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Judge Posner and the NLRB: Implications for Labor Law Reform

Leonard Bierman*

Judge Richard A. Posner is a vocal and forceful critic of the National Labor Relations Board ("NLRB" or "Board") and the labor policy he believes the NLRB pursues. He has sharply criticized the Board on a variety of counts ranging from procedure to policy and, in some instances, has explicitly refused to defer to the Board's administrative expertise. This Article examines Judge Posner's general view of the National Labor Relations Act ("NLRA" or "Act") and his recent criticisms of the NLRB in the context of NLRA reform. Part I presents an overview of Judge Posner's view of the NLRA and the powers it grants the NLRB. Part II examines several of Judge Posner's recent decisions criticizing the NLRB, and Part III analyzes the public-policy implications of those decisions and the ramifications for congressional labor law reform. Finally, Part IV questions the need for such reform and urges that any reform of the NLRB's structure or powers should be accomplished by Congress after deliberate consideration of all factors rather than initiated by federal judges on an ad hoc basis.

I. JUDGE POSNER'S VIEW OF THE NATIONAL LABOR RELATIONS ACT

Judge Posner views labor unions as "worker cartels designed to raise the price of labor above the competitive level." As originally enacted in 1935, the NLRA created "a

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1. See, e.g., NLRB v. Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983); NLRB v. American Medical Servs., Inc., 705 F.2d 1472 (7th Cir. 1983); Mosey Mfg. Co. v. NLRB, 701 F.2d 610 (7th Cir. 1983).


3. See Posner, Some Economics of Labor Law, 51 U. CHI. L. REV. 988, 991 (1984); see also R. POSNER, ECONOMIC ANALYSIS OF LAW 239 (2d ed. 1977) ("The primary purpose of a union is to control the supply of labor so that the employer cannot use competition among individual laborers to keep down the price of labor."). Judge Posner therefore believes that unions use the strike to create and enforce what is essentially a monopolistic power over labor serv-
system of federal regulation administered by a new agency, the National Labor Relations Board, [that was] designed . . . to foster unionization."\(^5\) The establishment of the NLRB is, in Judge Posner's opinion, further evidence that "the National Labor Relations Act is best understood as a means of federal governmental support for the cartelization of the labor supply."\(^6\) As Judge Posner explained:

Since the Act turned labor policy on its head, transforming a public policy of fostering competitive determination of wages and working conditions into one of fostering cartelization, it was quite sensible for Congress to be concerned that state and federal judges—who after all had largely fashioned the former policy—might resist its inversion.\(^7\)

Judge Posner asserts that the NLRB has a definite pro-union bias, and he questions the appropriateness of that bias under the current NLRA. Noting that the NLRA, as originally enacted in 1935, was clearly pro-union,\(^8\) Judge Posner explains

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5. Posner, supra note 3, at 992 (footnote omitted). Judge Posner notes that the NLRA, by legalizing nonviolent strikes and protecting workers from employer retaliation, has shifted many of the risks and economic costs of strikes from workers to employers, thereby strengthening the role of unions and raising the cost of labor. See id. at 997-98. A strike imposes costs on both parties: the employer may be forced to reduce or halt production and workers lose their wages. According to Judge Posner, the balance of these costs will determine the parties' relative bargaining power and thus the terms of the settlement ultimately reached. See id. at 997. The NLRA affects these costs. For example, the employer is not allowed to pay replacement workers more than the striking workers were receiving, nor may the employer fire workers who have been replaced. These rules limit the employer's ability to minimize its costs and therefore shift the balance in favor of the workers. See id. at 997-98.

Similarly, the NLRA fosters the cartelization of labor markets by preventing employers from engaging in what Posner terms "rational predatory activity" to defeat unionization in its incipient organizational stages, see id. at 1003-04, and by allowing union-shop agreements whereby all workers at a unionized location can be required to pay dues and fees, see R. POSNER, supra note 3, at 241-42; Posner, supra note 3, at 994-95.


7. See id.

that with the 1947 Taft-Hartley amendments,\textsuperscript{9} Congress partially redressed the NLRA's heavy tilt toward unions\textsuperscript{10} so that the Act "no longer evinces a univocal policy of promoting cartelization."\textsuperscript{11} Nevertheless, it is clear from some of Judge Posner's recent opinions that he believes that the NLRB has not fully comprehended the "message" of the Taft-Hartley amendments. Indeed, he has referred explicitly to the sharp prounion bias of the Board,\textsuperscript{12} and he has not hesitated to ignore the Board's administrative expertise and substitute his own views of the NLRA for those of the NLRB.\textsuperscript{13}

Today, according to Judge Posner, "there are very few judges, state or federal, who have any emotional or intellectual commitment to competitive labor markets."\textsuperscript{14} Judge Posner's

\begin{footnotes}


\footnote{12} See Posner, supra note 3, at 1010.

\footnote{13} See cases cited supra note 1. Judge Posner has challenged the idea that an administrative agency's statutory interpretations are entitled to deference:

\begin{quote}
Another canon [of statutory construction] that rests on an unrealistic view of the political process is the canon that the interpretation of a statute by the administrative agency that enforces it is entitled to great weight by the courts. There is no reason to expect administrative agency members, appointed and confirmed long after the enactment of the legislation they are enforcing, to display a special fidelity to the original intent of the legislation rather than to the current policies of the Administration and the Congress. They may of course know more than the courts about the legislation, and to the extent they support their interpretation with reasons at least plausibly based on superior knowledge the courts should give that interpretation weight. But the mere fact that it is the current agency interpretation does not entitle it to any particular weight. If the interpretation has persisted through several changes of Administration, that may be a different matter.
\end{quote}


\footnote{14} See Posner, supra note 3, at 1009. Judge Posner continued: "I am sure that most judges today would agree that if federal labor policy is one of facilitating the cartelization of labor, they should, and without much pain can, use this policy to guide them in reviewing decisions of the NLRB." Id. at 1010.
\end{footnotes}
statement implies that, if the only purpose of the NLRB is to prevent the evisceration of the NLRA by a hostile judiciary, the Board has outlived its usefulness. Similarly, Judge Posner's actions as a federal judge indicate that he is willing to override the Board's decisions whenever necessary to enforce the spirit of neutrality expressed in the Taft-Hartley amendments. An examination of five labor opinions written by Judge Posner since his appointment to the bench in 1981 illustrates his approach.

II. JUDGE POSNER'S LABOR-LAW THEORIES IN ACTION

A. PUTTING EMPLOYERS "THROUGH THE HOOPS": MOSEY MANUFACTURING CO. v. NLRB

Judge Posner's use of the review process to counter antiemployer bias in NLRB decisions is well exemplified by his opinion in *Mosey Manufacturing Co. v. NLRB*. Writing for a majority of the Seventh Circuit Court of Appeals sitting en banc, Judge Posner overturned the Board's decision and sharply criticized the Board for unfairly putting the employer "through the hoops." 

