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ECONOMICS, POLITICS, AND THE LAW: THE NLRB'S DIVISION OF ECONOMIC RESEARCH, 1935-1940*

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The last, and seldom noted, sentence of section 4(a) of the Labor Management Relations Act reads: "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, *or for economic analysis.*"[1] By 1947, when the Act was passed, this provision was simply a quiet[2] confirmation of a congressional decision, seven years earlier, not to appropriate salaries for the NLRB's Division of Economic Research.[3] The reaction to the Division's work during the NLRB's first five years, however, was hardly quiet.

The Supreme Court's use in 1937 of the economic and other non-legal data that the NLRB included in its arguments in *Jones and Laughlin* and the other Wagner Act cases[4] convinced many experts that

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1 61 Stat. 136 (1947), 29 U.S.C. § 154(a) (1964) (emphasis added).

2 The scant legislative history generated by this provision appears in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 495 (1948); *id.* at 2 NLRB 1052, 1577.

3 Act of Oct. 9, 1940, ch. 780, 54 Stat. 1037.

4 Washington, Virginia & Maryland Coach Co. v. NLRB, 301 U.S. 142 (1937); As-

the need for economic analysis in labor cases was an accepted fact, making the NLRB's Division of Economic Research an indispensable element in the administration of the National Labor Relations Act:

> These services, especially that of economic research, are a powerful complement to the Board's legal work. No small amount of the success that the NLRB has had before the courts may be attributed to facts that it has been able to present on the respective industries. . . . Public policy cannot be determined or enforced in a vacuum, or by legal precedents alone. Adjudication as well as legislation must be based on the facts of economic and social conditions. Only in this way can the law be vital. For the purpose of finding these facts a bureau of economic research is invaluable.[5]

In opposition to this view, a congressional committee and others saw the Division as a forum for the allegedly radical leanings of its Chief Economist, David J. Saposs, and as "perhaps more than any other [division] in the Board, imbued with that strangely exaggerated sense of social responsibility that Saposs brought to his work from his background of socialism and active participation in leftist organizations and programs."[6] Moreover, the committee charged that when these economic data were admitted into evidence through expert testimony at NLRB hearings, the Board committed an even more serious breach of the theory of separation of powers than the courts had recognized:

> It will thus be seen that the United States circuit court of appeals in the *Inland Steel case*, when it condemned the Board, as "prosecutor, judge, jury, and executioner," neglected to mention that the Board through Saposs and his assistants also acts as its own "witness" in producing evidence upon which it bases its findings, which are conclusive and not subject to judicial review.[7]

This conflict over the Division of Economic Research mirrored the most controversial and historically important issues in the early years of the NLRB: questions concerning due process and the proper administration of justice, the influence of leftist ideologies on the work of the Board, the preparation of constitutional cases, and the meaning of the Wagner Act itself—whether Congress intended the NLRB to be a judicial agency or an "industrial relations" agency. An analysis of the work of the Division of Economic Research thus provides a use-

sociated Press v. NLRB, 301 U.S. 103 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

5 Pate, *The National Labor Relations Board*, 6 So. Econ. J. 56, 57-58 (1939). *See also* Ziskind, *The Use of Economic Data in Labor Cases*, 6 U. Chi. L. Rev. 607 (1939).

6 H.R. Rep. No. 3109, 76th Cong., 3d Sess., pt. 1, at 147-48 (1941).

7 H.R. Rep. No. 1902, 76th Cong., 3d Sess., pt. 1, at 33-34 (1940).

ful contribution to our limited understanding of the NLRB as a functioning institution—as the administrative agency that implements our national labor policy in an environment of group power and conflict.[8] Finally, a consideration of the nature of the problems now before the NLRB, coupled with a review of the reasons for the abolition of the Division of Economic Research, strongly suggests a reassessment of the public policy forbidding the NLRB from engaging in economic analysis.

I

THE WORK OF THE DIVISION OF ECONOMIC RESEARCH

Since the prospects for the constitutionality of the Wagner Act were only as good as the connection between strikes and interferences with interstate commerce, the NLRB, as early as August 1935, began to consider "definite plans" for the organization of "industrial economic research."[9] Four days after the appointment of J. Warren Madden as the first Chairman of the Wagner Act NLRB, Edwin S. Smith, a non-lawyer member of the Board, told him that the Board needed

> an "industrial economist" thoroughly versed in the history of labor relations in various industries in this country. He should be a man capable of presenting his material adequately both in writing and as a witness. It would certainly be a full-time job, and a busy one . . . .[10]

Harry A. Millis, a member of the pre-Wagner, Resolution 44 Board, and Francis Biddle, successor to Lloyd Garrison as that Board's Chairman, recommended David J. Saposs for the job.[11] It is clear from Mr. Saposs's recollections of his first interview with Chairman Madden that the Board had neither formulated any "definite plans" for economic research nor even decided that it could be useful.[12]

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8 Although the literature of administrative law contains much about the legal powers of agencies, their procedures, and judicial review of their decisions, little is known about the part-judicial, part-political, part-ideological, part-"expertise" decision-making process of these agencies.

9 NLRB files, Memorandum from Edwin S. Smith to John Carmody, Work of the Industrial Economists, Sept. 20, 1935.

10 NLRB files, Memorandum from Edwin S. Smith to J. Warren Madden, Industrial Economist, Aug. 31, 1935.

11 Oral history interview with David J. Saposs, July 22, 1968, at 4, on file in the Labor Management Documentation Center, Cornell University.

12 I telephoned . . . Madden . . . made an appointment . . . and when I got there he was exceedingly friendly and very polite, but the first thing he told me . . . [was] "I haven't the slightest idea what you can do in the Board or for the Board." Well, I began explaining to him what I thought could be done, but

On the NLRB organizational chart, at least, the Division of Economic Research attained status equal to that of the Legal Division, the Trial Examining Division, and the Division of Publications.[13] But the lawyers in the NLRB did not see it that way; an economist who worked in the Division remembered: "As usual, in those days before computer technology enabled the government economist to draw even with lawyers in salary and status, the lawyers were running the show: 'After all it *is* a law which is being enforced.' "[14] A lawyer's attitude toward economists was reflected as late as 1940 when Chairman Madden explained the relatively low salaries of the Board's economists to a House Appropriations Committee: "it happens also that you can turn out economists more or less en masse. I mean you can take almost any kind of individual and if you put him through a certain type of education he can do this kind of work."[15] Saposs, by his own description a stubborn and "impudent"[16] person, had been preparing for the kind of work he was able to do at the NLRB ever since John R. Commons introduced him to institutional economics and the "Brandeis technique."[17] He set out to convince the Board's lawyers that the NLRB did need an economist.[18]

The Division carried on two interrelated types of work: it gathered economic material as evidence for use by the Board in particular cases, and it made general studies of labor relations problems to guide

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actually I myself wasn't very clear at that time as to what could be done, but I had certain notions of a general nature. "Well," he said, "Millis and Biddle have recommended you; you're hired." So, I started working.

Id. at 5.

13 *Hearings Before the House Special Comm. to Investigate the National Labor Relations Board*, 76th Cong., 3d Sess., pt. 1, at 5111-12 (1940) [hereinafter cited as *Smith Committee Hearings*].

14 Weisz, *Research as a Tool of Administration: The Contribution of David J. Saposs*, in THE LABOR MOVEMENT: A RE-EXAMINATION 100-01 (J. Barbash ed. 1967).

