procedure of case by case adjudication. This method, specially designed for resolving questions of fact, has limited usefulness in policy making. It is fragmentary in character, placing primary emphasis on the special facts of the single case, and focusing attention on one small facet of what is often a complex problem. This piecemeal process makes perspective difficult, for it tends to obscure the fact that policy is being made and to discourage direct discussion of the wisdom of the policy.
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> . . . .
>
> Policy making requires full consideration of an entire problem in its context, with a weighing of the views of all interested parties. The impact of a proposed policy in every foreseeable situation needs to be carefully studied and all possible alternatives considered. The adjudicatory process is ill-adapted to these ends. The procedures prescribed for rule making, especially those sketched in the Administrative Procedure Act, are far more appropriate.
>
> The Board is not compelled to continue with such awkward and inadequate procedures, for Section 6 grants to it broad powers to carry out the provisions of the Act through rule making. It is submitted that the adoption and extensive use of rule making procedures would substantially improve the policy developing functions of the Board. It would compel the Board to face more directly its policy problems, would provide more complete and pointed discussion, and would encourage the Board to make more articulate the rules and policies which it follows.[99]

In response to Professor Summers and others, the proposed Labor Law Reform Act of 1978 contained major amendments to section 6 of the NLRA. The amendments required the Board to promulgate rules regarding appropriate units for collective bargaining,[100] and rules pertaining to the standards to be applied in regulating labor elections.[101] To support these proposed statutory amendments both the House and Senate Labor Committees stated: "[t]here is no labor relations issue on

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space, 416 U.S. 267 (1974), though, clearly held that the choice between rulemaking and adjudication lies within the NLRB's discretion.

98. *See, e.g.*, Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L. J. 571 (1970); Peck, *The Atrophied Rule-making Powers of the National Labor Relations Board*, 70 YALE L. J. 729 (1961); Comment, *Shopping Kart: The Need for a Broader Approach to the Problems of Campaign Regulation*, 56 N.C.L. REV. 389, 403-04 (1978). *But see generally* Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L. J. 982 (1980).

99. Summers, *supra* note 8, at 105-06 (footnotes omitted).

100. For a general discussion of the issue of appropriate bargaining units, see R. Gorman, *supra* note 25, at 66-92.

101. *See* H.R. 8410, 95th Cong., 1st Sess., §§ 6(b)(1) & (2) and S. 1883, 95th Cong., 1st Sess., §§ 6(b)(1) & (2) texts *reprinted in* Senate Hearings, *supra* note 85, at 5-6, 28-29. *See also* H.R. REP. No. 637, *supra* note 83, at 53; S. REP. No. 628, *supra* note 83, at 47-48.

which there has been such a strong consensus as on the proposition that the Board should make greater use of its rule-making authority under section 6 of the Act."[102]

Greater use of rulemaking may indeed be one way to create greater stability and predictability in Board actions. One benefit would be that shifts in policy, although they might still occur,[103] would be less abrupt. If nothing else, pursuant to APA rulemaking guidelines, interested parties would have advance notice of the proposed change and the opportunity to comment on it.[104] Rulemaking also avoids the myriad of problems[105] involved in applying policy changes retroactively.[106]

Perhaps even more significantly, rulemaking would recognize shifts in policy for what they are, and make them more visible. Professor David Shapiro has conjectured that part of the reason for the Board's reluctance to engage in rulemaking might stem from the view that its changes in policy "would be more visible, and thus more embarrasing, if such changes were made by amending an outstanding regulation."[107] Under rulemaking, as Shapiro implies, Board policy changes would be made explicitly and openly. Rulemaking would not allow the Board to justify its decisions on narrow factual grounds turning on the peculiarities of a given case.[108] One positive result of this approach, and the increased visibility it requires, might be a greater reluctance on the part of the Board to make rapid and radical shifts in policy.[109]

Another positive result of the rulemaking approach, as Professor Samuel Estriecher recently pointed out very forcefully, would be the opportunity it affords for greater public commentary, input, and debate on major issues of Board policy.[110] Rulemaking affords an opportunity to look at a problem from its broadest perspective and evaluate the views of all interested parties.[111] Rulemaking proceedings would also afford the Board the flexibility to consider alternatives more varied than merely upholding or overruling a given precedent.[112]

Further, under rulemaking a complete hearing could be given to the premise underlying the Board's decision. For example, in the misrepresentations of fact area, the Board in overruling its *Hollywood Ceramics* decision in the *Shopping Kart* case, relied heavily, albeit selectively, on the empirical study done by Professor Julius Getman and his colleagues.[113] Rulemaking proceedings would allow free public discussion of such