Judge Posner's complaint was with the NLRB's frequent reversals of position on important policy issues. The issue in *Mosey* was whether a union misrepresentation made on the eve of an election was sufficient to invalidate election results. Just two months before the *Mosey* election, in *Shopping Kart Food Market, Inc.* the Board had held that it would no longer try

15. 701 F.2d 610 (7th Cir. 1983) (en banc).
16. See id. at 615.
17. See id. at 612.
to protect workers from misleading campaign statements as it had under the rule of Hollywood Ceramics Co.;\textsuperscript{20} under the new rule, an election would be set aside only if the misrepresentation involved the use of a forged document.\textsuperscript{21} The following year, the NLRB, by then dominated by Carter appointees, reversed \textit{Shopping Kart} in \textit{General Knit of California, Inc.}\textsuperscript{22} and reinstated the rule of \textit{Hollywood Ceramics}.\textsuperscript{23} Then, in 1982, a Reagan-appointed NLRB decided \textit{Midland National Life Insurance Co.},\textsuperscript{24} which again asserted the \textit{Shopping Kart} standard.\textsuperscript{25}

In \textit{Mosey}, the union's one-vote election victory was challenged on the basis of alleged union misrepresentations of fact made during the campaign.\textsuperscript{26} Employing the then-applicable \textit{Shopping Kart} standard, the NLRB denied the company's challenge and ordered the company to bargain with the union.\textsuperscript{27} The Board applied to the Seventh Circuit to enforce its order but, before oral argument, the NLRB decided \textit{General Knit}, which overruled \textit{Shopping Kart} without indicating which standard should be applied to pending cases.\textsuperscript{28} The Seventh Circuit remanded the case to the Board for reconsideration in light of the new \textit{General Knit} standard.\textsuperscript{29} On remand, the NLRB determined that there had been no material misrepresentation, reinstated its bargaining order against Mosey, and reapplied to the court for enforcement.\textsuperscript{30} After oral argument but before the panel reported its decision, the NLRB in \textit{Midland National

\textsuperscript{20} 140 N.L.R.B. 221 (1962). Under the \textit{Hollywood Ceramics} rule, an election will be set aside "where there has been a misrepresentation . . . which involves a substantial departure from the truth, at a time which prevents the other party . . . from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." \textit{See id.} at 224 (footnote omitted).

\textsuperscript{21} \textit{Shopping Kart Food Market, Inc.}, 228 N.L.R.B. 1311, 1313-14 (1977). The Board maintained that as long as campaign material is what it purports to be, employees need no protection. As "mature individuals" they "are capable of recognizing campaign propaganda for what it is and discounting it." \textit{Id.} at 1313. There is no way, however, that voters could "recognize a forged document 'for what it is'. . . since, by definition, it has been altered to appear to be that which it is not." \textit{Id.} at 1314. In such cases, therefore, Board intervention is warranted. \textit{Id.} at 1313.

\textsuperscript{22} 239 N.L.R.B. 619 (1978).

\textsuperscript{23} \textit{See id.} at 620.

\textsuperscript{24} 263 N.L.R.B. 127 (1982).

\textsuperscript{25} \textit{See id.} at 133.

\textsuperscript{26} \textit{See Mosey Mfg. Co. v. NLRB}, 701 F.2d at 611.

\textsuperscript{27} \textit{See id.} at 611-12.

\textsuperscript{28} \textit{Id.} at 612.

\textsuperscript{29} \textit{See id.}

\textsuperscript{30} \textit{Id.}
Life again reversed its position in overruling General Knit and reinstating Shopping Kart. This time, however, the Board explicitly stated that it would apply the Midland (i.e., Shopping Kart) standard "to all pending cases in whatever stage." 32 Despite his recognition that the NLRB clearly has authority to establish labor-election standards, 33 that the Board expressly stated that the Midland/Shopping Kart standard should be applied to all pending cases, 34 and that Mosey was a pending case, 35 Judge Posner held that Mosey was so "unusual" that the court could not be certain that the NLRB intended the new rule to apply in this instance. 36 He elaborated:

More than five years have passed since the union won the election by one vote. No one knows whether the carpenters' union is still preferred by a majority of the bargaining unit—it may be, but equally it may not be. In addition, by twice during this proceeding changing its mind as to the applicable standard the Board has put Mosey through the hoops, subjecting it to protracted legal expense and uncertainty (though at the same time, it must be admitted, allowing the company to stave off the evil day when it must bargain with the union). We cannot be certain that if this case is remanded the Board will apply Shopping Kart and order the company to bargain with a union that won an election by one vote, perhaps procured through misrepresentations, many years ago. 37 The first time the standard was changed, the court had remanded the case to the NLRB for elucidation. This time, however, Judge Posner refused to remand because the Board's inability to decide on an appropriate standard for policing elections already had delayed a decision for too long. 38 To avoid further unconscionable delay, the court ruled on the case as though the latest shift had not occurred. 39 Judge Posner thus

31. Id.
33. Judge Posner stated: "[W]e may assume, as no contrary argument is made, that the Board has the broadest power to make rules for election disputes, to change those rules, to apply a changed rule retroactively, and to do all this in adjudicative decisions rather than in formal rulemaking proceedings." Mosey, 701 F.2d at 612.
34. See Mosey, 701 F.2d at 612.
35. See id.
36. See id.
37. Id.
38. See id.
39. As Judge Posner explained:
   In these circumstances, unless we can properly enforce the Board's
overruled the NLRB's finding that there had been no material misrepresentations and, applying the rule of *Hollywood Ceramics*, denied enforcement of the NLRB bargaining order.\(^4\)


As *NLRB v. Village IX, Inc.*\(^4\) demonstrates, Judge Pos-

order without a remand, we shall deny enforcement outright. In asking us to enforce its order the Board is appealing to our equitable powers . . . , and we must ask what equity the Board would have if, after again ordering the company to bargain with the union, it came back to us asking for enforcement of its order. The election would still have been won by only one vote, but not five years ago, rather six or seven, the whole interval due mainly to the Board's inability to decide what standard to use in policing elections—it has changed its collective mind three times in the last three and a half years. When a party asking a court to do equity has strung out the proceeding to the point where the court cannot determine whether equitable relief would achieve the legitimate purposes of the suit, which in this case is to give a unit of Mosey's workers the collective bargaining representative of their choice, the court will withhold its assistance . . . . The best protection for these workers' freedom of choice would be a prompt new election, which a remand will not accomplish.

*Id.* at 613 (citations omitted). Judge Posner continued: "A shorter Board-caused delay in an election that was not nearly so close persuaded the Second Circuit recently to deny enforcement of the Board's bargaining order outright rather than to remand . . . ." *Id.* (citing *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871, 881 (2d Cir. 1982)).

\(^4\) See *id.* at 615. Three judges disagreed with Judge Posner's approach; one concurred and two dissented. Judge Richard Cudahy's dissent is particularly insightful and exposes the weaknesses in Judge Posner's analysis. Judge Cudahy sharply criticized the majority's "extraordinary exercise of judicial activism," *see id.* at 616 (Cudahy, J., dissenting), and he contended that the court had substituted its own judgment for that of the Board, *see id.* (Cudahy, J., dissenting). He added that the NLRB had clearly stated that its ruling in *Midland* should be applied retroactively, and thus there was no need to remand. *See id.* at 617 (Cudahy, J., dissenting).

Even if a remand were necessary, Judge Cudahy strongly disagreed with Judge Posner's finding that the application of equitable principles should preclude a remand. In Judge Cudahy's view, it was the employees who had been put "through the hoops" by their employer rather than the employer by the Board. Judge Cudahy noted that the employer, by filing various appeals, had been able to avoid bargaining with the union for years and that the Seventh Circuit's *first* review of the June 1977 election did not come until March 27, 1979. *See id.* at 617 & n.1 (Cudahy, J., dissenting). He concluded:

I see nothing equitable about a result which, when all is said and done, results in these employees losing their statutory right to representation because the majority is annoyed at the "fickleness" of the *Board*. I think that such an outcome has no sanction in the Act or in the decided cases.