15 *Hearings on H.R. 10539 Before the Subcomm. of the Senate Comm. on Appropriations*, 76th Cong., 1st Sess., pt. 1, at 578 (1940).

16 Oral history interview, *supra* note 11, at 11.

17 *Id.* at 3. The "Brandeis technique" is a reference to the economic brief filed by Mr. Louis Brandeis in Muller v. Oregon, 208 U.S. 412 (1908).

Mr. Saposs was born in the Russian Ukraine and came to the United States when he was nine years old. Prior to his appointment as Chief Economist at the NLRB, he had worked for the U.S. Commission on Industrial Relations, the New York State Department of Labor, the Carnegie Corporation Americanization Study, the Inter-Church World Movement, the Twentieth Century Fund, and the U.S. Department of Labor. He had taught at the University of Wisconsin, the University of Toledo, and Brookwood Labor College; had been the Education Director of the Amalgamated Clothing Workers; and had written many books and articles in the field of labor relations.

18 Oral history interview, *supra* note 11, at 10-11.

the Board in its formulation of policy. The current case work[19] of the Division ranged from the provision of assistance in drafting complaints (usually restricted to advising the Board regarding its jurisdiction through investigations of corporate organization and descriptions of interstate operations and properties) to the preparation of materials for use at Board hearings or for inclusion in appellate court briefs. These materials included "extracts from official sources or authoritative writings on the economics of the respondent's industry or operations; extracts from authoritative writings in the field of labor economics on a general question of labor relations, such as the significance of union recognition in collective bargaining; authenticated copies of governmental reports on an aspect of respondent's labor relations"[20] and expert testimony given by the Chief Economist concerning such labor relations problems as "written agreements, independent unions, employer labor policies and activities, and the history of the respondent's labor policy."[21] In the *Berkshire Knitting Mills*[22] case, for example, in which the company was charged with sponsoring a company union and interfering with its employees' right to join the American Federation of Hosiery Workers, Saposs testified about the historical development of employer anti-labor policies and activities, the revelations of the LaFollette Committee, and the findings of a Division of Economic Research analysis of eighty-five "independent" unions.[23] The Economic Research Division also analyzed employment records, primarily to investigate section 8(3) charges[24] and to secure compliance with back-pay and reinstatement orders.[25]

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19 The Division's work is summarized in each of the first five *NLRB Annual Reports*: 1 NLRB ANN. REP. 60-66 (1936); 2 NLRB ANN. REP. 41-47 (1937); 3 NLRB ANN. REP. 245-53 (1938); 4 NLRB ANN. REP. 152-57 (1939); 5 NLRB ANN. REP. 124-30 (1940).

20 3 NLRB ANN. REP. 249 (1938).

21 *Id.* at 249-50.

22 Berkshire Employees Ass'n v. NLRB, 121 F.2d 235 (3d Cir. 1941).

23 NLRB files, Division of Economic Research, Statistical Analysis of 85 'Independent' Unions and Readapted Company Unions, Research Memorandum No. 1, March 1938; Memorandum from David J. Saposs to Messrs. Madden, E.S. Smith, D.W. Smith, Fahy, Watts, Subject Matter Covered in Testimony at the Berkshire Knitting Mills Hearings, Jan. 6, 1938; Score Employers As Causing Unrest, N.Y. Times, Jan. 6, 1938, at 8, col. 4; Accuses Industry of War on Union, *id.*, Jan. 5, 1938, at 14, col. 1.

24 For example, when an employer was charged with having discriminated against his employees through a reduction in work force, allegedly necessitated by business conditions, employment records would be searched to check out seniority plans, merit rating systems, employee production records, and so forth. *See* NLRB files, Division of Economic Research, Investigation and Analysis of Employment Records and Personnel Policies in Connection with 8(3) Cases, Aug. 24, 1939.

25 *See* NLRB files, Division of Economic Research, The Functions of the NLRB Division of Economic Research, April 13, 1940, at 6.

The Economic Division also prepared research memoranda[26] ("The Structure of AFL Unions," "The Role of Supervisory Employees in Spreading Employer Views"), research outlines[27] ("Effective Collective Bargaining," "Employer Labor Policies and Activities"), and printed bulletins[28] ("Written Trade Agreements in Collective Bargaining," "Governmental Protection of Labor's Right to Organize") for use in future cases, for the information of the Board, and for general policy planning. The bulletin "Written Trade Agreements in Collective Bargaining" is typical of this aspect of the Division's work. This bulletin was an expansion of the economic materials prepared for the Board in the *Inland Steel*[29] case, which involved a question of whether the company's refusal to enter into a written agreement with the union was a violation of the NLRA. The Division made a detailed study of the theory and practice of collective bargaining, the historical development of the written trade agreement, the forms and content of the trade agreement, and the prevailing practice concerning the written agreement in a selected group of industries. The study concluded that a written trade agreement signed by both the employer and the union was an integral part of collective bargaining, helping to reduce industrial unrest, to provide a constitution for industrial democracy, and to "[institutionalize] the whole collective bargaining process."[30] The published bulletin informed employers and unions of the Board's attitude toward written collective bargaining contracts and provided documentary support for the Board's position in future cases involving this issue.[31]

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26 *See, e.g.*, NLRB files, Saposs, Statistical Analysis of 85 'Independent' Unions and Readapted Company Unions, Research Memorandum No. 1, March 1938 (mimeographed); Saposs, Digest of Testimony at Hearing in Case of Inland Steel Company and Steelworkers' Organizing Committee, Research Memorandum No. 2, April 1938 (mimeographed); Saposs, Ellickson & Stern, Role of Supervisory Employees in Spreading Employer Views, Research Memorandum No. 3, Nov. 1938 (mimeographed); Cooper, Union-Employer Responsibility, Research Memorandum No. 4, Jan. 1939 (mimeographed); Saposs, Structure of AFL Unions, Research Memorandum No. 8, May 1939 (mimeographed).

27 *See, e.g.*, NLRB files, Saposs, Employer Labor Practices and Activities, Research Outline No. 6, March 1938 (mimeographed); Saposs & Cooper, Effective Collective Bargaining, Research Outline No. 7, Dec. 1938 (mimeographed).

28 *See, e.g.*, NLRB files, Governmental Protection of Labor's Right to Organize, Bull. No. 1, Aug. 1936; The Effect of Labor Relations in the Bituminous Coal Industry, Bull. No. 2, June 1938; Collective Bargaining in the Newspaper Industry, Bull. No. 3, Oct. 1938; Written Trade Agreements in Collective Bargaining, Bull. No. 4, Nov. 1939.

29 Inland Steel Co. v. NLRB, 109 F.2d 9 (7th Cir. 1940).

30 NLRB files, Written Trade Agreements in Collective Bargaining, Bull. No. 4, Nov. 1939, at xii, 251, 256.

31 NLRB files, Memorandum from David J. Saposs to Messrs. J. Warren Madden, Edwin S. Smith, Donald W. Smith, Bulletin On Written Trade Agreements, Sept. 23, 1937.

II

CONSTITUTIONAL CASES

Economic labor relations data helped build the case records on which the Supreme Court sustained the constitutionality of the Wagner Act in 1937. A few years later, J. Warren Madden would tell the Smith Committee that the NLRB's development of the records in these cases was "a masterful job," "a perfectly splendid job," and that "a better piece of legal work has not been done."[32] He might have added that there was no better illustration of the potency of a coordinated effort by the Board's legal departments and the Division of Economic Research.