102. *See* H.R. REP. No. 637, *supra* note 83, at 36; S. REP. No. 628, *supra* note 83, at 19.
103. *See* 29 U.S.C. § 156 (1982) (giving the Board the power to "rescind" and "amend", as well as "make" rules pursuant to the APA).
104. *See* 5 U.S.C. §§ 553(b)(2) & (3) & (c) (1982).
105. *See* 116 Lab. Rel. Rep. (BNA) 145 (June 25, 1984) (statement of union labor attorney Marc Rauch).
106. *See generally* Bernstein, *supra* note 98, at 598-602.
107. *See* Shapiro, *supra* note 71, at 1544.
108. *See* Bernstein, *supra* note 98, at 597-98.
109. *See generally* Bernstein, *supra* note 98, at 597.
110. *See* 116 LAB. REL. REP. (BNA) 142-44 (June 25, 1984).
111. *See* Summers, *supra* note 8, at 105-06.
112. *See* Comment, *supra* note 98, at 403-04.
113. *See supra* notes 55-65 and accompanying text.

studies and permit them to be viewed from a broad perspective, including their implications on the Board's overall policy. In addition, data regarding such studies could be presented in informal rulemaking proceedings without the strictures of the formal rules of evidence which are generally applicable in adjudicatory proceedings.[114]

Finally, it may be possible for the NLRB, in some circumstances, to use rulemaking and adjudication in tandem.[115] For example, the Board, to gain some experience in a given area, could proceed at first on a case-by-case basis. During this period the Board could expressly limit the precedential authority of its decisions, suggesting that it was in the process of evolving a rule and that changes might come in the process. Perhaps at this stage the Board might issue a broad non-binding "general statement of policy"[116] signaling where it was heading. Then, at a point when the Board felt it had gained sufficient knowledge of the problem, it could hold binding rulemaking proceedings to elaborate and crystallize the rule.

In sum, greater use of Board rulemaking might create a regulatory system with greater certainty and stability. Policy shifts would be recognized for what they are and would be given a full public airing. A system involving abrupt, retroactive, factually-oriented policy shifts would be replaced by one requiring a full opportunity for notice and public comment, and involving prospective applications. Congress, in considering possible labor law reforms, should once again consider the possibility of mandating that the NLRB make greater use of rulemaking.

D. *Selectively Amending the Act*

1. Overview

One final possible option for Congress in terms of dealing with the problem of NLRB policy reversals would be to make selective clarifying amendments to given provisions of the NLRA. Two particularly salient amendments in this regard were offered as part of the proposed Labor Reform Act of 1978.[117]

2. Applying Section 8(c) to Representation Elections

One key amendment which was offered as part of the proposed 1977-78 labor reform legislation was a proposal to amend the Act's "free speech" section, section 8(c),[118] to explicitly apply it to labor representation elections. This statutory section states that union or employer speech will not constitute an unfair labor practice unless it

114. *See generally* Shapiro, *supra* note 71, at 1545.

115. The author is indebted to Professor Clyde W. Summers for this insightful point.

116. *See* 5 U.S.C. § 553(b)(3)(A) (1982). *See generally* Pacific Gas & Electric Co. v. Federal Power Comm'n., 506 F.2d 33 (D.C. Cir. 1974) (policy statement on natural gas curtailment plans held exempt from APA rulemaking requirements).

117. This Act was introduced in the House of Representatives as H.R. 8310, 95th Cong., 1st Sess. § 6 (1977) and in the Senate as S. 2467, 95th Cong., 2d Sess. § 6 (1978).

118. 29 U.S.C. § 158(c) (1982).

contains a "threat of reprisal or force or promise of benefit."[119] The Board, under the aegis of its "laboratory conditions" doctrine,[120] has in the past set aside and postponed elections because of speech involving neither threats nor promises of benefit. In recent years, however, the NLRB has begun to question the viability of its "laboratory conditions" doctrine, particularly as applied to the area of election misrepresentations of fact.[121] In 1977 the Board in an important decision held that, as a general rule, elections would no longer be set aside or postponed because of election misrepresentations.[122] This decision was, however, then reversed by the Board in 1978 and reinstated in 1982.[123]