*Id.* at 617 (Cudahy, J., dissenting) (emphasis in original).

\(^4\) See *id.* 723 F.2d 1360 (7th Cir. 1983).
ner's judicial activism is not confined to situations in which the NLRB has repeatedly changed its position over a short period of time. In Village IX, the employer had opened a restaurant called Shenanigans in late 1979. Several months later, a waitress at the restaurant began organizing employees on behalf of the United Retail Workers Union. Twenty-eight of the restaurant's forty-seven employees signed union authorization cards, and a representation election was scheduled. After the union lost by a vote of twenty-eight to twelve, it accused the employer of unfairly resisting unionization. The NLRB found that the employer committed a variety of unfair labor practices, including assaulting a union organizer, discharging an employee for union activities, enforcing overly broad bans on employee distribution of union materials, and delivering coercive speeches to the employees. Because of these extensive unfair practices, the NLRB invalidated the election result and ordered the employer to bargain with the union. The employer appealed the Board's decision to the Seventh Circuit, and the NLRB cross-petitioned for enforcement of its bargaining order.

Although Judge Posner upheld a majority of the NLRB's unfair-practice findings, he disagreed with the Board's finding that a speech by the employer to the employees was unlawfully coercive. The employer had asserted that restaurants in the town could not afford to pay union wages and that a union at Shenanigans would likely drive it out of business. The ultimate issue was whether the employer's speech was a threat and thus unlawful under section 8(c) or merely a lawful prediction of adverse consequences.

42. Id. at 1364.
43. Id. at 1365.
44. See id.
45. See id. at 1364-65.
46. See id. at 1363.
47. See id. at 1363-64.
48. Judge Posner agreed that the employer had discharged an employee and assaulted a union organizer because of their union activities, see id. at 1365, and had enforced unlawfully broad restrictions on employee distribution of union materials, see id. at 1365-67.
49. See id. at 1364. The employer referred to the union as a "cancer" that will "eat us up" and cause the business to "fall by the wayside." See id.
50. See National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (1982); infra text accompanying note 96.
51. As Judge Posner explained the issue:
On the one hand it is apparent from section 8(c) of the Act . . . , and from the use of the electoral process to determine representation, that
Although Judge Posner conceded that there is a fine line between unlawful threats and lawful predictions and that courts have differed on where that line is drawn, he found that the "Board's conclusions that [the employer's] speech was coercive is not supported by substantial evidence." Judge Posner noted that the employer's speech "offered a competent if extremely informal analysis of likely economic consequences of unionization in a highly competitive market in which most companies are not unionized—the restaurant market in Decatur" and that it "is well known that union wage demands sometimes result in plant closings." Judge Posner also cited a recent empirical study that concluded that employer cam-

the company has a right to state its side of the case. On the other hand the company may not threaten retaliation against workers for voting for the union, and a potent form of retaliation is to close down the plant or facility, thereby throwing all the workers out of work. Since the only effective way of arguing against the union is for the company to point out to the workers the adverse consequences of unionization, one of which might be closure, it is often difficult in practice to distinguish between lawful advocacy and threats of retaliation. . . . Analytically, however, the line is clear. To predict a consequence that will occur no matter how well disposed the company is toward unions is not to threaten retaliation; to predict a consequence that will occur because the company wants to punish the workers for voting for the union—a consequence desired and freely chosen by the company rather than compelled by economic forces over which it has no control—is.

Village IX, 723 F.2d at 1367 (citations omitted). For many years, the Board interpreted the NLRA to prohibit all antiunion speeches by employers because it believed that such speeches inhibited union activities. The 1947 Taft-Hartley amendments added § 8(c) to the Act in order to reduce the restrictions on employer speech. According to § 8(c), union or employer speech is not an unfair labor practice unless it contains a "threat of reprisal or force or promise of benefit." See, e.g., NLRB v. Federbush Co., 121 F.2d 954 (2d Cir. 1941) (holding that arguments by an employer to its employees about unions and unionism may constitute an unfair labor practice); Comment, Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections, 127 U. Pa. L. Rev. 755, 756-58 (1979); see also Note, Employer Free Speech in Union Organizing Campaigns, 15 U. Fla. L. Rev. 231 (1962) (reviewing developments leading to the enactment of § 8(c) and suggesting guidelines for employers).

52. See Village IX, 723 F.2d at 1367.
53. See id. at 1368-69.
54. See id. at 1369.
55. See id. at 1367.
56. See id. at 1368. Judge Posner also pointed out that the gradual relocation of industry from the North to the South apparently resulted from the lower rate of unionization in the South. See id.
campaign speeches "do not swing many votes." A major factor in Judge Posner's decision, however, apparently was his belief that the employer's statement was plausibly based on objective fact, and hence that the Board was being too harsh on a small restaurant in Decatur, Illinois. He commented:

A small company in the restaurant business should not have to hire a high-powered consultant to make an econometric forecast of the probable consequences of unionization on the restaurant business in Decatur. The usual assumption that employers hold all the cards in dealing with employees is reversed when a large national union is waging an organizational campaign against a small service company. 

Once again, Judge Posner intervened to prevent the NLRB from putting the employer "through the hoops."

In addition to overturning the Board's finding that the employer's speech constituted an illegal threat, Judge Posner criticized the Board's use of a bargaining-order remedy. He chastised the Board "for its stubborn refusal . . . to make adequate findings to support the issuance of a bargaining order in cases where the union, having lost the election, cannot be considered the presumptive choice of the employees to bargain with the employer on their behalf." Judge Posner commented that even if the court had upheld all of the NLRB's unfair-practice determinations, the inadequate factual record would have "provide[d] a compelling argument" for a remand to the Board. Because the court overturned some of the Board's unfair labor practice determinations, "the Board itself might not believe that the remaining [unfair practices] justified [issuance of a bargaining order]" and, thus, "the argument for remand is even stronger." Nonetheless, Judge Posner refused to remand Village IX to the NLRB. Instead, he asserted, the Seventh Circuit chose to make its own determination of whether a bargaining order is warranted because the court "despair[ed] that the Board could be induced to make adequate findings in bargaining-order cases."

58. See Village IX, 723 F.2d at 1368.
59. Id.
60. In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court held that the NLRB can issue remedial bargaining orders whenever the union has established majority support at some point, usually through authorization cards, and the employer's unfair practices are so pervasive that it would not be feasible to hold a new election.
61. See Village IX, 723 F.2d at 1370.
62. See id.
63. Id.
64. See id. Somewhat remarkably, Judge Posner explicitly recognized that the failure to remand in such instances might not be "fully consistent"
In making his own determination of the factual adequacy of the Board's findings, Judge Posner pointed to documentation of the Board's overuse of the bargaining-order remedy and found that the employer's unfair practices were not sufficiently egregious to merit the issuance of a bargaining order. Judge Posner emphasized that it had been several years since the union had obtained an authorization-card majority and that it had lost the representation election in January 1981 by a significant majority. Under those circumstances, the judge concluded, it would be "reckless" to assume that the union was the preferred collective-bargaining representative of the restaurant.

with the Supreme Court's holding in SEC v. Chenery Corp., 318 U.S. 80 (1940), "which, applied to the [NLRB's] regulatory domain, is that the making of labor policy is for the Board and not the courts." See Village IX, 723 F.2d at 1370. Judge Posner continued:

But it is consistent with Chenery for us to determine whether the Board, if it issued a bargaining order on the basis of the unfair labor practice findings, would be exceeding its authority; for if it would be, then a remand to let it decide whether to reissue the order—an order we would have to set aside on the company's appeal from it—would be a complete waste of time, and . . . Chenery does not require pointless remands.