The legal strategy was the core of the effort.[33] The Board believed that the Supreme Court's decision in *Texas and New Orleans R.R. v. Brotherhood of Railway and Steamship Clerks*[34] had established that the portions of the Act that pertained to the protection of self-organization were "reasonable means of carrying out a legitimate end" and were not arbitrary or capricious. Although the provisions concerning collective bargaining (particularly majority rule) were less certain to be upheld, "the danger of an unfavorable ruling on this [due process] issue [was] not great."[35] The Act was much more vulnerable on the question of the commerce power, and on this point the choice of legal arguments and the selection of test cases became most critical. The Supreme Court in its *Schechter*[36] decision had already rejected arguments based upon the more intangible obstructions to commerce mentioned in section 1[37] of the NLRA, such as the depressing effects on

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32 13 *Smith Committee Hearings*, at 2710.

33 For an interesting discussion of the legal strategy in each of the Wagner Act cases, see R. CORTNER, THE WAGNER ACT CASES 89-194 (1964).

34 281 U.S. 548 (1930).

35 NLRB files, Memorandum (M410) from T.I. Emerson, Gerhard Van Arkel, Charles Wood & Garnet Patterson, Selection of Test Cases Under the National Labor Relations Act, July 9, 1935, at 1.

36 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

37 Section 1 of the NLRA reads:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess

the market of wage competition and inadequate purchasing power[38] or the alleged expansionary effects on commerce of the increased income resulting from an equalization of bargaining power between employer and employee. The Board decided that the foundation would be the other congressional finding contained in section 1: that employer unfair labor practices lead to strikes and industrial unrest, which physically obstruct the flow of commerce.

Mere declarations by the legislature, however, would not be enough to justify the exercise of federal power. The legislative findings had to be supported by facts if the Supreme Court was to give weight and "great respect" to congressional conclusions. A review of the Supreme Court cases dealing with the weight to be given to legislative findings indicated that the "independent examination of the facts by the Court is without boundaries and may lead anywhere. Resort may be had to the facts known judicially to the Court . . . , to the evidence considered by Congress . . . , to facts argued before the Court, etc."[39]

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full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

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

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Act of July 5, 1935, ch. 372, § 1, 49 Stat. 449.

38 Despite its mention in § 1, Charles Wyzanski, who presented oral arguments on behalf of the NLRB in the *Associated Press* case, told the Supreme Court that "the demoralization of the wage structure, may have something to do with the reasonableness of the regulation, but it is not the foundation or the source of congressional power." ORAL ARGUMENTS IN THE CASES ARISING UNDER THE RAILWAY LABOR ACT AND THE NATIONAL LABOR RELATIONS ACT BEFORE THE SUPREME COURT OF THE UNITED STATES, S. Doc. No. 52, 75th Cong., 1st Sess. 72 (1937). J. Warren Madden said in his oral argument in the *Jones & Laughlin* case that

> I could imagine that there might be a sufficient connection between the wages and the labor troubles, thereby stopping the flow of commerce, but I see no such intimate connection whatever as there is between strikes and the flow of Commerce.

Id. at 115.

39 NLRB files, Memorandum of Stanley S. Surrey, The Relevance and Importance

It was recommended that factual evidence supporting the congressional findings of section 1 should be introduced into the case records and "should not be limited to the reports of the Congressional Committees and the record before these Committees, but should contain in addition other facts and material."[40]

The statute as a whole was to be justified by the introduction of certain general proofs: that interstate commerce was involved in the particular case, that the employer did commit a specific unfair labor practice, that such illegal acts have led or tend to lead to industrial unrest which obstructs interstate commerce, and "that the remedy adopted [was] in general an appropriate one."[41] The Board was advised, however, that it would be dangerous to stop with a general argument that might prove too much (by seeming to place all labor relations under the supervision of the federal government) rather than to go on to the specific case before the Court "and the effect of the unfair labor practice in *that* case upon interstate commerce."[42] The case-by-case approach was tactically designed, in part, to anticipate any desire of the Supreme Court "to narrow a favorable decision to prevent it from being too strong a precedent in favor of the regulation of labor relations."[43] The Board was also reminded that the Court had shown great interest in the business transactions of the Schechter Poultry Corporation.[44]

The best test case, therefore, would be one in which the general congressional findings of section 1 were clearly and concretely verified by its particular facts: a case where the employer's unfair labor practices had caused his employees to strike and to shut down the plant. In weaker cases, where the effect of the unfair labor practice was not so clear, the Board would have to rely on the tendency of such practices to lead to labor disputes that obstruct commerce. The question in that type of case was "one of probability and the findings of Congress [were] relevant to show what the probabilities [were];" moreover, "[t]he history of past labor disputes in which the employer was involved [was] relevant to show what probably might occur in a future case. The labor relations experience of the industry [was] likewise relevant."[45]

of the Congressional Findings Contained in the National Labor Relations Act, Sept. 30, 1935, at 25-26.

40 *Id.* at 27.

41 NLRB files, Memorandum from Stanley S. Surrey to Charles Fahy, Extent to Which the Board Must Go In Showing Effects Upon Interstate Commerce in a Particular Case and Manner of Proof, Oct. 11, 1935, at 3.

42 *Id.* at 4 (emphasis added).

43 *Id.* at 3-4.

44 *Id.* at 3.

45 *Id.* at 5.

In September 1935 an outline was drawn up detailing the kinds of economic data needed to support the legal strategy. The significant tests of the interstate nature of the respondent's business and industry included the products produced, the relative size of the business and the industry, the capital invested, sources of raw materials and manufactured parts, markets for finished products, the amount and value of production shipped out of state, advertising in other states, and the use of the products of other businesses and industries engaged in interstate commerce. The company's and the industry's labor relations histories were searched for strikes or threats of strikes (particularly those caused by employer unfair labor practices) and the effects of a stoppage on interstate commerce. It was also considered important to develop general labor relations facts that did not pertain directly to the specific business or industry, such as the causes of strikes in general, the removal of the causes of strikes by forbidding unfair labor practices, and the advantages of "friendly adjustment through the machinery provided by the Act."[46]

The Board's tactics in the field were no less important than the strategy in Washington. From September 1935 to January 1936, Regional Directors were required to submit all cases to the Board in Washington for its approval before any complaints were issued.[47] In mid-1936, after the Supreme Court decided in *Carter v. Carter Coal Co.*[48] that coal mining and manufacturing did not constitute commerce, the NLRB ordered its Regional Directors to hear fewer cases and to scrutinize more closely those that were heard, even though it would "probably be somewhat more difficult to retain the confidence of Labor in the Board and in your office."[49] J. Warren Madden recalls that the Board wanted to avoid "sick chicken"[50] cases:

> We were resolved that if possible . . . we would so arrange our litigation that we would get to the Supreme Court with impressive cases. . . . Our strategy . . . was difficult to manage in this respect. . . . The Board was processing cases originating from its . . . regional offices . . . and many of them were not large and impressive cases

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46 NLRB files, Memorandum (M411), The Use of Economic Data to Support the Constitutional Basis of the Wagner Labor Relations Act, Sept. 17, 1935, at 10-13.

47 NLRB files, Memorandum from Benedict Wolf to Ralph A. Lind, Jan. 15, 1936; 24 *Smith Committee Hearings*, at 5541-42. Section 3(d) of the Taft-Hartley Act gave the General Counsel of the Board "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 . . . ."