The policy instability which has recently plagued this area would have been avoided had the Labor Law Reform Act of 1978 become law.[124] That proposed legislation contained language explicitly applying section 8(c) to the representation election context, and abolishing the "laboratory conditions" doctrine. Initially, the amendment was part of an alternative minority party labor reform bill entitled the "Employee Bill of Rights Act" introduced in the House of Representatives by Congressmen Erlenborn and Ashbrook.[125] This proposed amendment was then incorporated by the Senate into the basic majority party reform package as enacted by the House.[126] In reporting the incorporation of this minority proposal into the basic labor reform bill, the Senate Human Resources Committee noted the importance it would serve in fostering free debate and speech in labor elections.[127]

There are forceful arguments that Congress should once again give careful attention to the issue of free speech in labor representation elections. The results of the Getman, Goldberg and Herman study aside, it seems unclear at best whether Congress ever had any idea that the NLRB would circumvent section 8(c) and establish an independent "laboratory conditions" scheme for regulating labor election speech. Instead, it appears considerably more likely that Congress simply assumed that the Board would continue, as it had done in the past, applying standards established for unfair labor practices in the election area as well,

119. *Id. See supra* notes 50, 51 and accompanying text.

120. The NLRB stated in the 1948 *General Shoe* case that "[i]n 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." General Shoe Corp., 77 N.L.R.B. 124, 127 (1948) (this statement announced what has come to be known as the "laboratory conditions doctrine"). *See generally* notes 52-65 *supra* and accompanying text; Bok, *supra* note 54.

121. *See supra* notes 61-65 and accompanying text.

122. Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 (1977).

123. *See supra* notes 63, 64 and accompanying text.

124. The legislation was ultimately "defeated", i.e., enough votes could not be garnered to stop the filibuster in June, 1978. 124 CONG. REC. S9405 (daily ed. June 22, 1978). This was well before the Labor Board's *General Knit* decision of December 6, 1978 reversing *Shopping Kart*. *See generally* Comment, *supra* note 13, at 777 n.129.

125. *See* Comment, *supra* note 13, at 792-93 & nn. 188-191.

126. H.R. 8310, 95th Cong., 1st Sess. § 6 (1977); *see also* S. 2467, 95th Cong. 2d Sess. § 6 (1978); *see also* Comment, *supra* note 13, at 795.

127. *See* S. REP. No. 628, *supra* note 79, at 26-28.

and that section 8(c) would govern both.[128] From the point of view of enforcing original congressional intent, as well as from the central perspective of increasing labor policy stability, congressional action clearly applying section 8(c) to labor representation elections is merited.

3. Codifying *Collyer*?

Another important amendment offered as part of the Labor Reform Act of 1978 was a minority party proposal presented by Congressmen Erlenborn and Ashbrook, and Senators Hatch and Tower, designed to codify the Board's *Collyer* and *National Radio* precedents[129] mandating NLRB deferral to arbitration.[130] The proposed statutory amendment provided that:

> [I]f an employer, or a labor organization on its own behalf or on behalf of employees, or employees on their own behalf or on behalf of other employees could submit a dispute to binding arbitration under the terms of an existing collective-bargaining agreement, or have agreed to submit a dispute to binding arbitration, or have submitted a dispute to binding arbitration, then such arbitration shall be the exclusive forum and such party or any person on whose behalf such action has or could be taken, shall only have the right to institute or maintain an unfair labor practice proceeding before the Board involving the same incident or subject matter when determinations of such arbitration are inconsistent with the rights granted by this Act.[131]

Arguably, under this amendment, contractual arbitration would have become the exclusive remedy in disputes involving both breaches of contract and unfair labor practices. Recourse to the Board's unfair practice machinery would be permitted only under *Spielberg*-like conditions[132] where the arbitrator's determinations are found to be "inconsistent" with the Act. Unlike the proposed amendment regarding application of section 8(c) to representation elections, however, *no* bipartisan consensus was reached on this issue during congressional consideration of the Labor Reform Act in 1977 and 1978. There are nevertheless many strong arguments in support of the Erlenborn/Ashbrook/Hatch/Tower approach, particularly in terms of promoting the Labor Act's bias in favor of the use of voluntary dispute settlement mechanisms.[133]

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128. *See* Note, *Free Speech and Free Choice in Representation Elections: Effect of Taft-Hartley Act Section 8(c)*, 58 YALE L.J. 165, 174 (1948). Board dictum in Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 n.11 (1962), stated that "Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and [that] it has no application to representation cases." This seems clearly erroneous. It is far more likely that Congress simply assumed that the Board would apply section 8(c) in both instances. *See generally* NLRB v. Shirlington Supermarket, Inc., 224 F.2d 649, 658-59 & n.5 (4th Cir.) (Soper, J., dissenting), *cert. denied*, 350 U.S. 914 (1955).