Id. (citing Illinois v. ICC, 722 F.2d 1341, 1348-49 (7th Cir. 1983)).

65. See Village IX, 723 F.2d at 1371 (citing J. GETMAN, S. GOLDBERG & J. HERMAN, supra note 57, at 113-16).

66. See id. at 1370-72. Judge Posner explained:

To require a company to negotiate for a collective bargaining contract with a union that has lost a representation election is an extreme remedy, reserved for extreme cases. . . . It goes against the grain of the National Labor Relations Act, which requires a company to negotiate only with a representative elected by majority vote of the members of the bargaining unit. Few would argue that if one of the political parties tried improperly to discourage voting for another party and the other party lost, the losing party's candidate should nevertheless be awarded the office he was seeking. . . . In any event, to give employees a collective bargaining representative that they do not want, as a way of punishing their employer for committing unfair labor practices, is so discordant with the basic philosophy of the Act that a bargaining order will not (except in the most egregious cases, and maybe not even then . . . ) be issued unless the union had a card majority and the unfair labor practices were so serious that employees would be intimidated from voting their true preferences in a new election even if no unfair labor practices were committed in the campaign leading up to that election and even though the new election (like the old) would be by secret ballot. We have held these conditions satisfied only where the employer's unfair labor practices were both serious and numerous . . . , where the six categories of unfair labor practices in which the employer was found to engage must have included many separate violations, or . . . where we described the employer's unfair labor practices as "pervasive."

Id. at 1370-71 (citations omitted) (emphasis omitted).
rant's employees in 1984.  

C. SUPERVISORS, PROUNION BIAS, AND RULE MAKING: NLRB v. RES-CARE, INC. AND NLRB v. AMERICAN MEDICAL SERVICES, INC.

In the companion cases NLRB v. Res-Care, Inc. and NLRB v. American Medical Services, Inc., Judge Posner once again disregarded the NLRB's fact-finding expertise and took it upon himself to determine whether nurses were employees or supervisors for purposes of the NLRA. As the judge noted in Res-Care, such determinations are "technically" issues of fact on which the judgments of the NLRB are generally accorded deference. Nevertheless, Judge Posner refused to defer to the Board's findings of fact in these cases, choosing instead to engage in exhaustive factual analyses before upholding the Board's ruling in Res-Care that the nurses were employees, and thus covered by the Act, and reversing a determination that the nurses were employees in American Medical Services.

Judge Posner based his reluctance to defer to the Board's findings on his beliefs that the Board's procedures were deficient and that the Board was philosophically biased. He chastised the NLRB for not using its section 6 rule-making power to adopt rules for applying the Act's statutory exclusion of supervisors to the medical field. This criticism, however, does not justify his refusal to defer. The Supreme Court held over a decade ago in NLRB v. Bell Aerospace Co. that the Board could develop rules on a case-by-case basis instead of relying on

67. See id. at 1372.
68. 705 F.2d 1461 (7th Cir. 1983).
69. 705 F.2d 1472 (7th Cir. 1983).
71. See Res-Care, 705 F.2d at 1466.
72. See id. at 1468.
73. See American Medical Services, 705 F.2d at 1475.
74. Section 6 provides: "The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter." National Labor Relations Act § 6, 29 U.S.C. § 156 (1982).
75. According to Judge Posner, if the NLRB "had awakened its dormant rulemaking powers for the purpose of particularizing the application of section 2(11) to the medical field," it would have been entitled to greater deference in this case. See Res-Care, 705 F.2d at 1466 (citation omitted).
rule making. Judge Posner, however, believed that the reliance on adjudication was particularly troublesome here because it allowed the Board to put employers "through the hoops":

By dealing with the issue entirely on an ad hoc, case-by-case basis, the Board has laid itself open to charges that its decisions applying section 2(11) have been more than tinged by opportunism—that it construes "supervisor" broadly when the question is whether an employee's unlawful act can be imputed to the employer and narrowly when the question is whether the employee is protected by the Act. 78

Thus, in Judge Posner's opinion, it was once again necessary for the court to intervene to ensure that the Board correctly interpreted the NLRA. 79


78. Res-Care, 705 F.2d at 1466 (citations omitted).

79. Judge Posner apparently believed that the Board had not given sufficient consideration to the Taft-Hartley Act's exclusion of supervisors from NLRA coverage. Indeed, in Judge Posner's view, the Taft-Hartley Act's treatment of supervisors represented an important feature of the Act's attempt to restore "balance" to national labor policy. See id. at 1465. Because unions, according to the judge, enforce their cartel power through the strike, the ability of employers to use supervisors to replace strikers is a significant component of the current NLRA. See id. at 1465; Posner, supra note 3, at 997-98. As Judge Posner stated in Res-Care:

To understand the statutory definition of "supervisor" you must understand its role in the overall scheme of the National Labor Relations Act. The Wagner Act was of course intended to promote unionization. . . . Taft-Hartley applied some brakes, so that the balance of power between companies and unions would not shift wholly to the union side. If supervisors were free to join or form unions and enjoy the broad protection of the Act for concerted activity, . . . the impact of a strike would be greatly amplified because the company would not be able to use its supervisory personnel to replace strikers. More important, the company—with or without a strike—could lose the control of its work force to the unions, since the very people in the company who controlled hiring, discipline, assignments, and the other dimensions of the employment relationship might be subject to control by the same union as the employees they were supposed to be controlling on the employer's behalf. We might become a nation of worker-controlled firms. Syndicalism is not the theory of the amended National Labor Relations Act.

705 F.2d at 1465.

Posner's belief that the United States would become a nation of "worker-controlled firms" if supervisors were granted bargaining rights is questionable. Professor Clyde Summers has recently argued for the granting of such bargaining rights to supervisors. Summers notes that other industrial nations, including Sweden, France, and West Germany, clearly recognize that
D. AN ANOMALY?: EAST CHICAGO REHABILITATION CENTER v. NLRB

East Chicago Rehabilitation Center v. NLRB80 at first appears to be a clear anomaly among Judge Posner's opinions. The case involved a spontaneous two-hour walkout by nurses' aides at a nursing home. The nursing home fired the striking employees, who then filed charges with the NLRB alleging that they had been engaged in activity protected by the NLRA and that the employer had committed an unfair labor practice by firing them.81 In examining the employees' claim, the Board distinguished wildcat strikes that undermine a union's position as the exclusive bargaining agent, and thus are not protected as concerted activity under the Act, from wildcat strikes that do not undermine the union, and thus are protected.82 The Board

"supervisors should have the same right to bargain collectively as other employees." See Summers, Past Premises, Present Failure, and Future Needs in Labor Legislation, 31 BUFFALO L. REV. 9, 23 (1982) (footnote omitted). He emphasizes that the special relationship of these employees to the firm and to their subordinates can be accommodated by requiring that they be represented through separate unions, as plant guards currently are. See id. See generally Goldberg, Empirical Research in Labor Law: Problems, Prospects, and Pleasures, 1981 U. ILL. L.F. 15, 28 (questioning the validity of the assumptions that influenced Congress to exclude supervisors from the protection of the NLRA).