48 298 U.S. 238 (1936).

49 NLRB files, Memorandum from Benedict Wolf to Regional Directors, May 21, 1936; 24 *Smith Committee Hearings*, at 5542-44.

50 A reference to Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

> and so there was danger that . . . if the Board decided such a case . . . and then the employer, . . . as he had a right to do, took the case into a United States Circuit Court of Appeals, and got it decided there . . . then that case would be ready . . . for the next step, a petition to the Supreme Court of the United States. And so we might find ourselves in the Supreme Court with a case which we would not have selected for that purpose.
>
> Our regional directors, on the whole, had good relations with union officials and very often they could persuade the union officials to cooperate in our strategy . . . and to withdraw a charge involving an unimpressive case of that kind, . . . by simply saying to the union officials, "if we get the wrong case to the Supreme Court and lose it, why then our whole project is destroyed. And so be patient . . . ."[51]

First preference was to be given to cases arising in those industries where the employees were actually *in* interstate commerce, such as interstate transportation and communication. The next-best industries were those which the Supreme Court had already designated as being in the flow of interstate commerce, such as stockyards, packing houses, grain elevators, and milling companies. Although rated third best and "generally less desirable," test cases in manufacturing could not be delayed since they constituted the bulk of the NLRB's potential jurisdiction.[52]

The Board brought along an interstate bus case (*Washington, Virginia and Maryland Coach Co.*), an interstate communication case (*Associated Press*), and three interstate manufacturing operations (*Jones and Laughlin Steel Corp., Fruehauf Trailer Co.*, and *Friedman-Harry Marks Clothing Co.*).[53] The Board took this varied set of cases, representative of the broad scope of the NLRB's potential jurisdiction, into four circuit courts of appeals[54] for review that would provide the Supreme Court with "a range of thinking of circuit court judges about the statute . . . ."[55] Ironically, it was because the NLRB lost all of its manufacturing cases in the circuit courts that it was able to hold back these more doubtful cases until they could be accompanied to the Su-

51 Oral history interview with J. Warren Madden, Nov. 2, 1968, at 44-45, on file in the Labor Management Documentation Center, Cornell University.

52 NLRB files, Memorandum (M410), from T.I. Emerson, Gerhard Van Arkel, Charles Wood, Garnet Patterson, Selection of Test Cases Under the National Labor Relations Act, July 9, 1935; Memorandum from Benedict Wolf to Regional Directors, May 21, 1936; 24 *Smith Committee Hearings*, at 5542-44.

53 *See* cases cited in note 4 *supra*.

54 *Associated Press* and *Friedman-Harry Marks* were taken to the Second Circuit, *Jones & Laughlin* to the Fifth Circuit, *Fruehauf Trailer* to the Sixth Circuit, and *Washington, Virginia & Maryland Coach Co.* to the Fourth Circuit.

55 Oral history interview with Charles Fahy, July 23, 1968, at 21, on file in the Labor Management Documentation Center, Cornell University.

preme Court by the strong interstate transportation and communication cases.[56]

Although the same due process argument ran through all the cases, the *Jones and Laughlin* case was developed almost entirely around the commerce question, the single issue of the Wagner Act's application to manufacturing.[57] The Division of Economic Research therefore made its major effort in that case and supplied the kind of economic and industrial relations evidence essential to the success of the legal strategy. Many industrial relations experts, including William Leiserson, Sumner Slichter, John A. Fitch, Hugh Kerwin, and David Saposs, testified at the hearing in the *Jones and Laughlin* case in Washington, D.C., in April 1936. Their experience and opinions ranged over general industrial relations "facts": that employers' refusals to recognize unions had caused widespread industrial strife in the nation's basic industries, that outstanding strikes (the Southwest Railway strike in 1886, the anthracite coal strike in 1902, the steel strike in 1919, and so forth) had seriously obstructed commerce, that unfair labor practices had been a major cause of industrial conflict, that collective bargaining had been working most satisfactorily in many industries, and that "[g]overnmental intervention of some kind [had] been the rule in major labor disputes for more than half a century."[58] The economic testimony then shifted, as required by the legal strategy, to the economic structure and labor relations history of the steel industry: the industry's place in the American economic system, its concentration of ownership and integration of production, its national and international market—and the Homestead strike of 1892, the U.S. Steel Corporation strikes of 1901 and 1910, the steel strike of 1919, the threatened steel strike of 1934, the company union movement, and the industry's use of espionage and the Coal and Iron Police to prevent union organization for collective bargaining.[59] The NLRB's Supreme Court brief summarized this expert testimony and supported it with references to government reports, scholarly journals, and labor relations textbooks and histories.[60] The Economic Division also sup-

56 CORTNER, *supra* note 33, at 113, 133, 317.

57 NLRB files, Memorandum from Charles Fahy to J. Warren Madden, Supreme Court Arguments, Nov. 23, 1936, at 2.

58 NLRB Division of Economic Research, Government Protection of Labor's Right to Organize 33, Bull. No. 1, Aug. 1936. These hearings before the NLRB were held in Washington, D.C., from April 2 to April 8, 1936. The verbatim testimony of the expert witnesses appears in the Record at 398-970, NLRB v. Jones & Laughlin Steel Corp., 83 F.2d 998 (5th Cir. 1936).

59 NLRB Division of Economic Research, *supra* note 58, at 33-43.

60 Brief for Petitioner at 21-31, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

plied the last and most critical economic evidence needed to complete the lawyers' plan of attack—the interstate nature of the operations of the Jones and Laughlin Steel Corporation, particularly its Aliquippa plant where the alleged unfair labor practices occurred.[61]

Jones and Laughlin told the Supreme Court that, whereas the Board had "made some effort to adhere to the ordinary standards of relevancy" at the opening hearings in Pittsburgh, "the bars to irrelevant and prejudicial material were entirely dropped"[62] in Washington. The company characterized the economic data as "a miscellany of economic and political opinions," "hypothetical evidence," and pure speculation based upon magazine articles, newspaper clippings, doctoral theses on labor relations, and "a best seller, 'Steel Dictator.' "[63] The corporation's most serious complaint was that the "evils in other branches of the industry and in other industries were used to blacken the reputation of the respondent."[64] The employer maintained, finally, that since its operation had not been interrupted by the strike or impaired in the slightest way by the discharge of the complaining employees, "[i]t [was] a defiance of reason and good judgment to argue that guesswork evidence . . . can bridge the distance between the discharge of thirteen employees and the movement of interstate commerce."[65]

III

INTERNAL PROBLEMS

Only those who were privy to the Supreme Court's deliberations know why the Court sustained the Wagner Act. It has been denied that the Supreme Court (particularly Chief Justice Hughes and Associate Justice Roberts) changed its judicial views for political reasons.[66] When it is recognized, however, that the government's evidence in the *Carter* case "had shown beyond doubt that labor disputes in the coal industry had interfered not only with interstate commerce in coal itself but with interstate rail transportation and a great proportion of all industry as well,"[67] it is reasonable to discount the effect of the Board's

61 Brief, *supra* note 60, at 52-72.

62 Brief for Respondent at 19, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

63 *Id.*

64 *Id.* at 20.

65 *Id.* at 21.