129. *See supra* notes 23-32 and accompanying text.

130. *See* S. 1855, 95th Cong., 1st Sess., § 7 *reprinted in* Hearings, *supra* note 85, at 23-24.

131. *Id.*

132. *See generally* notes 33 to 39 *supra* and accompanying text.

133. *See* 29 U.S.C. § 173(d) (1982).

The primary weakness with such a broad deferral approach, however, is its impact on individual employee rights, both with respect to the potential abrogation of statutory rights which may be involved,[134] but even more so with respect to inherent weaknesses in the American labor arbitration system. This latter point has recently been very insightfully developed by Professor Reginald Alleyne,[135] who noted that the existence of a grievance arbitration mechanism in a labor contract does *not* per se mean that a dispute will necessarily be heard by a labor arbitrator.[136] Alleyne emphasized that, absent a breach of the duty of fair representation,[137] unions are free to take, or not take, a case to arbitration, and that a number of political and economic factors may influence this decision.[138] The bottom line in all of this being that there is little certainty that the rights of the individual employee will be vindicated in the arbitration process.[139]

As a possible reform in this area, Professor Alleyne suggested that parties charging unfair labor practices be given the option of pursuing a given case in either the arbitral or NLRB forums.[140] This approach would afford charging parties the opportunity to pursue a particular case in the manner they perceive as most advantageous while avoiding the "two bites at the apple" problem, the anathema of many management representatives.[141] Such an approach, if statutorily mandated, would also provide a sharp measure of procedural stability for an area of labor law beset by ongoing change and controversy.[142] In considering future labor law reforms, the "Alleyne charging party option" approach to arbitral deferral, is one that Congress should study closely.

III. CONCLUSION

The perennial problem of National Labor Relations Board policy instability has, in recent months, taken on rather unusual proportions, engendering cries for congressional reform. This article has examined the problem of NLRB policy vacillation, and has offered several remedies in the context of possible congressional action. Particular attention has been given to various proposals presented as part of the Labor Law Reform Act of 1978, which was enacted by the U.S. House of Representatives, but successfully filibustered in the U.S. Senate.

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134. *See generally* Harper, *Union Waiver of Employee Rights Under the NLRA: Part II, A Fresh Approach to Board Deferral Arbitration*, 4 IND. REL. L.J. 680 (1981).

135. *See* Alleyne, *Arbitrators and the NLRB: The Nature of the Deferral Beast*, 4 IND. REL. L. J. 587 (1981).

136. *Id.* at 600-02.

137. *See generally* Summers, *The Individual Employee's Rights Under The Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977).

138. *See* Alleyne, *supra* note 135, at 602 & n.54.

139. *Id.* at 601-03.

140. *Id.*

141. *See, e.g.*, Statement of Former NLRB General Counsel John Irving Before House Oversight Hearings on NLRB, Daily Lab. Rep. (BNA), June 27, 1984 at E-8. *See generally* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (upholding an employee's right to "two bites at the apple" under Title VII of the Civil Rights Act).

142. *See supra* notes 23-32 and accompanying text.

It has been asserted that, as a general proposition, there is considerable merit to the idea that Congress resist pressures for reform in this area, and maintain the status quo. From this perspective, NLRB shifts in policy can be seen as merely reflecting the rather regular shifts in Board membership which occur because of the relatively short terms office members are afforded under the Act. It can be argued that such changes in membership, and consequently in policy, help keep the Board and our labor laws responsive to prevailing political climates. Moreover, it is clear that the overwhelming majority of Board decisions do involve clear adherence to time honored precedents.

Nevertheless, there are also strong arguments in favor of congressional action dealing with the problem of Board decisional instability. Various proposals presented as part of the aborted Labor Reform Act of 1978 present considerable promise. In particular, congressional action requiring that the Board make greater use of rulemaking, and applying section 8(c) to representation elections would be especially constructive. Careful congressional study of other ways of better coping with the problem of abrupt NLRB policy shifts, such as mandating Board political balance, and providing for a charging party arbitration deferral option, also seem called for. The considerable uncertainty caused by recent bouts of NLRB policy "flip-flops" seems to argue, if nothing else, for more careful congressional examination of the issue.