80. 710 F.2d 397 (7th Cir. 1983), cert. denied, 104 S. Ct. 1414 (1984).
81. See 710 F.2d at 399-400. The broad language of § 7 protects the right to engage in wildcat strikes: "Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." National Labor Relations Act § 7, 29 U.S.C. § 157 (1982).

82. Judge Posner explained the distinction:
Section 9(a) makes the "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . . the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." Thus, if the 17 workers had been striking to enforce a demand that the company bargain with them, rather than with the union, over where they could eat lunch, the strike would not have been protected by the provision in section 7 that "employees shall have the right . . . to bargain collectively through representatives of their own choosing . . . ." But that is not what the workers were doing. Their spontaneous, unorganized walkout in protest against the company's unilateral change in the conditions of their employment was not an effort to butt their way into the bargaining process but an instance of what section 7 protects under the rubric of "other concerted activities for the purpose of . . . mutual aid or protection."

determined that the walkout did not undermine the union. It therefore ruled that the discharges were unfair practices and ordered the employees reinstated with back pay.83

Judge Posner upheld the NLRB's ruling. Indeed, he added, in curiously approbatory language, that “the Board rather than the courts should be the innovator” with respect to this issue.84 He then went on to explain that the Board can reconcile the policies of section 7 with those of section 9(a), can harmonize the Act's discordant themes of the rights of employees as individuals and the rights of unions as collectivities, better than we—who maybe cannot do it at all. We have no guides to judgment in this area.85

Despite the laudatory language, Judge Posner's ruling in East Chicago can be reconciled with his other, less deferential, holdings. As Judge Posner explained:

Although the concept of administrative agency expertise has a large fictive component, there is no denying that the Board knows more than we do about the impact of wildcat strikes on unions and employers; and we are not much worried that the Board's all too frequent bias toward unions will prejudice it in this area against employers, since a wildcat strike will often (the petitioner would say always) hurt the union as well as the employer. Therefore, if the Board chooses to distinguish between wildcat strikes that undermine the union's position as exclusive collective bargaining representative and ones that do not, as it did in this case and has done in others,.. we must let it—

Thus, when the NLRB's perceived bias toward unions comes to

83. See id. at 400.
84. See id. at 402.
85. Id.
86. Id. at 402-03 (citations omitted). Judge Coffey issued a sharp dissent, accusing the majority of "concentrating solely on the interests of employees to the exclusion of the interests of the employer as well as the public," see East Chicago, 710 F.2d at 406 (Coffey, J., dissenting), and of making "a mockery of Congress' intent to strike a fair balance between the interests of employers and employees," see id. (Coffey, J., dissenting). Judge Coffey contended that Judge Posner was overly deferential to the NLRB. He stated:

[T]he excessive deference afforded by the majority to the NLRB is particularly injudicious since this case involves a "wildcat" strike in the health care field which, like police and fire departments, provides vital services, rather than in the usual industrial setting with which the NLRB is more accustomed and has accumulated a certain expertise.

Id. at 407 (Coffey, J., dissenting). He concluded:

Judge Posner's cool and detached analysis treats this case as though we were considering a walkout occurring on an assembly line, in a steel mill or in a coal mine, where at most an interruption in production would result. Rather, I dissent as I believe it is important to emphasize that this walkout occurred in the health care field, where human lives are all too frequently hanging in the balance. . . . Finally, I disagree with the majority's decision because, in holding that
the fore in a case, Judge Posner would emphasize the "large fictive component" of the Board's administrative expertise. In such cases, broad federal court intervention may be necessary to ensure that the "balance" called for in the 1947 Taft-Hartley amendments is enforced. In cases such as *East Chicago*, however, in which the Board's possible prounion bias cannot influence the decision, the Board's expertise is somewhat less "fictive." Thus, judicial intervention is not as necessary as when the NLRB is "putting employers through the hoops."

III. LABOR-REFORM ISSUES RAISED BY JUDGE POSNER'S APPROACH

Judge Posner's approach to NLRA cases has important public-policy implications beyond the conflict between the courts and the Board. In particular, his approach has focused attention on potential problems with the NLRA and the Board's administration of this Act, thereby raising again the issue of legislative reform. Despite the role played by the NLRB and the federal courts in interpreting and administering the NLRA, ultimate responsibility for the Act lies with Congress. Congress gave considerable attention to the issue of NLRA reform in 1977 and 1978, but the labor-reform bill passed by the House of Representatives was successfully filibustered in the Senate. Judge Posner's views and his judicial activism may well revive the congressional reform effort. This section critically analyzes various labor-reform issues raised by Judge Posner's view that the NLRB's prounion bias misconstrues the NLRA.

A. REDUCING NLRB BIAS BY CLARIFYING THE NLRA

As is true of many statutes, the NLRA is sufficiently vague to allow differing and even contradictory interpretations. This problem is accentuated in the NLRA, however, because the Taft-Hartley Act of 1947 only imperfectly achieved its goal of

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87. A comprehensive labor law reform bill was passed by the House of Representatives in 1977, see 123 CONG. REC. 32,613 (1977), but a successful filibuster in the Senate in 1978 forced this legislation off the floor, see 124 CONG. REC. 18,397-400 (1978). For a complete listing of the proposed bills, see Comment, supra note 51, at 755 & n.1.

removing a pro-union bias from the 1935 Wagner Act. As a result, the NLRA occasionally is unclear. For example, section 1 of the Act declares that United States labor policy is one of "encouraging the practice and procedure of collective bargain-
ing." At the same time, section 7, as amended in 1947, states that employees have both the right to join unions through which they can bargain collectively and the right to refrain from joining such unions. These provisions, which do not explain how to encourage collective bargaining without encouraging unionization, exemplify the general tension between various provisions of the Act.

A total revision of the statute to completely clarify American labor policy would be difficult and impractical. It would require Congress to determine precisely what the primary goal of American labor policy should be and to implement that objective despite the opposition of those who prefer the current vagueness. To avoid such problems, however, Congress could clarify those NLRA provisions that create the most confusion.

A good starting point would be section 8(c), which was passed by Congress in 1947 specifically to overrule previous NLRB holdings that any antiunion speech by an employer con-

91. Section 7 provides:
   Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

92. This argument is not meant to be simplistic. It can be argued that Congress, in enacting the Taft-Hartley Act, was only trying to give employees a "free choice" not to undercut the promotion of collective bargaining. Nevertheless, the "spirit" of Taft-Hartley certainly runs counter to the notions of the Wagner Act in this regard, and the general perception is that the Taft-Hartley amendments made the NLRA less "prounion." See, e.g., Posner, supra note 3, at 1010-11; supra text accompanying notes 9-10. For an interesting exposition of the view that the NLRA is still clearly designed to encourage collective bargaining, see Summers, supra note 79, at 9-18.
stitutes an unfair labor practice. Section 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provision of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

As Judge Posner noted in Village IX, however, a precise definition of a "threat of reprisal or force or promise of benefit" is not readily available. A statement that is a threat to one person might be viewed as only a prediction of consequences to another.

These divergent interpretations allow biases to influence decisions. Judge Posner's perception of a pro-union bias therefore may be accurate with regard to speech issues; one commentator has observed that "one general Board rule is that 'promises of benefit' by an employer will constitute an unfair labor practice, while such promises by a union will not." If it is true, as a recent empirical study has shown, that pre-election speeches have little effect on the results of labor-representation elections, then overturning election results and mandating that the employer bargain with the union on the basis of a threatening speech may be particularly unfortunate.