66 *See* 2 M. PUSEY, CHARLES EVANS HUGHES 766-72 (1951); Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

67 Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 676 (1946).

strategy and arguments and to give major credit to environmental conditions—President Roosevelt's decisive re-election victory in 1936, which made his Court Plan a more realistic threat to the independence of the federal judiciary, and the CIO organizing drives in steel and auto and other mass production industries that had been marked by violence and the sit-down strikes. For whatever reason, the Court was ready to have its mind changed, and in the *Jones and Laughlin* case the Court had available and relied on the Board's economic material to justify its rejection of precedent. The Court, in fact, followed the economic outline step by step:

> We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects [on commerce] in an intellectual vacuum. . . .
>
> . . . Refusal to confer and negotiate has been one of the most prolific causes of strife. . . .
>
> These questions have frequently engaged the attention of Congress and have been the subject of many inquiries. The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919-1920 with its far-reaching consequences. The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to the respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce . . . .[68]

In support of this portion of its opinion, the Supreme Court made footnote references to documents supplied by the Division of Economic Research: the *Final Report of the Industrial Commission* (1902); the *Report of the Anthracite Coal Strike Commission* (1902); the *Final Report of the Commission on Industrial Relations* (1916); the National War Labor Board, *Principles and Rules of Procedure* (1919); and Senate Report No. 289, *Investigating Strikes in Steel Industry*.[69]

The influence of the Division of Economic Research's work on the Supreme Court was also debated within the NLRB itself. Charles Fahy, NLRB General Counsel during these critical years, agreed that it was "prudent, wise, and helpful" to present economic data to the Supreme Court, but felt that the economists "thought their contri-

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[68] 301 U.S. at 41-43.

[69] *See* 301 U.S. at 43 nn.8 & 9.

bution was more important than it was."[70] The Economic Division's response to the Supreme Court's decisions was made in the assertive language of an insecure department seeking to solidify its position and to attain first-class citizenship in the organization. The Division's strongest declarations went beyond picayune squabbles over professional prestige to question the appropriateness and the value of the essentially legalistic approach the Board had adopted. The Division of Economic Research's section of the NLRB's *Second Annual Report*, for example, asserted the economic and sociological basis of the NLRA and told of a "trend toward enlightenment" wherein "the public consciousness is being focused on the economic factors inherent in the problems confronting the Board."[71] The enthusiasm with which the report was written led to a disconcerting (at least to the Board's lawyers) exaggeration:

> The decisions of the Supreme Court with their full use of the economic evidence presented in each case, *coupled with the complete disregard for finely spun legal distinctions* reaffirmed the appropriateness of the "economic approach" for which the famous Brandeis brief was the precedent.[72]

One week after the Wagner Act decisions, David Saposs came forward with specific proposals intended to get the Division of Economic Research involved more substantially in the NLRB's case work. The Chief Economist wanted to have the NLRB's jurisdiction in future cases decided in the field "by a member of the staff trained in economics, working in cooperation with the regional attorney."[73] He requested that "in important cases" an economist proficient in labor

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[70] From a personal standpoint . . . and I say this with a good deal of respect for the economic data, from a personal standpoint it was not so important to me as a lawyer. . . .

. . . .

. . . I think, and I wouldn't wish to emphasize this at all, I think there might have been some rather slight feeling on my part, and perhaps some of the other lawyers, that some of the economic experts thought their contribution was more important than it was. . . . I think they made an important contribution, but I thought more in terms of a lawyer using economic data, rather than in terms of an economist which [*sic*] might downplay the legal part of the problems. I think there was some pride of profession.

Oral history interview with Charles Fahy, July 23, 1968, at 28, 30-31, on file in the Labor Management Documentation Center, Cornell University.

[71] 2 NLRB ANN. REP. 46 (1937).

[72] *Id.* at 47 (emphasis added).

[73] NLRB files, Memorandum from David J. Saposs to J. Warren Madden, Edwin S. Smith, Donald W. Smith, Charles Fahy, Robert Watts, Nathan Witt, Benedict Wolf, Philip Levy, Suggested Plan of Activities for the Division of Economic Research, April 19, 1937, at 1-2.

relations "assist, not only in the preparation of evidence prior to the hearing, but also at the hearing," and that after the hearing there be close cooperation between the Division and the review attorney handling the case.[74] Saposs also recommended that data for all major industries be prepared, that educational material on appropriate labor relations issues be published "for the public, employers, workers, and legislators," and that the NLRB establish "for *all* our staff" a reading course, supplemented by lectures, "in the history and practices of labor relations . . . ."[75]

The Board's General Counsel, on the contrary, told Mr. Saposs that "any advice to the Regional Attorneys on [the] interpretation of Supreme Court decisions" should go out from the office of the General Counsel.[76] In a memorandum to Mr. Saposs, dated May 13, 1937, he said:

> Should we obtain soon several Circuit Court decisions to the effect that the jurisdiction of the Board applies to ordinary manufacturing enterprises engaged in interstate commerce, which I am convinced we should, we could then eliminate, in ordinary manufacturing cases, all economic material except that which is necessary to prove the operations of the particular respondent.[77]

Charles Fahy was opposed to the establishment of any general rules governing the use of economic data and suggested, instead, that the use of such materials in "borderline cases" and in circuit court briefs should be treated "as a separate problem in each case as it arises." He also maintained that it was "no longer necessary to prove the history of labor relations in ordinary manufacturing cases," that it was not feasible for the Economic Division to review drafts of Board decisions, and that no "general preparation of material for Circuit Court

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74 Among other duties, attorneys in the Board's Review Division, which was abolished by the 1947 amendments, analyzed the records of hearings held in the regions and before the Board in Washington, and prepared digests of the record for oral presentation to the members of the Board. The review attorney would also write formal opinions at the direction of Board members. *Id.* at 2.

75 *Id.* at 3. *See also* NLRB files, Memorandum from David J. Saposs to J. Warren Madden, Edwin S. Smith, Donald W. Smith, Suggested Subjects for General Research by the Division of Economic Research, May 25, 1937, at 1-3. Educational literature would include studies of collective bargaining, union responsibility, the bargaining unit, bargaining in good faith, anti-union attitudes of employer associations, independent unions, and sit-down strikes.

76 NLRB files, Memorandum from Charles Fahy to David J. Saposs, June 12, 1937.

77 NLRB files, Memorandum from Charles Fahy to David J. Saposs, Economic Material as Evidence in Hearings, May 13, 1937, at 1.

Briefs should be undertaken by the Economic Division" except to review any economic material which a particular brief might contain.[78] The Board sustained the recommendations of General Counsel Fahy.[79]

The internal disagreement over the proper role of the Division of Economic Research continued as the tremendous post-April 1937 expansion of the NLRB's workload increased the amount, if not the scope, of the Division's activities. In December of 1937, Mr. Saposs complained to the members of the Board that no regional attorney had followed Mr. Fahy's instructions that they send weekly lists of difficult "borderline" cases to the Legal Division and to the Division of Economic Research:

> [M]atters of jurisdiction in difficult and borderline cases depend on a knowledge of business methods, corporate structure, and other economic data. The interests of vast numbers of poorly paid and underpaid workers are involved who sorely need labor organization protection. Yet their requests for Board intervention is being decided by the Legal Division on totally inadequate economic data.[80]

Several months later, Saposs objected when he discovered that certain attorneys and trial examiners had been asked to evaluate the Chief Economist's oral testimony and the economic materials used in Board hearings.[81] As another indication of the way things were going, in August 1938 the Associate General Counsel instructed all NLRB attorneys to submit requests for economic data to the Associate General

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78 *Id.* at 1-2. *See also* NLRB files, Memorandum from Charles Fahy to J. Warren Madden, Edwin S. Smith, Donald W. Smith, Robert Watts, Benedict Wolf, Nathan Witt, Philip Levy, David J. Saposs, Reconsideration of Economic Data Required in Cases Before the Board, Sept. 2, 1937, at 1-3.