Any problem of NLRB exploitation of vague statutory language can be remedied by clearly focused reform. For example, inequitable NLRB interpretations of section 8(c) could be minimized by adding statutory language explicitly stating that the section applies to threats and promises of benefit made by unions as well as to those made by employers. Another approach might be to retain the existing section but to add language specifying in more detail what type of speech is protected by the Act. The proposal of Senators Hatch and Tower during the 1977-1978 congressional attempt to reform the NLRA provides one example of possible clarification:

97. See NLRB v. Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983); supra notes 41-67 and accompanying text.
98. See id. at 1367.
99. For example, Professor Archibald Cox notes that employees in different trades in different parts of the country may perceive the same statement quite differently. See A. Cox, LAW AND THE NATIONAL LABOR POLICY 44 (1960).
100. See Comment, supra note 51, at 763; see also id. at n.51 (citing cases).
The expressing of any views, argument, opinion, or the making of any statement (including expressions intended to influence the outcome of an organizing campaign, a bargaining controversy, a strike, lockout, or other labor dispute), or the dissemination thereof, whether in written, printed, graphic, visual, or auditory form, shall not (i) constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . if such expression contains no threat of reprisal or force or promise of benefit.102

Such clarification, of course, will not solve the entire speech problem because it leaves untouched the NLRB's practice of overruling election results even when no threat has been found if the Board finds that "laboratory conditions" were not maintained. The laboratory-conditions doctrine was established in the 1948 case of General Shoe Corp.,103 in which the NLRB explained 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."104 When such conditions are not met, the election will be set aside and "the experiment . . . conducted over again."105


103. 77 N.L.R.B. 124 (1948). Before the passage of the Taft-Hartley amendments in 1947, the NLRB usually did not set aside representation elections on the basis of a pre-election speech unless that speech constituted an unfair labor practice. See, e.g., Hercules Motor Corp., 73 N.L.R.B. 605, 654 (1947); M.T. Stevens & Sons, 68 N.L.R.B. 229, 231 (1946). Although Congress clearly intended to protect certain speech by enacting § 8(c), it did not consider whether the newly protected speech, which would not be an unfair labor practice, might nonetheless interfere with the holding of a free and fair representation election. See Note, Free Speech and Free Choice in Representation Elections: Effect of Tart-Hartley Act Section 8(c), 58 YALE L.J. 165, 174 (1948). In General Shoe, the Board found such a distinction. See 77 N.L.R.B. at 126.

104. General Shoe, 77 N.L.R.B. at 127. In General Shoe, small groups of employees had been propagandized in their homes and had been called to the employer's office the day before the election to hear an antilabor speech. Id. at 125-26. The employer's statements contained no threats of force or reprisal or promises of benefit and did not constitute an unfair labor practice. Id. at 126. Nonetheless, the Board set aside the election because it determined that those activities created an atmosphere that prevented a free choice by employees. See id.

105. Id. The courts have upheld the Board's "laboratory conditions" test when challenged on first amendment grounds. See Bausch & Lomb, Inc. v. NLRB, 451 F.2d 873, 878-79 (2d Cir. 1971).

The NLRB's application of its laboratory-conditions doctrine has not been entirely consistent. For example, the more conservative and generally less prounion Eisenhower, Nixon-Ford, and Reagan Boards have enforced the doctrine with considerably less vigor than did the Kennedy-Johnson and Carter
Of course, as with the problem of vague statutory language, Congress could rectify some of Judge Posner's concerns about undue NLRB bias and remedy the inconsistency with regard to speech by amending the NLRA to expressly overrule the laboratory-conditions doctrine and thus further clarify congressional intent with regard to section 8(c).106

B. REDUCING NLRB BIAS BY MANDATING RULE MAKING

Lack of statutory clarity is not the only reason for apparent NLRB bias in the application of the NLRA. Another source of the problem, as exemplified by Judge Posner's allegation of differential application of the "supervisors" test in *ResCare*107 and *American Medical Services*,108 is the Board's development and application of tests on a case-by-case basis.109 The NLRB originally interpreted the NLRA to include all supervisors, and the Supreme Court upheld that view in *Packard Motor Car Co. v. NLRB*.110 Congress, however, overturned *Packard* in 1947 with an amendment defining the term "supervisor" for the purposes of the Act and excluding supervisors from NLRA protection. That amendment provides:

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106. It is difficult to imagine that Congress, in enacting § 8(c) to protect employer free speech, ever had any idea that the NLRB would avoid its statutory mandate by developing the laboratory-conditions doctrine. Legislative clarification would help fulfill Congress's original deregulatory intent in enacting § 8(c). In taking such action, however, Congress must be *extremely* explicit about what it is trying to do lest the door be left open for some form of future Board regulation. For example, § 8(c)'s language currently applies only to "[t]he expressing of any views, argument or opinion, or the dissemination thereof." Thus, if misrepresentations of fact or other campaign statements now intended to be regulated by the section could be characterized as falling outside this definition, the regulation might not be effective. Care must be taken to guard against this.

107. 705 F.2d 1461 (7th Cir. 1983).

108. 705 F.2d 1472 (7th Cir. 1983).

109. See supra notes 68-79 and accompanying text.

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.\textsuperscript{111}  

Judge Posner and other NLRA critics believe, however, that even precise definitions cannot lead to consistent results when they are unevenly applied.\textsuperscript{112} One way of achieving equal application, according to Judge Posner, is for the NLRB to rely more heavily on rule making rather than reaching policy decisions on an ad hoc basis.\textsuperscript{113} Although no process can assure unbiased administrative-agency interpretation, reliance on rule making can make unbiased interpretations more likely because it will force policy determinations to be made explicitly and openly, with full opportunity for public comment and debate.\textsuperscript{114} Moreover, as Professor Samuel Estreicher recently noted, rule making would assure that the widest spectrum of views are heard and considered before highly controversial policy decisions are made.\textsuperscript{115} Even if an apparently one-sided policy resulted from such a process, therefore, those potentially harmed by it have at least had an opportunity to influence the decision.  

The benefits of rule making are sufficiently important that Congress should reconsider that part of the 1978 Labor Reform Act that would require the Board to promulgate rules for estab-

\textsuperscript{113} See NLRB v. Res-Care, Inc., 705 F.2d 1461, 1466 (7th Cir. 1983); infra notes 74-79 and accompanying text. Drafters of the attempted 1977-1978 Labor Reform Act agreed with this belief. See H.R. 8410, 95th Cong., 1st Sess. § 6(b)(1) & (2), reprinted in Hearings, supra note 102, at 5-6; S. 1883, 95th Cong., 1st Sess. § 6(b)(1) & (2), reprinted in Hearings, supra note 102, at 28-29. See generally Parker & Gilmore, The Unfair Labor Practice Caseload: An Analysis of Selected Remedies, 34 LAB. L.J. 172, 173 (1983). The Board can continue developing new "rules" by adjudication unless Congress intervenes to tell the Board to do it differently.
\textsuperscript{114} See Rulemaking as Aid in NLRB Policy Reversals, 116 LAB. REL. REP. (BNA) 142-44 (June 25, 1984) (statements of New York University Law Professor Samuel Estreicher) [hereinafter cited as Rulemaking]. See generally Summers, Politics, Policy Making, and the NLRB, 6 SYRACUSE L. REV. 93, 105-06 (1955) (contending that, although the Board has rule-making power, it relies on adjudication as an "ill-adapted" substitute).
\textsuperscript{115} See Rulemaking, supra note 114, at 142.
lishing appropriate collective-bargaining units and for developing regulatory standards for labor elections.\textsuperscript{116} In support of these amendments, both the House and Senate Labor Committees stated: "There is no labor relations issue on which there has been such a strong consensus of scholarly opinion as on the proposition that the Board should make greater use of its rule-making authority under Section 6 of the Act."\textsuperscript{117} Congress should draw on that consensus to enact this reform.

C. REDUCING NLRB BIAS BY ALTERING THE STRUCTURE AND ROLE OF THE BOARD

Another asserted basis for inconsistency is the changing political composition of the NLRB. The Board consists of five members, appointed by the President and serving staggered five-year terms. Although the current nonstatutory practice maintains political balance by having no more than three members from the same political party,\textsuperscript{118} that practice only minimizes the extent of the shift because, as one former Board member explained, "political labels are of no meaning whatsoever."\textsuperscript{119} A President can appoint a conservative Democrat or a liberal Republican and meet the political-party-balance test and yet create a clear ideological imbalance within the agency. Thus, codification of current practice, as proposed in the 1977-1978 reform efforts, would do nothing to solve the problem of the Board's shifting political composition.\textsuperscript{120}

If the purpose of political-party balance is to achieve ide-

\textsuperscript{116} See H.R. 8410, 95th Cong., 1st Sess. § 6(b)(1) & (2), reprinted in Hearings, supra note 102, at 5-6; S. 1883, 95th Cong., 1st Sess. § 6(b)(1) & (2), reprinted in Hearings, supra note 102, at 28-29.


\textsuperscript{118} See S. REP. No. 637, 95th Cong., 1st Sess. 31 (1977).

\textsuperscript{119} See Walther, Suggestions and Comments on the Future Direction of the NLRB, 34 LAB. L.J. 215, 228 (1983). It does seem, however, that formal political-party limitations do put a political check on administrative-agency makeup, at least in extreme cases. For example, the Senate recently rejected the nomination of a purported "Democrat" to a "Democratic" seat on the Federal Trade Commission, 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. See N.Y. Times, Oct. 18, 1982, at D2, col. 2; Wall St. J., Mar. 31, 1982, at 22, col. 3.

\textsuperscript{120} The Labor Reform Act of 1978 proposed that Board membership be expanded from five to seven, that members serve for seven rather than five years, and that no more than four members of a seven-member Board could belong to the same political party. See S. REP. No. 628, 95th Cong., 2d Sess. 45 (1978); H.R. REP. No. 637, 95th Cong., 1st Sess. 52 (1977).
logical balance within the agency, that purpose might be more readily achieved by seeking a better indicator of ideological vision of American labor policy. For example, New Jersey has created a tripartite labor-relations board consisting of representatives from unions, management, and the public. That approach promises to create greater and more lasting ideological balance and thus to lessen inconsistency.121

A more drastic alternative is to replace the NLRB with a federal labor court.122 Although a labor court may provide more consistent enforcement of America's complex employee-relations laws,123 it is not clear that a labor court would be immune from bias. As Professor Benjamin Aaron commented on a similar proposal in 1969:

Sen. Griffin argues that the labor court, shielded from the pressures of partisan politics, would adopt a more "judicious" approach to the adjudication of labor disputes. But the lifetime appointments of the justices of the United States Supreme Court have apparently not accomplished this purpose. Certainly life tenure has not prevented at-

121. See N.J. STAT. ANN. § 34:13A-5.2 (West Supp. 1983). A tripartite approach to labor law administration is also common in Europe. See Aaron, Labor Courts: Western European Models and Their Significance for the United States, 16 UCLA L. Rev. 847, 854-55 (1969). Another way of encouraging moderation and cooperation between labor and management with respect to NLRB appointments would be to require such appointments to be "cleared" by a joint labor-management committee similar to the committee used by the American Bar Association to evaluate federal judicial appointments. For a discussion of this general issue and of the type of cooperation that exists in this regard in other countries, see Bok, Reflections on the Distinctive Character of American Labor Laws, 84 Harv. L. Rev. 1394, 1448-54 (1971).

122. There was much discussion of this alternative in the middle to late 1960's; the National Association of Manufacturers (NAM) asked the Republican Party to include the concept in its 1968 platform and, in 1969, Republican Senator Robert P. Griffin of Michigan introduced a bill in Congress to establish a labor court. See S. 103, 91st Cong., 1st Sess., 115 CONG. REC. 771 (1969); Aaron, supra note 121, at 847. See generally Morris, The Case for Unitary Enforcement of Federal Labor Law, 26 Sw. L.J. 472 (1972).

Interest in a labor court at that time was sparked by the perception, especially prevalent among business leaders, that the "New Frontier" Board appointed by Presidents Kennedy and Johnson was overtly and unfairly biased in favor of unions. For a sharp criticism of this Board, see K. McGuinness, THE NEW FRONTIER NLRB (1963). Thus, NAM's statement to the 1968 Republican platform committee asserted that replacing the NLRB with a labor court or some other court "would minimize administrative policy making and lead to more even-handed justice in this important area." Aaron, supra note 121, at 847 (footnote omitted). Senator Griffin echoed a similar theme, stating that a labor court would help keep the administration of the nation's labor laws away from "partisan politics." See id. at 877.

123. See generally Aaron, Labor Relations Law in the United States from a Comparative Perspective, 39 Wash. & Lee L. Rev. 1247, 1258 (1982); Morris, supra note 122.
tacks by Senator Griffin and his colleagues against both the wisdom of their decisions and their integrity. Although the notion that judges merely "apply" the "law," without regard to their own backgrounds, prejudices and preconceptions, was discredited long ago, its ghost continues to plague us.  

Such a radical change is not necessary, however, to encourage greater consistency; that end may be more readily accomplished by relatively minor changes in the compensation levels and selection procedures for administrative-law judges. Currently, NLRB administrative-law judges are the first triers of fact in NLRA cases and their decisions are entitled to deference by the regulatory agency. Very few of the individuals selected for these positions, however, have private-sector management labor-relations experience. One reason is that compensation for administrative-law judges is considerably below what many private-sector attorneys can earn. Civil-service requirements and bureaucratic selection procedures, such as a requirement that the applicant demonstrate two years of litigation experience during the seven preceding years, also contribute to the problem. This requirement excludes many experienced lawyers because they tend to spend less time in the courtroom and more time counseling clients as they become more experienced and successful. The exclusion of lawyers with management labor-relations experience is unfortunate because such lawyers might help avert the Board's perceived antiemployer "bias."

IV. REDUCING NLRB BIAS: A CAUTIONARY NOTE

Judge Posner's approach to labor law focuses attention on

124. Aaron, supra note 121, at 877. An American labor court is particularly unlikely to be less partisan than the NLRB arguably has been because the decentralized and highly contentious nature of American labor relations will likely be reflected in, rather than ameliorated by, any court appointments made by labor and management. See Bok, supra note 121, at 1453-54.

125. For criticisms of the "expertise" of such administrative-law judges by Judge Posner, however, see NLRB v. Acme Die Casting Corp., 728 F.2d 959, 962 (7th Cir. 1984); NLRB v. Coca-Cola Co. Foods Div., 670 F.2d 84, 86 (7th Cir. 1982).


128. See E. MILLER, supra note 126, at 50-56; see also Miller, The Tangled Path to an Administrative Judgeship, 25 Lab. L.J. 3 (1974).