79 *See* NLRB files, Memorandum from Charles Fahy to Regional Attorneys and Attorneys in Regional Offices, Jurisdictional Proof and Cooperation Between Legal Staff and Economic Division, Sept. 22, 1937. The Economic Division expanded from 4 to 12 members between June 30, 1937, and June 30, 1938, but this was due to an increased NLRB case load rather than to an expansion of the Division's jurisdiction. 13 *Smith Committee Hearings*, at 2728.

80 NLRB files, Memorandum from David J. Saposs to J. Warren Madden, Donald W. Smith, Edwin S. Smith, Jurisdiction in Borderline Cases, Dec. 22, 1937, at 1.

81 NLRB files, Memorandum from David J. Saposs to George Pratt, Opinions of Trial Examiners on Economic Material in Board Hearings, Aug. 23, 1938, at 1. *See also* Memorandum from David J. Saposs to Robert B. Watts, Economic Data for Hearings in the Field, Aug. 23, 1938.

In one of these memoranda the Board's Assistant Chief Trial Examiner called the Chief Economist's oral testimony in one case "completely worthless" and concluded that "[w]hile there may be cases on which economic material is relevant, I am definitely of the opinion that it should be abandoned in the usual run of cases." 25 *Smith Committee Hearings*, at 6774.

Counsel and to cease direct correspondence with the Economic Division.[82] By January 1939 Saposs was resisting proposed reductions in the staff of the Division of Economic Research.[83]

William Leiserson, a product of the University of Wisconsin and a student of John R. Commons (as was David Saposs), became a member of the Board on June 1, 1939. Several months later he defended the Division of Economic Research in public hearings held by the Special House Committee to Investigate the NLRB (the Smith Committee). The Committee introduced into evidence a letter which Leiserson had written to Professor Commons on March 27, 1940, which is such a clear and forceful exposition of the "economist's" conception of the proper administration of the Act that it is quoted at length:

> I would summarize the whole situation by saying that there is nothing the matter with the law at all. The whole trouble and most of the public clamor, I am convinced, stems from two things: One, misconception on the part of the Board and its lawyers as to the basic . . . purpose of the Act; Two, poor administration.
>
> You have no doubt read of the Smith Committee's recommendation to amend the Act by separating the so-called prosecuting from the judicial functions of the Board. This proposal makes plain the basic misconception regarding the work of the Board. As a matter of fact, we have neither prosecuting nor judicial powers. We are really a branch of the Congress for investigation and fact-finding purposes similar to the Interstate Commerce Commission or to the Wisconsin Industrial Commission. . . .
>
> The Board and its lawyers can't seem to grasp this idea . . . . The lawyers seem to have the notion that the only way to arrive at the truth is by two opposing lawyers trying to keep things out of the record, and whatever gets in, that is the truth. They have no understanding of the method of inquiry or investigation that we call economic or social research. This explains the recommendation that Dave Saposs's economic research division should be abolished. . . .
>
> The problem is really more far reaching than the N.L.R.B.

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82 NLRB files, Memorandum (M609) from Robert B. Watts to all attorneys, Economic Data for Hearings in the Field, Aug. 9, 1938, at 1:

> Effective at once, all requests for economic data or for the services of the Chief Economist or members of his staff will be submitted solely to the Associate General Counsel, together with a statement of the reason for desiring the data or services in any particular case. The past practice of sending a duplicate request to the Economic Division will be discontinued.
>
> In the event the Associate General Counsel approves a request in a specific instance, he will arrange directly with the Economic Division for its participation in the case. Until after such clearance, there will be no correspondence between the attorneys in the Regional Offices and the Economic Division.

83 *See* NLRB files, Memorandum from David J. Saposs to J. Warren Madden, Recommended Reclassifications in the Division of Economic Research, Jan. 16, 1939, at 1.

itself. It threatens the whole idea of scientific investigation and administrative control as it was thought out and worked out in Wisconsin years ago. As new administrative agencies have been created here, great numbers of lawyers have been recruited to man them. These have been trained in new ideas about administrative *law* that are now current in the law schools. Their knowledge of labor relations, for example, is confined to decisions of courts on labor cases. . . .

I have had occasion to say that it won't be long before we will have an association of practitioners before the Labor Board, to whose members both employers and unions will be forced to go to get the benefits of the Act because no layman could understand the legal practices and procedures. This is the trend here now in Washington, and it threatens, I think, to develop a new body of technical law just as ill-adapted to dealing with modern problems as the common law and the equity law now are . . . . I think it threatens the whole idea of flexible and informed handling of modern economic problems by expert administrative agencies.[84]

Charles Fahy was equally clear and forceful when he gave the Smith Committee a lawyer's reaction to Leiserson's letter to Commons:

[In] unfair labor practice cases, as distinct from representation cases, it is my opinion that Dr. Leiserson's views as expressed in the Commons letter have no relation to reality and are impossible of acceptance. . . .

. . . Congress itself provided for a complaint, an answer, and a hearing in which the parties could be represented and introduce relevant testimony. . . .

Now it is true that the orders of the Board have no compulsory effect until approved by the court, but it is also true that the court must give great weight to findings of fact of the Board and to the type of remedial order which the administrative agency has applied in the particular case. So that the fact that the Board orders, in order to be effective, must be approved by the court, is not sufficient to do away with the necessity of the kind of procedure set forth in the [statute] and used by the Board. There can be no substitution solely of economic and social research, notwithstanding the great value of such research in some cases on certain aspects of some cases. To indict the Board or its legal staff for following the requirements with respect to procedure contained in the statute itself and required by the Constitution, by affording a trial is, to me, fantastic.[85]

Mr. Fahy's judgment was sustained in 1947 when Congress reaffirmed and expanded the essentially legalistic procedures which he had defended and which Mr. Leiserson had feared.

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84 24 *Smith Committee Hearings*, at 4977-78.

85 25 *Smith Committee Hearings*, at 6747-48.

IV

THE SMITH COMMITTEE INVESTIGATION

The Smith Committee, however, was interested in other things. The Committee's composition reflected the newly developed, loosely organized, but politically important coalition of conservative Republicans and Southern Democrats, which vigorously opposed the President, the New Deal, organized labor, and the whole concept of administrative law.[86] The Smith Committee was so consumed with the pursuit of these larger objectives that it never gave careful consideration to the proper role of economic analysis in the work of the NLRB. Instead, the Committee conducted a personal attack on David J. Saposs, charging that he advocated the "destruction of the capitalistic system in this country,"[87] and recommended that the Division of Economic Research be abolished.[88] Committee member Routzohn gave the House of Representatives his opinion of Saposs: "You have heard of Saposs. If he is not a Communist, then we have not any Communists in this country or in Russia."[89]

Earl Latham's account of this episode shows that the Committee was clearly wrong.[90] Although Latham claims that there were some Communists at the NLRB in 1939, the Committee had suspicions but no facts and did not seriously pursue the hunt.[91] The ironic consequence was that on the basis of some carefully selected extracts from Saposs's writings and several innuendoes and misrepresentations,[92] the Smith Committee brought down one of the most ardent anti-Communists at the NLRB, and with him the Division of Economic Research. The two New Deal Democrats on the Committee vigorously

86 The Smith Committee "majority" consisted of Chairman Howard Smith of Virginia (a Democrat who had survived President Roosevelt's purge list in the 1938 elections) and Republicans Charles Routzohn of Ohio and Charles Halleck of Indiana. The "minority" was comprised of New Deal Democrats Abe Murdock of Utah and James Healey of Massachusetts.