129. Nolan & Lehr, supra note 127, at 69.
several problems in administering the NLRA and highlights useful congressional reforms. For example, Judge Posner's recommendations that Congress clarify specific areas of statutory or interpretative vagueness and that Congress require the Board to use rule making more frequently merit support. Acknowledging the need for reform, however, entails acceptance neither of Judge Posner's premise of the NLRB's anti-employer bias nor of his remedies of overriding or dismantling the Board.

Judge Posner's view of the NLRB as inappropriately pro-union is short-sighted. NLRB biases, at least since the passage of the Taft-Hartley amendments, have been fluid, with decisions of Democrat-appointed Boards tending to be more pro-union than those of Republican-appointed Boards. Thus, when the conservative Eisenhower Board reversed many of the policies of the Roosevelt-Truman era, CIO President Walter Reuther and others stridently accused it of distorting the

130. See supra notes 94-117 and accompanying text.
131. For an excellent empirical study documenting this proposition, see Cooke & Gautschi, Political Bias in NLRB Unfair Labor Practice Decisions, 35 INDUS. & LAB. REL. REV. 599 (1982). See generally Defense of NLRB's Performance, 116 LAB. REL. REP. (BNA) 103 (June 11, 1984) (speech by former NLRB Chairperson Edward B. Miller, responding to criticism of the Reagan Board's promanagement bias) [hereinafter cited as Defense].

It is not surprising that Democratic Boards render decisions that are more prounion than those of Republican boards. Democratic presidents have tended to appoint individuals with prounion sympathies to the Board. Several Democratic appointees have previously served as aides to prounion members of Congress. For example, Frank McCulloch, the chairperson of the Kennedy-Johnson Board, was a former aide to prounion Senator Paul H. Douglas of Illinois. See F. McCulloch & T. Bornstein, THE NATIONAL LABOR RELATIONS BOARD 70 (1974). Because the Democratic Party has recently become even more closely aligned with organized labor, the trend of Democratic Presidents appointing individuals to the NLRB with generally prounion leanings can certainly be expected to continue. Republican Presidents have tended to name management labor lawyers, some of whom return to representation of management after their Board terms expire, including Guy Farmer (former chairperson), Peter Walther, Betty Murphy (former chairperson), and Edward B. Miller (former chairperson). See II MARTINDALE-HUBBELL LAW DIRECTORY 47B (1985) (Murphy); id. at 685B (Farmer); id. at 2668B (Miller); V id. at 1312B. For criticisms of Democratic Boards for being too "prounion," see F. McCulloch & T. Bornstein, supra note 131, at 72-73; K. McGuiness, supra note 122. For criticisms of Republican Boards for being too "promanagement," see Anti-Union Bias, 116 LAB. REL. REP. (BNA) 53 (May 21, 1984); Dotson Board, 116 LAB. REL. REP. (BNA) 90 (June 4, 1984) (statement of AFL-CIO Secretary-Treasurer Thomas Donahue); NLRB Rulings That Are Inflaming Labor Relations, BUS. WK., June 11, 1984 at 122, 127, 130 [hereinafter cited as NLRB Rulings].

NLRA in favor of employers. The Kennedy-Johnson Board quickly reversed many of the Eisenhower Board's policies, and a variety of prominent management observers then sharply criticized the Board for a blatantly pro-union approach. The Nixon-Ford and Carter Boards, of course, brought similar policy reversals and similar criticism.

Today, many observers believe that the NLRB, which has had a Reagan-appointed majority since late 1983, is biased toward employers. The Reagan NLRB has reversed the Carter Board on many important issues and thereby raised the ire of the AFL-CIO and its political allies. The AFL-CIO Executive Council has accused the Reagan Board of "malevolence" toward unions, and the federation's president, Lane Kirkland, recently stated that the NLRB "now is a deterrent, a weapon of the most retrograde, antiunion employers and forces in this country." Donald L. Dotson, a former management attorney and the Reagan-appointed Board chairperson, countered by asserting that the Board is not on an ideological anti-union campaign and that "[t]he pendulum had swung too far to the left; now it is moving back toward the middle, where it should remain."

133. See Dunau, supra note 18, at 206-07.
134. Perhaps the most trenchant of such criticism is set forth in K. McGuiness, supra note 122.
135. See generally NLRB Rulings, supra note 131, at 122, 127.
136. See AFL-CIO Views on NLRB Actions, 116 LAB. REL. REP. (BNA) 46 (May 21, 1984) [hereinafter cited as AFL-CIO Views]; Defense, supra note 131; NLRB Rulings, supra note 131, at 122.
137. See supra notes 24-25 and accompanying text.
139. See NLRB Rulings, supra note 131, at 122.
140. Id. A perhaps more telling response to recent AFL-CIO criticism, however, has come from former NLRB Chairperson Edward B. Miller, who finds it "incredible" that the labor federation and its allies are "crying foul when the current Board is changing its views on a handful of issues in the same manner that every Board has always changed whenever new members are appointed." See Defense, supra note 131, at 104. There are, of course, as Professor Derek Bok has noted, obvious political benefits in terms of rationalizing adverse decisions and laying the groundwork for possible legislative action in making such accusations. See Bok, supra note 121, at 1451.

In any event, such swings of the pendulum can have some ironic twists. For example, one of the major current complaints against the Reagan Board by the AFL-CIO and Democratic legislators has regarded the Board's attempt to assume greater control over the agency's quasi-independent general counsel's office. A similar complaint emerged in 1950 when President Truman, unhappy with his appointment to the general-counsel spot, asked Congress to diminish the general counsel's role and transfer much of the chief lawyer's authority to the Board itself. The Republican-dominated Congress refused.
and others, the NLRB has not demonstrated an unbroken path of antiemployer sentiment. Although the NLRB has at times been biased, that bias has shifted as Board membership has changed.

Furthermore, it is not evident that Board bias is undesirable. Board partisanship, particularly a fluctuating partisanship, can be a stabilizing influence by reflecting the prevailing national political climate, at least as expressed in presidential elections. As Professor Clyde Summers noted:

Ought not government, in the making of policies, reflect majority 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.

The answer for the critics of any Board is not to be found in judicial activism but in political activity designed to change the politicians and their policies.

CONCLUSION

Judge Richard A. Posner's criticisms of the National Labor Relations Board have emphasized that the Board is prounion and that it has not properly executed its role as a neutral administrator and enforcer of the NLRA. In an effort to rectify the Board's alleged bias, Judge Posner has ignored the Board's administrative expertise and readily overturned several Board decisions. Some of Judge Posner's comments have exposed problems with regard to the NLRA and its administration and have suggested possible solutions. It is Congress, however, and not the federal judiciary, that has the primary responsibility for


141. Cf. Shapiro, Why Do Voters Vote? (Book Review), 86 Yale L.J. 1532, 1545 (1977) ("That shifts in the substance of Board policy often follow shifts in the Board's political complexion is well known. Indeed such shifts may be desirable—so long as the policies remain within statutory grounds—if the administration of federal labor law is to reflect in some degree the prevailing political climate.").

142. Summers, supra note 114, at 100. But see Cooke & Gautshi, supra note 131, at 548-49 (presenting an opposing view).

formulating our nation's labor laws. Consequently, it is up to
the Congress to take whatever action is necessary. Any con-
gressional consideration of reform, however, must proceed with
cautions. Outcries about NLRB bias in any given time period
tend to overshadow the bias of other times and the reality that
bias is in part a positive reflection of the political process in
operation.