87 17 *Smith Committee Hearings*, at 3418. The Committee's documentation consisted of a number of carefully chosen extracts from Saposs's writings, the fact that Saposs was born in Russia, that he belonged to a Socialist Club as a student at the University of Wisconsin, and that he was a faculty member at Brookwood College, labeled a Communist school by the AFL. *Id.*

88 The Smith Committee's recommendations appear in H.R. REP. No. 1902, 76th Cong., 3d Sess., pt. 1, at 37 & n.1 (1940).

89 86 CONG. REC. 7730 (1940) (remarks of Congressman Routzohn).

90 E. LATHAM, THE COMMUNIST CONTROVERSY IN WASHINGTON: FROM THE NEW DEAL TO MCCARTHY 124-50 (1966).

91 *Id.* at 137-38.

92 17 *Smith Committee Hearings*, at 3413-86.

defended the NLRB and, in particular, the Division of Economic Research but were unwilling to defend Mr. Saposs.[93]

Although he surely was not an impartial and unaffected observer, Saposs believed that he was brought down by a conspiracy. He maintained that the Committee's minority report was written with the assistance of NLRB staff members. The New Deal congressmen, according to Saposs, wanted to protect the NLRB but did not want to write a report that would whitewash the Board at a time when public criticism of its work had become a crucial political issue. Saposs contended "that one way to meet that situation was to criticize me [Saposs] as a person who had had bad connections and who was definitely biased."[94] According to Saposs, the Communists at the NLRB, whom the Smith Committee never reached, were delighted not only to part with a troublesome anti-Communist but also to use that hollow offering to appease those who suspected a left-wing influence at the Board.[95] Saposs also concluded that in so far as the Legal Division was concerned it "would have liked to have retained the economic division [but it wanted] to have somebody head up the economic division who was a little more amenable to the lawyers and less . . . controversial."[96] However, given the Board's support in 1937 of Mr. Fahy's position concerning the Division of Economic Research, it was perhaps inevitable that the role of the Division would have been a limited one in any event.

In June 1940 the House Appropriations Committee, influenced by the Smith Committee's recommendations, severely cut the appropriation for the Division of Economic Research. The Board then changed the name of the Division of Economic Research to the Technical Service Division but retained Saposs and limited him to technical work, such as gathering case statistics and computing back-pay awards in 8(3) cases.[97] The House Appropriations Committee saw this as an attempt

93 Apparently the real explanation for the amendment proposed by our colleagues was the testimony in the record with reference to economic philosophy of Dr. Saposs, head of the Economic Research unit. If the excerpts from his writings which were read into the record are a fair example of his views we disapprove as strongly as our colleagues of a person entertaining such views holding an important position in the Government. We do not feel, however, that the abolition of a whole division performing a useful function is a logical solution of dealing with the problem of one office holder whose views are abhorrent to our committee. H.R. REP. No. 1902, 76th Cong., 3d Sess., pt. 2, at 22 (1940). Saposs vigorously objected to the "qualified manner" of this minority report in a letter to Congressmen Healey and Murdock, 25 *Smith Committee Hearings*, at 6779-84.

94 Oral history interview, *supra* note 11, at 83.

95 *Id.* at 83-87.

96 *Id.* at 87.

97 NLRB files, Letter from J. Warren Madden to the Comptroller General of the United States, Aug. 10, 1940.

by the Board to circumvent the House of Representatives's intention to follow the Smith Committee recommendations and abolish the Division of Economic Research.[98] The Division was finally eliminated by the provisions of Public Law No. 812, approved in October 1940.[99] Senator Hayden of the Senate subcommittee that considered this bill gave his own impression of why the House persisted in its efforts to get rid of even the narrow functions of the Technical Service Division:

> I think you [the Board] would have found no difficulty if you had used other personnel; I think that is the difficulty. In case the personnel you now have on the job should die and if you then should have to find someone else to do that work—and I think you could find such people—then I think your trouble would be largely solved.[100]

The Smith Committee also cited the use of data provided by the Division of Economic Research in the *Inland Steel* case as one of its prime examples of the NLRB's improper administration of justice. The Committee charged that the NLRB, "through Secretary Witt," had helped to plan the attack of the Steel Workers' Organizing Committee against Youngstown, Republic, and Inland Steel in the Little Steel Strike of 1937, and had deliberately provoked "a test case for a Board decision that a written contract was essential to establish the good faith of the employer in collective bargaining."[101] The Committee, in particular, pointed to

> the curious spectacle of the Board directing Mr. Saposs, chief of its Division of Economic Research, to prepare evidence on the question of a signed agreement and then using that evidence as a basis for its decision that a written agreement is an essential ingredient of collective bargaining.[102]

The *Inland Steel* case became the focal point for the Committee's antagonism toward the entire administrative process, an antagonism "founded upon the inarticulate major premise that justice administered by men in black robes is superior to justice administered by men in sack suits."[103] But in fact, whether the Board was guilty of "acts akin to entrapment" or not, the Smith Committee chose a very weak case

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98 NLRB files, Letter from Hon. M. C. Tarver to J. Warren Madden, July 2, 1940.

99 Act of October 9, 1940, ch. 780, 54 Stat. 1037.

100 *Hearings on H.R. 10539 Before a Subcomm. of the Senate Comm. on Appropriations*, 76th Cong., 3d Sess. 317 (1940).

101 H.R. REP. No. 1902, 76th Cong., 3d Sess., pt. 1, at 13 (1940).

102 *Id.* at 15.

103 Gellhorn & Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339, 356 (1939).

with which to attack the role of the Division of Economic Research. Saposs's evidence concerning the extensive use of written trade agreements and their contributions to industrial peace and stability was presented orally at the *Inland* hearing and was made part of the record in the case. Inland Steel had full opportunity to rebut Mr. Saposs's testimony and to present its own evidence and, although neither of the Smith Committee's majority reports to Congress[104] mentions it, Inland Steel took full advantage of that opportunity. The company presented Dr. Raleigh Stone of the University of Chicago School of Business, who attempted to refute Saposs's documentary evidence and conclusions both in oral testimony at the hearing and in a lengthy nonlegal brief which he prepared at the request of the Board's Trial Examiner.[105] By putting all of the economic evidence into the case record so that there could be cross-examination, rebuttal, and written and oral arguments, the NLRB had, contrary to the claims of the Smith Committee, equitably reconciled the requirements of procedural fairness with the need for the full and free use of the agency's expertise.[106]

The Smith Committee may have felt that these were only the appearances of procedural fairness and concluded that the NLRB was biased because it had already made up its mind about the written agreement and had used Saposs's evidence simply to buttress this preconceived point of view. But in an even clearer case of alleged prejudgment, *FTC v. Cement Institute*,[107] the Supreme Court held that such preconceptions do not disqualify the agency from passing judgment. The Federal Trade Commission had made reports to Congress and to the President and had testified before congressional committees clearly indicating (long before it issued the complaint in the *Cement Institute* case) that the Commission believed that the multiple basing point system violated the Sherman Act. One of the cement companies that had agreed to use this system of pricing asked the FTC to disqualify itself from passing on the issues because the Commission was "prejudiced and biased." The Supreme Court denied the request primarily because of the industry's opportunity to produce evidence to change the Commission's views.[108]

Justice is best served by making the agency's ideas and positions

104 H.R. REP. No. 3109, 76th Cong., 3d Sess. (1941); H.R. REP. No. 1902, 76th Cong., 3d Sess. (1940).

105 24 *Smith Committee Hearings*, at 5951-53.

106 K. DAVIS, ADMINISTRATIVE LAW TEXT 267 (1959).

107 333 U.S. 683 (1948).

108 *Id.* at 701.

known to the parties at the earliest possible stage in the case[109] and by giving the parties the "opportunity to meet in the appropriate fashion any materials that influence decision."[110] Justice is not served by always futile efforts to insist on minds untouched by experience or values or by attempts to keep the administrative agency from utilizing *all* of its experience and expertise.

CONCLUSION

Authorities in the field of administrative law have long maintained that one of the principal reasons for choosing the administrative process over the legislative or judicial is the need for continuous expert supervision. This most important attribute of the administrative process depends upon staff work organized so that all pertinent expertise can be utilized fully in every aspect of each decision. Congress has limited the effectiveness of the NLRB by prohibiting the Board from conducting any sustained and expert study of the industrial relations dimensions of the problems that confront the Board.

The employers and unions that come before the NLRB frequently have access to the highest-priced talent and most sophisticated aids to data collection and analysis. An administrative agency, however, unlike a court, has an obligation to seek information beyond that presented by the interest groups that appear before it. The NLRB is solely responsible for the implementation of congressional intent as expressed in the Taft-Hartley Act.

The Board, for example, is currently considering a proposed remedy that would require an employer, found guilty of a refusal to bargain, to

> [c]ompensate . . . each of its employees for the monetary value of the minimum additional benefits . . . which it is reasonable to conclude that Union would have been able to obtain through collective bargaining . . . for the period commencing with the date of the Respondent's formal refusal to bargain . . . .[111]

The advocates and opponents of this novel remedy have laid some complex economic argumentation before the Board concerning time

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109 DAVIS, *supra* note 106, at 204.

110 *Id.* at 269.

111 Ex-Cell-O Corp., NLRB Trial Exam. Dec. 80-67, at 18 (Case No. 25-CA-2377, 1967). *See also* Zinke's Foods, Inc., NLRB Trial Exam. Dec. 662-66 (Cases No. 30-CA-372, 30-RC-400, 1966); Herman Wilson Lumber Co., NLRB Trial Exam. Dec. 757-66 (Case No. 26-CA-2536, 1966); Rasco Olympia Inc., NLRB Trial Exam. Dec. 167-66 (Case No. 19-CA-3187, 1966).

series and cross-sectional analyses, geographic wage differentials, the structure of the local labor market, the use of wage comparisons within the company and the industry (or among similar industries), and the use of area standards, standard collective bargaining contracts, and the wage data provided by the Bureau of Labor Statistics. The Board is being asked to determine appropriate objective standards by which such benefits could be estimated and to decide if it is possible to distinguish the union's impact on relative wage levels from other wage-influencing factors such as age, skill, labor market conditions, nature and size of the industry, productivity, cost of living, and an employer's ability and willingness to pay. The NLRB should have the economic expertise needed to make these decisions.

An agency denied the right to conduct its own economic analysis must get along without information that could contribute to a sound conclusion, rely upon the argumentation and materials of the parties that appear before it, or act surreptitiously. If the agency succumbs to what must be a great temptation to violate the prohibition, it will be certain not to make known the extra-record information and, as a result, the parties will never have an opportunity to meet it. An administrative agency, moreover, runs a great risk of failing to carry out congressional intent if it becomes dependent upon the parties that appear before it for certain kinds of information:

> The prime weakness of the regulatory agency is not the much-publicized tendency toward governmental excesses but is the little-recognized tendency of the agency sooner or later to succumb in greater or lesser degree to the persuasions of powerful groups that are supposed to be regulated. This weakness is immeasurably aggravated if the agency must decide particular cases exclusively upon the basis of materials supplied to it by private interests.[112]

There is little doubt, however, that the adversary process will remain the predominant and probably the most suitable procedure for dealing with labor relations problems. The congressional prohibition found in section 4(a), therefore, has had its most serious consequences in the areas of policy determination rather than in the handling of individual Board cases. It has, for example, prevented the Board from conducting its own studies of how its administration of the law is working in practice. The Board should be free to conduct a series of impact studies such as Philip Ross's evaluation of the effect of section 8(a)(5) upon employers and unions.[113] For instance, what

112 DAVIS, *supra* note 106, at 277-78.

113 P. ROSS, THE LABOR LAW IN ACTION: AN ANALYSIS OF THE ADMINISTRATIVE PROCESS UNDER THE TAFT-HARTLEY ACT (1966).

in fact has been the effect of the Board's *Fibreboard*[114] decision? How has that decision affected management rights, efficiency, economic and technological developments, management decisions at the work place, and the labor-management relationship? As George Shultz, the Secretary of Labor, so effectively understated it, "Answers to such questions would give more meaning to discussions of legislative or administrative actions."[115] The Board should also be free to determine if its remedies are producing the desired effects. It is dismaying to realize that the NLRB's basic reinstatement remedy, after thirty-four years, has not been subjected to comprehensive empirical investigation to assess its effectiveness.[116]

There is another area where careful economic-industrial relations studies would be most valuable. Since the Supreme Court's decision in the *Wyman-Gordon*[117] case, the Solicitor of the NLRB has suggested that "although the Board may not feel legally compelled to do so, it might nevertheless deem it desirable in the public interest to venture forth on rule-making in certain subject-matter zones."[118] These "subject zones" could include the Board's jurisdictional standards, certain election rules, the contract-bar doctrine, the model authorization card, and standards for fines which unions assess against their members.[119] Substantive rule-making would involve the NLRB in considerations well beyond the problems of adjudicating a single case—and, since a substantive rule would apply to all unions and all employers subject to the Act, the Board should be able to run extensive field studies to discover if the proposed rule has an empirical foundation.

These suggested uses of economic and industrial relations data would contribute to more knowledgeable judgments and policy choices; yet the NLRB is the only administrative agency forbidden to seek such information on its own. The NLRB's Division of Economic Research was the victim of political pressures and maneuverings, "pride of Profession," empire building, personal attacks, and a mighty hostility

114 Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

115 Shultz, *Priorities In Policy and Research for Industrial Relations*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, PROCEEDINGS OF THE TWENTY-FIRST ANNUAL WINTER MEETING 12 (G. Somers ed. 1969).

116 *But see* Drotning & Lipsky, *The Effectiveness of Reinstatement as a Public Policy Remedy: The Kohler Case*, 22 IND. & LAB. REL. REV. 179 (1969).

117 NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

118 Address by William Felderman, A.B.A. Labor Law Section Annual Meeting, Aug. 11, 1969, in BNA-DLR 157: F-1, 3 (Aug. 14, 1969).

119 *Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pt. 1, at 135-56 (1968).

to the administrative process. Through it all, ironically, little attention was given to the substance of the Division's work or its importance to the NLRB. Although each of the causes of the Economic Division's demise would still have to be reckoned with today, it is reasonable to conclude that the part of section 4(a) of the LMRA that prohibits the Board from engaging in economic analysis is a historical anachronism.